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The Encyclopedic Digest of Virginia and West Virginia Reports

BEING A COMPLETE

Encyclopedia and Digest of all the Virginia and West Virginia Case Law up to and including Vol. 103 Virginia Reports and Vol. 55 West Virginia Reports

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As to particular offenses, see the specific titles, as for instance, as to assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 729.

I. Definitions, Nature and Distinction.

A. DEFINITIONS AND NATURE.

See post, "Classification of Offenses," II.

"Criminal Law."—"It may seem a little strange, says Mr. Bishop, yet such is the fact, that no definition distinguishing the criminal law from the other branches of our judicial system can be given, the correctness of which will be universally acknowledged; but, he says: 'Criminal law treats of those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name.'" Cherry *v.* Com., 78 Va. 381, dissenting opinion of Lacy, J.

"Crimes and Offenses."—The terms "crimes and offenses," do not properly signify the acts by which the laws are violated, but they signify the violations of law which those acts produce. Jett *v.* Com., 18 Gratt. 933.

"Crime" and "Offense" as Synonymous Terms.—In legal acceptation the words "crime" and "offense" both in the common and statute law are synonymous terms, although the word crime is often used to denote offenses of the higher grades. 1 Haw., p. 1, Black. Com., pp. 4, 5. "In the same fifth page of 4 Blackstone's Commentaries, we are told that crime consists in doing an act, in violation of a public law; and in the second page of the same book, that the law teaches the grades of every crime, and adjusts to it, its adequate and necessary punishment. Crime or offense, then, is the doing an act, in violation of a public law." Com. *v.* Myers, 1 Va. Cas. 187. See also, Cherry *v.* Com., 78 Va. 381.

Crime.—See post, "At Common Law," II, A.

"A crime may be defined to be a breach and violation of the public rights and duties due to the whole community considered as a community in its social aggregate capacity. The word crime, says an eminent writer, seems, where it has reference to positive law, to comprehend those acts which subject the offender to punishment." Cherry *v.* Com., 78 Va. 381, dissenting opinion of Lacy, J.

In Jett *v.* Com., 18 Gratt. 933, a crime or offense is said to be the transgression of a law.

A crime is defined by Bouvier to be an act committed or omitted in violation of a public law forbidding or commanding it. Moundsville *v.* Fountain, 27 W. Va. 199.

"A crime or misdemeanor is defined by Blackstone to be an act committed or omitted in violation of a public law either forbidding or commanding it. In the present state of the authorities we may hesitate to say that in no case is anything deemed a crime unless punishable in the name of the state, but this is the general rule in the United States." Cherry *v.* Com., 78 Va. 381, dissenting opinion of Lacy, J.; Com. *v.* Myers, 1 Va. Cas. 187.

"This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms." Cherry *v.* Com., 78 Va. 381, dissenting opinion of Lacy, J. See post, "Classification of Offenses," II.

To constitute a public offense for which a public prosecution will lie the act done or duty omitted, must affect injuriously some thing or right in which the community as a body politic, have a common interest, and the facts producing this injury, and connecting it with such a special public right or interest, must be both alleged and proved. Com. *v.* Webb, 6 Rand. 726. See post, "Distinctions," I, B. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; NUISANCES; TRESPASS.

A violation of an ordinance of the convention of 1776 for which a punishment was prescribed is an offense. Com. *v.* Dowdall, 1 Va. Cas. 7; Com. *v.* Whealand, 1 Va. Cas. 9.

A private nuisance injuriously affecting only one individual is not an offense for which a public prosecution will lie. Com. *v.* Webb, 6 Rand. 726. See the title NUISANCES.

Crime Includes Violations of Municipal Ordinances.—The definition of crime as now used will not be limited alone to capital offenses and such offenses, known as "felonies" and "misdemeanors," as are declared to be criminal by positive legislative enactment, excluding therefrom offenses against the ordinances of municipalities. Violation of the public ordinances of cities, towns, and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs. Because it is provided that "the proceeding in such

case shall be by summons in the corporate name of the town or village as plaintiff, and shall conform so far as practicable, to the regulations respecting civil actions before justices," the criminal character of the offense involved is not converted into a demand of a civil nature. Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152. But see Moundsville *v.* Fountain, 27 W. Va. 199, where it is said: "The violation of any ordinance of a town or city is an offense, but it is not a crime, which is defined by Bouvier to be 'an act committed or omitted in violation of a public law forbidding or commanding it.' But such ordinance has no operation outside of the town or city and therefore is not a public law, and hence a violation of such ordinance is not a crime." See the titles JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS; ORDINANCES.

Crime an Offense against the State Only.—"Crime is an offense against the state, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the state. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the state are concerned in the punishment and suppression of crime. And the state, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws." Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001. See also, Moundsville *v.* Fountain, 27 W. Va. 199.

"Quasi Crime."—"It has been said in one case that quasi crime would not embrace an indictable offense, whatever might be its grade. Wiggins *v.* City of Chicago, 68 Ill. 372." Cherry *v.* Com., 78 Va. 381, dissenting opinion of Lacy, Judge.

Constructive Offenses.—As to constructive offenses, see post, "Construction and Application of Criminal Statutes," III.

"Same Criminal Act" as Synonymous with Same Offense."—The cases suffice to show a great conflict of authority upon the question, whether by the "same offense" is always meant the "same criminal act." Very many cases are cited by Bishop in his work on Criminal Law, vol. 1, from § 1060 to § 1064 inclusive. His conclusion is, that "in principle and according to the better authority, while one act may constitute as many distinct offenses as the legislature may choose to direct, for any one of which there may be a conviction without regard to the others, it is in the language of Cochburn, chief justice, 'a fundamental rule of law, that out of the same facts a series of charges can not be preferred.' Reg *v.* Elnigton, 9 Cox C. C. 86, 90." Moundsville *v.* Fountain, 27 W. Va. 182.

"There is one case at least, where these words 'same offense' have not been interpreted as the equivalent of 'same criminal act,' and where, it seems to me, they are properly otherwise interpreted; that is, where the criminal act is at the same time an offense against the laws of a state and those of the United States. Where this is the case the accused may be twice punished for such criminal act, once by the state and again by the United States. (Moon *v.* The People of the State of Illinois, 14 How. 13; Fox *v.* The State of Ohio, 5 How. 410.)" Moundsville *v.* Fountain, 27 W. Va. 182.

As a crime or offense is the transgression of a law, the same act may constitute several offenses. Jett *v.* Com., 18 Gratt. 933.

Com., 2 Va. Cas. 144; State *v.* Harr, 38 W. Va. 58, 17 S. E. 794; State *v.* Whitt, 39 W. Va. 468, 19 S. E. 874; Ex parte Garrison, 36 W. Va. 686, 15 S. E. 417. See also, Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; Moundsville *v.* Fountain, 27 W. Va. 186.

"The word 'punishable' in § 3879, Va. Code, 1887 and 1904, evidently refers to offenses which may be punished by confinement in the penitentiary, and not to those only which must be so punished. The legislature never intended to leave the grade of any offense to the discretion of a jury." Benton *v.* Com., 89 Va. 570, 16 S. E. 725.

In Benton *v.* Com., 89 Va. 573, 16 S. E. 725, it is said: "As long ago as Barker's Case, 2 Va. Cas. 122, it was decided that every offense punishable by confinement in the penitentiary is a felony, unless it be by statute denominated a misdemeanor; and there are numerous decisions outside of Virginia to the same effect." See also, Trimble *v.* Com., 2 Va. Cas. 144; Randall *v.* Com., 24 Gratt. 644.

Where a statute provides that an offense may be punished by imprisonment in the penitentiary and also gives the court or jury the discretion to fix a less punishment, such discretion does not reduce the grade of the crime from felony to misdemeanor. State *v.* Harr, 38 W. Va. 58, 17 S. E. 794.

Conviction of unlawful shooting is a conviction of a felony, though punished by imprisonment in jail and fine. Forbes *v.* Com., 90 Va. 550, 19 S. E. 164.

An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried and sentenced for another petit larceny, is an indictment for a felony, as it charges an offense which may be punished by imprisonment in the penitentiary. Rider *v.* Com., 16 Gratt. 499. See the titles LARCENY; SENTENCE AND PUNISHMENT.

Breaking and entering a house in the nighttime, with intent to commit larceny, may be punished by imprisonment in the penitentiary or in jail, at the discretion of the jury, and is a felony. Section 3706, Va. Code, 1904. Benton *v.* Com., 89 Va. 570, 16 S. E. 725.

The committing magistrate does not by his warrant fix the grade of the offense with which the accused is tried. Hawley *v.* Com., 75 Va. 847. See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

"It is the punishment prescribed by statute which determines whether the offense be felony or not, so that in this state there are no felonies except such as are so designated by statute." State *v.* Harr, 38 W. Va. 58, 17 S. E. 796; Va. Code, 1904, § 3879; § 1, ch. 152, W. Va. Code (Ed. 1891, p. 943).

The same act can not at the same time constitute a felony and a misdemeanor. They can not coexist as the result of one and the same transaction. The crime must be one or the other, not both, or either. Benton *v.* Com., 89 Va. 570, 16 S. E. 725. See ante, "At Common Law," II, A.

Misdemeanor.—All offenses which can not be punished with death or confinement in the penitentiary are misdemeanors. State *v.* Whitt, 39 W. Va. 468, 19 S. E. 874; State *v.* Harr, 38 W. Va. 58, 17 S. E. 796; Ex parte Garrison, 36 W. Va. 686, 15 S. E. 417. See also, Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Forbes *v.* Com., 90 Va. 550, 19 S. E. 164; Benton *v.* Com., 89 Va. 570, 16 S. E. 725; Moundsville *v.* Fountain, 27 W. Va. 186; Randall *v.* Com., 24 Gratt. 644; Trimble *v.* Com., 2 Va. Cas. 144; Barker *v.* Com., 2 Va. Cas. 122; Rider *v.* Com., 16 Gratt. 499; Com. *v.* Callaghan, 2 Va. Cas. 460.

"The word 'misdemeanor,' in its usual acceptation, is applied to all those crimes and offenses for which

the law has not provided a particular name; and they may be punished, according to the degree of the offense, by fine or imprisonment, or both." Ex parte Garrison, 36 W. Va. 686, 15 S. E. 417. See ante, "Definitions and Nature," I, A.

Whatever Is Not Felony Is Misdemeanor.—"In relation to those offenses which rise to the grade of felony, there is usually, particularly in the designation of them by name, an accuracy in the definition; as for example, murder, burglary, arson, etc., in each of which, the term ex vi termini imports the constituent of the offense; but in the general classification of crimes, whatever is not felony, is misdemeanor. In relation to these, then, they are not only numerous, but indefinitely diversified, comprehending every act which, whilst it falls below the grade of felony, is either the omission of something commanded or the commission of something prohibited by law." Com. *v.* Callaghan, 2 Va. Cas. 460.

As to misdemeanors the law can do no more than lay down general principles; and it belongs to the courts of the county to apply "those principles to the particular cases as they occur, and to decide whether they are, or are not, embraced by them. Thus the law, as a general proposition, prohibits the doing of any act, which is contra bonos mores. The particular acts which come up to this description, it is impossible to include in any precise enumeration; they must be decided as they occur, by applying this principle to them as a standard. Thus again, it is now established as a principle, that the incitement to commit a crime, is itself criminal, under some circumstances. 6 East 464; 2 East 5. As for example, the mere attempt to stifle evidence, though the persuasion should not succeed. Cases of this kind may be as various, as the varying combinations of circumstances." Com. *v.* Callaghan, 2 Va. Cas. 460. See ante, "At Common Law," II, A.

III. Construction and Application of Criminal Statutes.

See the titles ORDINANCES; STATUTES.

A penal statute is one which imposes a forfeiture or penalty for transgression of its provisions, or for doing a thing prohibited. Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754; Harris *v.* Com., 81 Va. 240; Kloss *v.* Com., 103 Va. 864, 49 S. E. 655; Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965; Wortham *v.* Com., 5 Rand. 669.

Penal statutes and ordinances are to be construed strictly, and a man is not to be punished unless he is plainly within their language. Gates *v.* City of Richmond, 103 Va. 702, 49 S. E. 965; Com. *v.* Weldon, 4 Leigh 653; Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754.

Penal statutes are construed strictly, and more or less so according to the severity of the penalty. "When a law imposes a punishment which acts upon the offense alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended it should extend further than this expression; and humanity would require that it should be so limited in construction." Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754.

"In United States *v.* Wiltberger, 5 Wheat. 76, 5 L. Ed. 37, Marshall, C. J., observes: 'The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded in the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not the judicial, department. * * * The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is

within the intention of a statute its language must authorize us to say so.'" Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

"The rule is universal, except where otherwise provided by statute, that penal statutes are to be construed strictly, and are never to be extended by implication. * * * 'No man,' said the court in Harris *v.* Com, 81 Va. 240, 243, 59 Am. Rep. 666, 'incurs a penalty unless the act which subjects him to it is clearly within the spirit and the letter of the statute imposing the penalty.' Sutherland on Statutory Constr., § 348." Kloss *v.* Com., 103 Va. 864, 49 S. E. 655.

"It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated." Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

Property.—Virginia Code, ch, 192, § 53, p. 796, provided that if a person "unlawfully but not feloniously take and carry away, or destroy deface or injure any property, real or personal, not his own, he shall be deemed guilty of misdemeanor." It was held, that in a penal act, like the one under consideration, the word "property," standing alone, ought to be considered to mean full and complete property, such as, by the common law, may be protected by a public prosecution for the larceny thereof. Davis *v.* Com., 17 Gratt. 617. See the title LARCENY.

"'**There can be no constructive offenses,** and, before a man can be punished, his case must be plainly and unmistakably within the statute.' United States *v.* Lacher, 134 U. S. 624; United States *v.* Wiltberger, 5 Wheat. 76; Harris *v.* Com., 81 Va. 240." Lescallett *v.* Com., 89 Va. 878, 17 S. E. 546; Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965. See ante, "Definitions and Nature," I, A.

Revenue Laws Imposing Penalties.—In so far as a revenue law imposes penalties for its violation, it is a penal statute and is to be strictly construed, and no man is to be subjected to its penalties unless he comes clearly within the spirit and letter of the statute. Kloss *v.* Com., 103 Va. 864, 49 S. E. 655. See the titles REVENUE LAWS; TAXATION.

A penal ordinance is to be construed strictly. It is not to be extended by implication, and must be limited in its application to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute. Fox *v.* Com., 16 Gratt. 1; Harris *v.* Com., 81 Va. 240, 59 Am. Rep. 666; Street *v.* Broaddus, 96 Va. 825, 32 S. E. 466; Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965. See the title ORDINANCES.

A city ordinance which imposes a fine upon any person who shall place any portico, porch, door, window, step, fence, or other projection which shall project into any street of the city, or who shall continue such an obstruction after notice to remove it, is aimed at permanent obstructions, and does not apply to temporarily putting a skid across a sidewalk to unload goods from a wagon in the street into a merchant's storeroom. Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

Statutes as to Manner of Trial.—Statute of 1831, 1832, ch. 22, § 11, provided that free negroes and mulattoes in all cases of felony except homicide and other capital crimes are to be tried in the same manner in which slaves are tried. It was held, the statute changes the manner of trial and the tribunal for the trial, but not the punishment which previous laws inflicted on free negroes or mulattoes for such crimes. By the former law a slave, guilty of horse stealing, was punished with death without benefit of clergy;

the free negro, by imprisonment in the public jail and penitentiary. The court said: "We do not think it consistent with the settled rules of interpretation applicable to penal statutes, and particularly to statutes on the subject of capital felonies to construe this statute as abolishing former laws, and substituting death as the punishment instead of imprisonment, by the mere declaration, that the manner of punishment of the free negro shall be the same as the manner of punishment of the slave." Com. *v.* Weldon, 4 Leigh 652.

Obvious Intention of Legislature.—A penal statute will be construed according to its obvious intention, though the collocation of the different branches of the provision are so arranged, by mistake, as to lead to a different conclusion. Matthews *v.* Com., 18 Gratt. 989.

"'In construing penal statutes the legislative intent "is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.'" Sarlls *v.* U. S., 152 U. S. 574, 38 L. E. 556, 14 Sup. Ct. 720." Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

The 45th, 46th, and 47th sections of the act concerning criminal proceedings, 1 Rev. Va. Code, 1819, p. 611, can not properly be denominated a penal statute. "It neither defines, nor creates any criminal offense, nor prescribes a punishment for one. It merely directs how certain proceedings shall be carried on in trespasses and misdemeanors, preparatory to their introduction into court. There is no reason why, in construing such an act, we should stick to the letter, nor why we should not carry into effect the obvious intention of the legislature." Wortham *v.* Com., 5 Rand. 669.

The rule of noscitur a sociis is succinctly stated as follows: "'It is a fundamental principle in the construction of statutes that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language though apparently general, may be limited in its operation or effect, where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.' 26 Am. & Eng. Ency. Law, p. 608, citing among other cases Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. 176." Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

Principle of Ejusdem Generis.—"The rationale of the principle of ejusdem generis, seems to be, that if the legislature had intended the general words to apply, uninfluenced by the preceding particular words and without restriction, it would in the first instance have employed a compendious word to express its purpose. Rex *v.* Wallis, 5 Term R. 379. The rule is illustrated and applied in the comparatively recent case of American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466." Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

"The court says: 'One of these rules of construction is that general words may be limited to the same genus or class as the specific words which precede them. In Sutherland on Statutory Constr. (§ 268) it is said that "where there are general words following particular and specific words, the former must be confined to things of the same kind." In Broom's Legal Maxims (side page 651) the rule is laid down as follows: "Where a particular class (of persons or things) is spoken of, and the general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class; the effect of general words, where they follow particular words, being thus restricted." Sedgwick, in his work on Construction of Statutes (p. 361) says: "Where general words follow particular words, the rule is to construe the former as applicable to things or per-

sons particularly mentioned." The decisions of the courts fully sustain the text writers, that this is the true rule of construction in such cases, subject to certain limitations not necessary to be mentioned here.' Lynchburg *v.* Norfolk, etc., R. Co., 80 Va. 237; Chesapeake, etc., R. Co. *v.* Bank, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449." Gates *v.* Richmond, 103 Va. 702, 49 S. E. 965.

"We should, in all such cases, bear in mind the precedent set in the construction of a statute of George II by the courts in England. By that law the stealing of sheep, or other cattle, was made felony without benefit of clergy. But the general words 'or other cattle' being looked upon as much too loose to create a capital offense, the statute was held to extend to nothing but the stealing of sheep." Com. *v.* Weldon, 4 Leigh 653.

Previously Established Construction of Term.—Where a statute punishes an offense by giving it a name known to the common law without further defining it, the courts will look to the common law to ascertain the nature and limits of the offense. In so doing it, the rule is, that if a statute employs a word or phrase which has already been used in the common law or in another statute, and has there acquired a construction and established meaning, it is to be understood in the meaning previously determined. Thus in Virginia the statute punishing the offense of robbery in no way pretends to define it and the courts hold that a "robbery" under our statutes differs in no respect from robbery purely at the common law; and if the indictment is good as a common-law indictment it is good under the statute. Houston *v.* Com., 87 Va. 257, 12 S. E. 385. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; ROBBERY.

IV. Elements.

A. IN GENERAL.

See ante, "Definitions and Nature," I, A; "Classification of Offenses," II; post, "General Rule," V, J, 5, a, (2), (a).

As a general rule the definition of any offense; as for example, murder, burglary, arson, etc., ex vi termini, imports the constituent of the offense. Usually the elements necessary to constitute the crime are to be gathered from the definition of it, but in the case of misdemeanor the law can do no more than lay down general principles; and it belongs to the courts of the country, to apply those principles to the particular cases as they occur and to decide whether they are, or are not embraced by them. Com. *v.* Callaghan, 2 Va. Cas. 462.

Properties of Statutory Felonies.—"'Whenever a statute makes any offense felony, it incidentally gives it all the properties of a felony at common law.' Idem 156; Pond's Case, 8 Michigan 150; Moore's Case, 31 Conn., 479; Gray *v.* Coombs, 7 J. J. Marshall 478." Parrish *v.* Com., 81 Va. 1.

B. GUILTY KNOWLEDGE OR INTENT.

See post, "Ignorance or Honest Mistake," IV, F, 3.

In General.—As a general rule criminal intent or guilty knowledge is an essential element of offenses mala in se. Acts mala in se are prohibited because of their moral turpitude or the criminal intent with which they are committed. State *v.* Cain, 9 W. Va. 559.

"In felonies and most cases of misdemeanor under the common law, intent is regarded as being one of the chief elements necessary to constitute the crime or offense." State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315.

A specific intent to accomplish a particular purpose is an essential element of some crimes. In these cases it is necessary to prove specific intent. State *v.* Shores, 31 W. Va. 491, 7 S. E. 413. See post, "Intent," V, J, 5, a, (2), (c).

"Some crimes consist not merely in

the committing of a criminal act and the criminal intent inferred therefrom, but in whole or in part in the specific intent with which the act is done." State *v.* Hertzog, 55 W. Va. 74, 46 S. E. 792.

As to specific intent as an essential element in certain offenses, see, for instance, the titles ASSAULT AND BATTERY, vol. 1, p. 729; EMBEZZLEMENT; FALSE PRETENSES AND CHEATS; FORGERY AND COUNTERFEITING; HOMICIDE; LARCENY; RAPE; ROBBERY; SEDUCTION; and other specific titles.

As to guilty knowledge a necessary element in criminal conspiracies, see the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 76, 80.

When Guilty Knowledge Is Not Essential.—As a general rule criminal intent or guilty knowledge is not an essential element of the offense where acts which are not mala in se, are made mala prohibita from motives of public policy, and not because of their moral turpitude, or the criminal intent with which they are committed. State *v.* Cain, 9 W. Va. 559. See post, "Guilty Knowledge," V, J, 5, a, (2), (d).

"The law is well settled in this state and elsewhere that, where a statute commands an act to be done or omitted which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. State *v.* Cain, 9 W. Va. 559; State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315; Barnes *v.* State, 19 Conn. 398; 3 Greenl. Ev., § 21." State *v.* Farr, 34 W. Va. 84, 11 S. E. 737.

"This is peculiarly the case in regard to statutes respecting revenue and police matters, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know these facts and to obey the law at his peril." State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315.

It is within the power of the legislature to enact statutes commanding that an act be done or omitted, which in the absence of such statute, might have been done or omitted without culpability and make the failure to do so a criminal offense without regard to the intent of the doer. If such an intention appears, the courts will give it effect although the intention of the doer may have been innocent. State *v.* Cain, 9 W. Va. 559; State *v.* Farr, 34 W. Va. 84, 11 S. E. 737; State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315. See post, "Ignorance or Honest Mistake," IV, F, 3.

Willfully Doing a Criminal Act.—"If a person willfully does an unlawful and criminal act, he takes upon himself all the legal and penal consequences of such act, regardless of his knowledge, unless knowledge is made an essential ingredient of the crime." State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

Averment of Intent or Guilty Knowledge.—In a criminal prosecution whenever the criminal intent or guilty knowledge of the prisoner is an essential element of the crime, it is essential that it be substantially averred in the indictment. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413. State *v.* Cain, 9 W. Va. 559; Wash *v.* Com., 16 Gratt. 530.

When a specific intent to accomplish a particular purpose is an essential element of a crime, it is necessary to allege such specific intent. State *v.* Shores, 31 W. Va. 491, 7 S. E. 413. See post, "Intent," V, J, 5, a, (2), (c).

"When acts, which are not mala in se, are made mala prohibita from motives of public policy, and not because of their moral turpitude, or the criminal intent with which they are committed," it is not necesary to allege

criminal intent or guilty knowledge in the indictment. State *v.* Cain, 9 W. Va. 559; State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

Upon a prosecution for the violation of a revenue law where the intent of the defendant is not made by the statute one of the ingredients of the offense, it need not be alleged. White *v.* Com., 78 Va. 484.

Generally, as to the averment of intent, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

As to the necessity for averring and proving in intent any particular offense, see the specific titles.

Burden of Proof.—As to burden of proof of criminal intent or guilty knowledge, see post, "Intent," V, J, 5, a, (2), (c); "Guilty Knowledge," V, J, 5, a, (2), (d).

Presumption as to Intent.—A man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act. It is not true that a man always intends that which he does or that which is the immediate or necessary consequence of his act, and the law holds no man to such responsibility. It does presume, however, that he so intends it, but it allows him if he can, to rebut, or overthrow that presumption. State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; Hill *v.* Com., 2 Gratt. 594; State *v.* Hertzog, 55 W. Va. 79, 46 S. E. 792; State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Dickey, 46 W. Va. 319, 33 S. E. 231; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Schnelle, 24 W. Va. 767; State *v.* Smith, 24 W. Va. 814, 825; State *v.* Greer, 22 W. Va. 800, 816; State *v.* Jones, 20 W. Va. 764; State *v.* Abbott, 8 W. Va. 741. See also, State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; McCue *v.* Com., 103 Va. 910, 49 S. E. 623; Honesty *v.* Com., 81 Va. 283; Harrison *v.* Com., 79 Va. 374; Lewis *v.* Com., 78 Va. 732; White *v.* Com., 78 Va. 484; Murphy *v.* Com., 23 Gratt. 960; Wash *v.* Com., 16 Gratt. 530. See post, "Intent," V, J, 5, a, (2), (c). See also, the title PRESUMPTIONS AND BURDEN OF PROOF.

If the prisoner wounded the prosecutor, by the deliberate use of an instrument likely to produce death under the circumstances, the presumption of the law is that he intended the consequences that resulted from said use of said deadly instrument. Honesty *v.* Com., 81 Va. 283; Lewis *v.* Com., 78 Va. 732; Hill *v.* Com., 2 Gratt. 594. See the title HOMICIDE.

C. MALICE.

In General.—Malice is an essential of certain offenses. See, for example, the titles ASSAULT AND BATTERY, vol. 1, p. 729; HOMICIDE; MALICIOUS PROSECUTION, ETC.

Malice Classified and Defined.—"Malice * * * may be either express malice or implied malice. Express malice does not mean, necessarily, malice expressed in words, but is defined to be when the act is done with a sedate and deliberate mind and formed design, which condition of the mind and formed design being a mental condition and not ordinarily susceptible of other kinds of proof, may be evidenced by the external circumstances attending the execution of the act; such as, for instance, lying in wait, antecedent threats, old grudges, and need not be of any special duration before the blow —a moment is sufficient. Implied malice is where the law implies malice from the act itself, from which death ensues; as, for instance, when one, without any sufficient provocation at the time, slips up and without warning kills another, malice is presumed from want of provocation; when one kills another with poison, malice is presumed from the use of poison, and when one deliberately uses a deadly weapon and death ensues, malice is presumed from the deliberate use of

a deadly weapon." Whitehurst *v.* Com., 79 Va. 556. See also, State *v.* Welch, 36 W. Va. 690, 15 S. E. 419. See the title HOMICIDE.

In a legal sense, any unlawful act which is done willfully and purposely, to the injury of another, is as against that person malicious. Scott *v.* Shelor, 28 Gratt. 891.

Malice and Passion Distinguished.—"'Malice aforethought' implies a mind under the sway of reason, whereas 'passion,' whilst it does not imply a dethronement of reason, yet is the furor brevis, which renders a man deaf to the voice of reason; so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity. Passion and malice are, therefore, inconsistent motive powers, and hence an act which proceeds from the one can not also proceed from the other. * * * Malice excludes passion. Passion pre-supposes the absence of malice. In law they can not coexist." Brown *v.* Com., 86 Va. 466, 10 S E. 745. See also, the title HOMICIDE.

Malice Implied from Acts of Accused.—As to inference of malice from the act of striking another with a deadly weapon, see the title HOMICIDE.

D. WANT OF CONSENT AS ELEMENT.

In certain crimes, the want of consent on the part of the injured person is an essential element of the crime. See, for instance, the titles LARCENY; RAPE; ROBBERY.

E. CORPUS DELICTI.

As to the corpus delicti, a material fact to be established in every criminal prosecution, see post, "Corpus Delicti," V, J, 5, a, (2), (b).

F. FACTS RELIEVING FROM CRIMINAL RESPONSIBILITY.

1. Want of Capacity.

a. In General.

Test of Capacity.—The test or criterion of criminal accountability turns on the capacity to know right from wrong, and the knowledge that the accused knew the particular act was wrong. State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982.

As to the right and wrong test, see generally, the title INSANITY.

To do a willful, deliberate and premeditated act one must have reasoning powers, and the power to exercise the will to refrain from the act or to commit it. If willful, the will of the actor must have entered into his act. If deliberate and premeditated, it was the result of reason and reflection, of will and thought concurring. State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982. See the titles HOMICIDE; INSANITY.

Drunkenness.—As to the effect of drunkenness upon the capacity to commit crime, or as excusing from responsibility therefor, see the title DRUNKENNESS.

Irresistible Impulse.—As to irresistible impulse to commit a criminal act, as relieving from legal responsibility therefor, see the title INSANITY.

Infants.—As to infancy as a ground for relief from criminal responsibility, see the title INFANTS.

Coverture.—A married woman is responsible for crime. She is a jurisdictional person in a criminal law court. It can take jurisdiction over her and render judgment against her. It can hang or imprison her. It can impose a fine upon her. Gill *v.* State, 39 W. Va. 479, 20 S. E. 568. See post, "Coercion," IV, F, 2. See the title HUSBAND AND WIFE.

b. Presumption as to Capacity.

The law presumes persons over the age of fourteen years to be of sufficient capacity to form the criminal purpose. Law *v.* Com., 75 Va. 885. See generally, the titles INFANTS; INSANITY; PRESUMPTIONS AND BURDEN OF PROOF.

As to presumptions of capacity in particular cases, see the specific titles,

as for instance, as to capacity to commit rape, see the titles INFANTS; RAPE.

In all cases every man is presumed to be same, and to possess a sufficient degree of reason to be responsible for his crime. State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982; State *v.* Schnelle, 24 W. Va. 767; State *v.* Robinson, 20 W. Va. 713; State *v.* Douglass, 28 W. Va. 297; Boswell *v.* Com., 20 Gratt. 860; Baccigalupo *v.* Com., 33 Gratt. 807.

"In Boswell's Case, 20 Gratt. 860, one of the grounds of error assigned, was that the court in that case gave to the jury the following instruction, to wit: 'That every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury.' In commenting upon this instruction, the president of this court said: 'I think this instruction is unexceptionable.'" Baccigalupo *v.* Com., 33 Gratt. 807. See the title INSANITY.

Infants.—As to presumption as to capacity of infants to commit crime, see the titles INFANTS; RAPE.

c. A Question of Fact.

Capacity to commit crime is a question to be determined by the jury from the age, appearance, and conduct of the accused both at the time of the commission of the offense and at the time of the trial. This is true both in regard to persons who are over the age of fourteen years and to persons over seven years of age and under fourteen years. State *v.* Williams, 40 W. Va. 268, 21 S. E. 721.

2. Coercion.

See ante, "In General," IV, F, 1, a. See the title HUSBAND AND WIFE.

Where a wife acted in the furtherance of a combination to commit a felony, in the presence of her husband, she will be presumed to have acted under his coercion. But if the circumstances show that she was not acting under such coercion, but of her own free will, then she is accountable for her acts. Uhl *v.* Com., 6 Gratt. 706; State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

"The court * * * instructed the jury, that if they believe that the acts which she did were in the presence of her husband, and nothing appeared in the evidence or circumstances to show whether she was acting under his control and coercion, then the law will raise the prima facie presumption that she acted under such coercion and control; and she will not be guilty. But if they believe the facts and circumstances transpiring at the time, show she was not acting under such coercion and control, but that she acted from her own free and uncontrolled will, then if the evidence proves her guilty of the offense charged, she will be responsible to the law." Uhl *v.* Com., 6 Gratt. 706.

"In a charge of keeping a house of ill fame the ordinary rule of coercion does not apply, 'for this is an offense as to the government of the house in which the wife has a principal share, and also such an offense as may generally be presumed to be managed by the intrigues of her sex.' 1 Hawk P. C. C., § 12. No one could imagine for a moment that any woman could be coerced by her husband into keeping a house of ill fame, nor that any pure wife, free from blame, would remain at such a house kept without her consent and connivance." State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

A husband and wife may be jointly indicted but whether the wife should be convicted upon the indictment, must depend upon the facts proved upon the trial, if defense shall be made. In such a case, if they are convicted the fine must be assessed, and a judgment rendered against each separately. Com. *v.* Hamor, 8 Gratt. 698; Com. *v.* Ray, 1 Va. Cas. 262; Gill *v.* State, 39 W. Va. 479, 20 S. E. 572. See the titles IN-

TOXICATING LIQUORS; SENTENCE AND PUNISHMENT.

In Com. *v.* Ray, 1 Va. Cas. 262, a husband and wife were jointly indicted for an assault and battery; and it was held, that separate fines ought to be assessed against each according to the degree of their offense.

This has been held to be the law where a husband and wife were jointly indicted for a single act of retailing ardent spirits. Com. *v.* Hamor, 8 Cratt. 698. See the title FINES AND COSTS IN CRIMINAL CASES.

A writ of fieri facias upon a judgment of a circuit court for a fine against a married woman may be levied upon her separate estate personal or real. Gill *v.* State, 39 W. Va. 479, 20 S. E. 568. See the title SEPARATE ESTATES OF MARRIED WOMEN.

3. Ignorance or Honest Mistake.

See ante, "Guilty Knowledge or Intent," IV, B; post, "Intent," V, J, 5, a, (2), (c); "Guilty Knowledge," V, J, 5, a, (2), (d).

Ignorance or honest mistake of fact will exempt one from criminal responsibility when a criminal intent is an essential element of the offense. Stoneman *v.* Com., 25 Gratt. 887; Brown *v.* Com., 86 Va. 466, 10 S. E. 745; State *v.* Evans, 33 W. Va. 417, 10 S. E. 792; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918.

When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense; but, when a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defense. State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315.

"Ignorance, or mistake of fact, may, in some cases, be admitted as an excuse, as when a man, intending to do a lawful act, does that which is unlawful. Thus, where one, being alarmed in the night, by the cry that thieves had broken into his house, and searching for them with his sword in the dark, by mistake, killed an inmate of his house, he was held innocent. So, if the sheep of A stray into the flock of B, who drives and shears them, supposing them to be his own, it is not larceny in B. This rule would seem to hold good in all cases where the act, if done knowingly, would be malum in se." State *v.* Cain, 9 W. Va. 559. See Brown *v.* Com., 86 Va. 466, 10 S. E. 745; Stoneman *v.* Com., 25 Gratt. 887; State *v.* Evans, 33 W. Va. 417, 10 S. E. 792; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918. See the titles FORGERY AND COUNTERFEITING; HOMICIDE.

For instance, if a person charged with selling intoxicating liquor in violation of the statute had intended and actually believed at the time that he was selling coal oil, and with that intent and under that belief had by mistake delivered to the purchaser spirituous liquor, then such honest mistake of fact would no doubt excuse the unlawful sale of intoxicating liquor, and relieve him from the penalty of the statute. But if he knew at the time that he was selling liquor, his ignorance of the fact that the sale in the particular case was a violation of the statute, and the most positive evidence that he did not intend to violate the law, would not excuse the sale or relieve him from the prescribed penalty. State *v.* Denoon, 31 W. Va. 122, 5 S. E. 315.

Homicide.—This rule has been applied where one killed his assailant in what he reasonably believed to be necessary self-defense. Stoneman *v.* Com., 25 Gratt. 887; Brown *v.* Com., 86 Va. 466, 10 S. E. 745; State *v.* Evans, 33 W. Va. 417, 10 S. E. 792. See the title HOMICIDE.

Taking Property under Claim of Right.—In State *v.* Shores, 31 W. Va. 491, 7 S. E. 413, this rule was applied where one took another's property under a bona fide claim of right, honestly believing that it was his own. See the titles BURGLARY AND HOUSEBREAKING, vol. 2, p. 657; LARCENY.

Uttering Forged Paper.—This rule was applied where one was charged with uttering or attempting to employ as true a forged paper and it appeared that the accused was ignorant of its character. Sands *v.* Com., 20 Gratt. 800. See the title FORGERY AND COUNTERFEITING.

4. Doctrine of Estoppel as Applicable to Criminal Prosecution—Former Adjudication.

"The doctrine of estoppel, strictly speaking, is not applicable to the commonwealth in a criminal prosecution. The nearest approach to it is the doctrine, founded on the maxim of the common law, that no one shall be twice put in jeopardy for the same offense. 'This doctrine,' says Bigelow, 'has a close relation to the subject of estoppel by former judgment, and may be considered as the criminal law counterpart of the same doctrine. But the doctrine rests upon technical notions of jeopardy, and not upon the principle of res judicata,' etc. Bigelow on Estoppel (3d Ed.) 47." Justice *v.* Com., 81 Va. 217. See the titles AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181; ESTOPPEL; FORMER ADJUDICATION OR RES ADJUDICATA.

But the doctrine of estoppel has been held applicable to the accused. In Com. *v.* Evans, 101 Mass. 25, it was held, on the trial of an indictment for manslaughter, that the record of a former conviction of the accused for the identical assault which caused the death of the deceased, was conclusive evidence that the assault was unjustifiable. Justice *v.* Com., 81 Va. 217.

"In Regina *v.* Blakemore, 9 Eng. L. & Eq. 541, the defendant was indicted for the nonrepair of a highway which it was alleged he was liable to repair ratione tenuræ. At the trial evidence was permitted to be introduced showing the conviction of one Smith, a former owner of the lands in question, on a presentment alleging his liability to repair the same highway, and also that the defendant purchased these lands with notice of the liability to repair, and was then the owner and occupier of the same. It was held, that the evidence was admissible, as tending to show immemorial usage, and liability by reason of tenure; and it was assumed by some of the judges that the defendant, being a privy in the estate with Smith, the former conviction was an estoppel, though the point was not necessary to the decision." Justice *v.* Com., 81 Va. 217.

"So in Regina *v.* Inhabitants of Haughton, 1 E. & B. 501 (72 E. C. L. 501), the defendants being indicted for the nonrepair of a certain highway, the question was, whether they were liable to repair. And it was held, that the record of a former judgment on a presentment against the same defendants for the nonrepair of the same highway was conclusive evidence that they were." Justice *v.* Com., 81 Va. 217.

5. Compromise by Prosecutor or Other Person.

See the title COMPOUNDING OFFENSES, vol. 3, p. 36.

No compromise or settlement made by the person who was injured by the commission of a crime or any one else could bar a prosecution by the commonwealth for a crime. It has been held, in Virginia, that no compromise between the prosecutrix and the prisoner, or any one else could bar a prosecution by the commonwealth for a seduction under promise of marriage. Barker *v.* Com., 90 Va. 820, 20 S. E. 776. See the title SEDUCTION.

As to compromise and settlement as a defense in the case of particular crimes, see the titles EMBEZZLEMENT; FALSE PRETENSES AND CHEATS; FORGERY AND COUNTERFEITING; LARCENY; LIBEL AND SLANDER; RAPE; SEDUCTION; and the other specific titles.

6. Existence of a Civil Liability.

Where a person was charged with the larceny of a check from a corpora-

tion, it was held, that the mere fact that the defendant became civilly liable to the association by appropriating its money did not at all affect the question of his criminal responsibility if he acted with a felonious intent. Shinn *v.* Com., 32 Gratt. 899. See the title EMBEZZLEMENT; LARCENY.

7. Intent to Make Restitution.

As to intent to make restitution as a defense to a prosecution for embezzlement or larceny, see the titles EMBEZZLEMENT; LARCENY.

8. Defense of Person or Property.

In General.—"Wherever the party shall be forcibly attacked, in person or property, it is lawful to repel force by force, and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects human passions, which no prudential motives are for the most part strong enough to restrain; considering, moreover, that the future process of the courts is by no means an adequate remedy for injuries accompanied by force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. 4 Minor's Inst., page 5, and cases there cited. Sir Matthew Hale says: The right of self-defense in these cases is founded in the law of nature, and is not, nor can be, superseded by the law of society. The true principle upon which rests our right of defending either our persons or our goods is this: The law of nature does not oblige us to give them up when any one has a mind to hurt them or take them from us, and this is evidence because our right to them would be unintelligible, or would in effect, be no right at all, if we were obliged to suffer all mankind to treat them as they pleased without endeavoring to prevent it. Rutherforth's Institutes, 187-8. This right of defense is indefinite in its extent, and while legal principles are general their application to particular cases must always depend upon special circumstances. 'The law allows us to defend our persons and our property; and such general allowance implies that no particular means of defense are prescribed to us. We may, however, be sure that whatever means are necessary are lawful, because it would be absurd to suppose that the law of nature allows of defense and yet forbids us, at the same time, to do what is necessary for the purpose. From hence it follows that he who attempts to injure us, gives us an indefinite right over his person, or a right to make use of such means to prevent the injury as his behavior and our situation make necessary.'" Parrish *v.* Com., 81 Va. 1.

Right Proceeds from Necessity.—"The right to defend one's person or property proceeds from necessity. And, however complete this right may be, or however far the law permits it to be carried, it stops where necessity ends. The party making the defense may use no instrument and no power beyond what will simply prove effectual." Hash *v.* Com., 88 Va. 172, 13 S. E. 398; Parrish *v.* Com., 81 Va. 1.

Kinds of Permissible Defense.—"There are two kinds of permissible defense of person or property. The one extends, when necessary, to the taking of the aggressor's life and this is called the perfect defense. The other, or imperfect defense, does not permit him who employs it to go so far, but he may resist trespass on his person or property to an extent not exactly the same in all circumstances, yet not involving the life of the trespasser; and this is called the imperfect defense. 1 Bish. Cr. Law., §§ 840, 841." Hash *v.* Com., 88 Va. 172, 13 S. E. 398.

"The perfect right of self-defense extends, when necessary, to the taking of the aggressor's life; but it can not be resorted to for the protection of property, except where it consists of

the castle, or a felony is being committed on it; while, on the other hand, the imperfect right of defense is permitted as well of the property as the person. Hence a man may lawfully defend his property in possession by any degree of force, short of taking of life, necessary to make the defense effectual, unless it amounts to a riot, a forcible detainer, or some other like crime. Yet he can not proceed therein beyond what necessity requires. 1 Bishop Cr. Law., §§ 860, 861." Hash *v.* Com., 83 Va. 23, 13 S. E. 398.

Defense of One's Person.—"The rule is commonly stated in the American cases thus: If the individual assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills his assailant, the killing is justifiable.' 1 Bishop Cr. Law (6th Ed.), § 865." Hash *v.* Com., 88 Va. 172, 13 S. E. 398. See the title HOMICIDE.

Right to Oppose the Commission of a Felony.—It is lawful for one to oppose another who is committing felony, even to the taking of his life, yet, if there is no obstacle to his arrest, the shooting of him in the felonious act, instead of having him arrested, is a felony. Hash *v.* Com., 88 Va. 172, 13 S. E. 398. See the title HOMICIDE.

Defense of Property.—"One, in defense of his property, must not commit a forcible detainer, a riot, or any like crime. He must not kill the aggressor; but, if the question comes to this, he must find his redress in the courts. If the wrongful act is proceeding to a felony on the property, he may then kill the doer to prevent the felony, if there is no other way; otherwise this extreme measure is not lawful. And the defense may be such, and such only, as necessity requires, of course, within the limit which forbids the taking of life. Therefore, a man commits a felonious homicide who inflicts death in opposing an unlawful endeavor to carry away his property. There is here the right to resist, but not to the taking of life." Hash *v.* Com., 88 Va. 172, 13 S. E. 398. See also, Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371. See the title FORCIBLE ENTRY AND DETAINER; HOMICIDE; RIOT.

Prosecution for Homicide.—As to defense of persons or property as relieving from criminal responsibility upon a prosecution for homicide, see the title HOMICIDE.

Prosecution for Assault and Battery.—As to self-defense as a defense to a prosecution for assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 744.

9. Other Persons Being Equally Guilty.

"When two or more persons join in the commission of a crime, all the parties participating therein are guilty, and so is each of them, whether the crime is such that it may be committed by one person, or where it is of that class which requires the concurrent acts of others, as in cases of fornication, adultery, conspiracy, riot, lewd and lascivious cohabitation and many others. Crimes are joint and several, and all participants therein, are severally liable to the full punishment prescribed for the offense. 1 Bish. Cr. Law, §§ 629, 630, 631. Reg. *v.* King, 1 Salkeld. Hence it follows, that where parties are indicted and convicted, either jointly, when all are tried together, or when indicted jointly and tried at different times, or indicted and tried separately, each one incurs the full penalty; and the fact that one of them has suffered that penalty, does not in any manner operate as a satisfaction of the guilt of another. One is not less guilty, because another is equally guilty; each receives the same punishment as if he alone had committed the offense." State *v.* Foster, 21 W. Va. 767; Williams *v.* Com., 85 Va. 607, 8 S. E. 470. See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 75; AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 190.

A plea that when prisoner's associate was tried for the same offense, prisoner was a fugitive from justice, and that associate was acquitted, and that therefore prisoner was acquitted, is bad. Williams *v.* Com., 85 Va. 607, 8 S. E. 410.

V. Prosecution.

A. LAWS GOVERNING.

1. Effect of Repeal of Statutes Pending Prosecution.

See generally, the title STATUTES.

Statute in Virginia.—"No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offence or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect; save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings, and if any penalty, forfeiture, or punishment be mitigated by any provisions of the new law, such provisions may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." Va. Code, 1849, p. 101, ch. 16, § 18; Ch. 2, § 6, Va. Code, 1904. This section is quoted in Lewis *v.* Arnold, 13 Gratt. 454, 462. See also, M'Gruder *v.* Lyons, 7 Gratt. 233; Yarborough *v.* Deshazo, 7 Gratt. 374, 377, where this section is cited. The object of this section is to reverse the rule in force before its passage, that, the repeal of a law, prescribing a punishment for an offense, without a proviso, that offenses committed before the operation of the new law, shall be punished under the old, excuses offenders under the repealed law. Scutt *v.* Com., 2 Va. Cas. 54; Attoo *v.* Com., 2 Va. Cas. 383; Com. *v.* Leftwich, 5 Rand. 657. See also, Pitman *v.* Com., 2 Rob., 813, 814, 816; Com. *v.* Pegram, 1 Leigh 569; Com. *v.* Wyatt, 6 Rand. 694.

Statute Prescribing Punishment after May 1, 1828.—A statute passed in the session of assembly of 1827-28, prescribing a new punishment for an offense committed after May 1st, 1828, does not repeal former statutes, defining the offense, and prescribing other punishment for the same, as to such offense committed before May 1st, 1828. Com *v.* Pegram, 1 Leigh 569. See also, Allen *v.* Com., 2 Leigh 731; Pitman *v.* Com., 2 Rob. 807, 808.

Depriving Court of Jurisdiction.—"Whenever a court is deprived of jurisdiction over any class of cases, by the repeal of a statute which gives the jurisdiction, and there is no provision made for the transfer of such cases to some other court which has or is given jurisdiction, and no reservation made for the trial of pending cases in such courts, all such cases fall with the repealed statute." But taking the jurisdiction away does not result in acquitting the accused. He may be reindicted and tried in a court having jurisdiction of such offenses. Dulin *v.* Com., 91 Va. 718, 20 S. E. 821.

Statute in West Virginia.—The ninth section of chapter thirteen of the West Virginia Code of 1868 provides that "the repeal of a law, or its expiration, by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect or the law expired, save only that the proceedings had shall conform, as far as practicable, to the laws in force at the time such proceedings take place unless otherwise specially provided; and that if any penalty or punishment be mitigated by the new law, such new law may, with the consent of the party affected thereby, be applied to any judgment pronounced after it has taken effect." The said Code of 1868 took effect on the first day of April,

1869. This provision is still retained in the W. Va. Code, § 9, ch. 13, p. 132. State *v.* Abbott, 8 W. Va. 741; Gregg *v.* State, 3 W. Va. 705. See also, State *v.* Gillilan, 51 W. Va. 278, 41 S. E. 131.

Time of Consenting.—Such consent of an accused person may be given and entered of record in court as part of the proceedings in the cause before the jury is impaneled and before the verdict of the jury is received and recorded. It would be the better and the safer practice for the court to ask the defendant to elect before, or at the time the jury is impaneled, under which of the said laws he desires and elects to be tried, and have applied to his case. Still if the defendant did not then elect and consent to be tried under the new law, he should be allowed by the court, to consent at any time before the verdict of the jury is received and recorded by the court. State *v.* Abbott, 8 W. Va. 741.

In Gregg *v.* State, 3 W. Va. 705, it is said: "And this election must be made before verdict rendered."

Necessity for Consent.—The nineteenth section of chapter one hundred and fifty-nine of the West Virginia Code of 1868 provides that "if a person indicted for murder be found guilty by the jury, thereof, they shall, in their verdict, find whether he is guilty of murder in the first or second degree. If they find him guilty of murder in the first degree, they may, in their discretion, further find that he be punished by confinement in the penitentiary. If such further finding be not added to their verdict, the accused shall be punished by confinement in the penitentiary during his life," etc. On the 3d day of November, 1873, A. was indicted in the county of Kanawha by the grand jury, then attending the circuit court of said county, for the murder of G. on the 11th day of September, 1861, in said county, and the evidence shows that the killing was done at that time. At the time the killing was done the punishment as was prescribed by law was death. On the 10th day of November, 1873, A. plead not guilty to the indictment, and on that day there was a jury selected, impaneled and sworn according to law, to try the cause in said circuit court. The jury found A. guilty of murder in the first degree, and found that he be punished by confinement in the penitentiary; and the court, upon the verdict of the jury, rendered judgment that A. be confined in the penitentiary of the state for and during his life. Held, that it was error in the court, in the trial of A., to apply the provisions of the Code of 1868, authorizing the mitigation of the punishment of murder in the first degree to confinement in the penitentiary during life without the consent of A. given in court and entered of record; and that without such consent of A., given in court and entered of record before the verdict of the jury was received and recorded by the court, the punishment prescribed by the said ninth section of chapter thirteen of the Code of 1868 could not be applied by the jury or court. And in the absence of such consent given by A. in court and entered of record as a part of the proceedings in the cause, the punishment prescribed by the law, in force at the time the killing took place, should have been applied to the case. State *v.* Abbott, 8 W. Va. 741. See also, the title HOMICIDE.

Effect of Failure to Elect.—An offense punishable with death prior to April 1st, 1869 (the time when the new Code took effect) was committed prior thereto, but the accused was not indicted and tried until after that date. The accused did not elect to be tried or punished by the law that took effect April 1st, 1869, and which provides that the jury may find a verdict and attach the death penalty thereto, or fix the term of imprisonment in the penitentiary for life, until after verdict rendered; and it is held, that he ought to have elected to be tried and punished by the law as it existed subsequently

to April 1st, 1869, or the punishment will be determined according to the law as it existed at the time the offense was committed; and this election must be made before verdict rendered. And the jury having found a verdict of guilty, the court must sentence the accused according to the law existing at the time the offense was committed. Gregg *v.* State, 3 W. Va. 705. See also, State *v.* Abbott, 8 W. Va. 741. And see the title HOMICIDE.

Proceedings of Court at Trial.—See generally, the titles CONSTITUTIONAL LAW, vol. 3, p. 172; STATUTES.

Every state may at any time change the forms of procedure in her criminal courts, and the laws in force in that respect at time of trial must prevail. Jones *v.* Com., 86 Va. 661, 10 S. E. 1005, citing Ewing *v.* Com., 5 Gratt. 701; Wilson *v.* Com., 86 Va. 666, 10 S. E. 1007.

Remedial laws in force at the time when the indictment was found, must prevail, at the trial though, when the offense was committed, different modes of procedure were required. Wilson *v.* Com., 86 Va. 666, 10 S. E. 1007.

In a case where the law, as to matters of form and procedure, has been changed between the period when the offense was committed and the period when the trial takes place, the proceedings of the court at the time of the trial should conform to the law at that time in existence and not to the mode of proceeding prescribed by the law in force when the crime was committed. Jones *v.* Com., 86 Va. 661, 10 S. E. 1005.

By the law in force before May 1, 1888, when the Virginia Code of 1887 went into effect, the accused, when indicted, was required to be sent before a justice for examination. By § 4003 of Code, 1887, that requirement is omitted, and accused, indicted since then, need not have such preliminary examination, though the offense was committed before then. Jones *v.* Com., 86 Va. 661, 10 S. E. 1005. See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

By the law in force before May 1, 1888, when the Virginia Code of 1887 went into effect, the county court alone was empowered to issue the venire facias though the indictment was to be tried in the circuit court. By § 4020, Code, 1887, any court wherein a person accused of felony is to be tried, may cause a venire facias to issue for his trial, and that section is the law of the case, no matter when the offense was committed. Wilson *v.* Com., 86 Va. 666, 10 S. E. 1007. See the title JURY.

Though at the time the felony charged was committed, and at the time of the arrest of the prisoner, the law in relation to called courts was unrepealed, yet if before the commitment the act abolishing called courts had gone into effect, it was proper for the committing justice to send the prisoner to be tried according to the new law. Ewing *v.* Com., 5 Gratt. 701.

2. Ex Post Facto Laws.

See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

In the case of Perry *v.* Com., 3 Gratt. 632, it was decided that the constitutional provisions forbidding ex post facto laws relates to crimes and punishment, and not to criminal proceedings. State *v.* Strauder, 8 W. Va. 686. See ante, "Effect of Repeal of Statutes Pending Prosecution," V, A, 1. See the title SENTENCE AND PUNISHMENT.

3. Equity Jurisdiction.

Equity courts exercise no criminal jurisdiction. Thus, where a defendant in a suit in equity disobeys the process, order or decree of court, the regular and proper proceeding to punish such contempt should be entirely separate from the chancery suit and placed on the law docket. This is because a con-

tempt of court is in the nature of a criminal offense and the proceeding for its punishment is criminal in its character. State *v.* Irwin, 30 W. Va. 404, 4 S. E. 413. See the titles CONTEMPT, vol. 3, p. 236; EQUITY; INJUNCTIONS, JURISDICTION.

A prosecution under the 13th section of the act of 1792, concerning incestuous marriages, was a criminal prosecution; and therefore, it seems, the direction therein, that such prosecution should be instituted in the high court of chancery, was unconstitutional. Attorney General *v.* Broaddus, 6 Munf. 116.

4. Territorial Limitation of Operation of Criminal Laws.

a. Doctrine in West Virginia.

"It seems to be an axiom that a state's criminal law is of no force beyond its limits. Whart. Confl. Laws, § 18; Story Confl. Laws, § 621; 1 Bish. Crim. Law, § 110. Story, J., said in The Appollon, 9 Wheat. 362, that laws of a country 'must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction.' It can be asserted that a crime committed in another country, and in violation of its laws, can not by legislative fiction or construction, be considered an offense in another country. This doctrine does not, however, apply to cases where a crime is perpetrated partly in one and partly in another country, provided, as Mr. Bishop says, 'what is done in the country which takes jurisdiction is a substantial act of wrong; not merely some incidental thing, innocent in itself alone.'" Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 438. See also, the title CONFLICT OF LAWS, vol. 3, p. 120; JURISDICTION.

"The American states are distinct and separate, as between themselves, as to the administration of criminal law. Wherein a state assumes criminal jurisdiction over crimes done within another, it would seem to be without power." Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 438.

Crimes Commenced in One State and Consummated in Another.—Laws punishing crimes committed partly in one state and partly in another, or commenced in one state and consummated in another are not necessarily unconstitutional. Virginia, as far back as 1840 enacted that if a blow be given in the state and death result in another prosecution might be in Virginia, in the county of the blow. But Virginia has never had legislation punishing as murder cases where the blow was without but death within the state. Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436. See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; HOMICIDE; JURISDICTION; VENUE.

"Chapter 144, § 6 (W. Va. Code), reads as follows: 'If a person be stricken or poisoned in, and die by reason thereof out of this state, the offender shall be as guilty, and be prosecuted and punished, as if death had occurred in the county in which the mortal stroke or poison was given or administered. And if any person be stricken or poisoned out of this state, and die by reason thereof within this state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or the poison administered, in the county in which the person so stricken or poisoned may so die.'" Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

The latter clause of § 6, ch. 144, of the West Virginia Code (1891), providing that, "if a person be stricken or poisoned out of this state, and die by reason thereof within the state, the offender shall be as guilty, and may be prosecuted and punished, as if the mortal stroke had been given, or poison administered, in the county in which the person so stricken or poisoned may so die," is not unconstitutional or in-

valid. Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436.

b. Doctrine in Virginia.

The states in the administration of criminal law are sovereign, and in their respective jurisdiction and the laws which regulate their internal police, they are as foreign to each other as each state is to foreign governments. Except in those states where statutory provision is made for the punishment of crimes committed in another jurisdiction, the common-law rule prevails which furnishes no warrant for the conviction in a state court of a person charged with the commission of an offense in another state. It was the rule at common law that every prosecution for a criminal case must be in the county where the crime was committed with the exception that where property is stolen in one county and the thief has been found with the stolen property in his possession, in another county, he may be tried in either; but this rule of the common law was never extended further than the counties. Strouther *v.* Com., 92 Va. 789, 22 S. E. 852; Com. *v.* Linton, 2 Va. Cas. 205. See also, Com. *v.* Gaines, 2 Va. Cas. 172. See the title LARCENY.

It seems to be the rule in Virginia that jurisdiction of extraterritorial offenses may be conferred upon the courts by statutory provisions to that effect. "The British parliament and the Virginia legislature, have in various instances prescribed punishment for extraterritorial offenses." Com. *v.* Gaines, 2 Va. Cas. 172; Strouther *v.* Com., 92 Va. 789, 22 S. E. 852.

Crimes Commenced in One State and Consummated in Another.—In Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 437, it is said: "The case of Linton, 2 Va. Cas. 205, is said in Hunter *v.* State, 40 N. J. Law 514, to be the only case holding that where a blow is given in one state, followed by death in another, there can be no prosecution in the state of the blow. No reasons are given by the court. I do not see how that decision was reached, except on the untenable ground of the alleged rule of the old common law that, where the blow is in one county, death in another, neither can try the case; by parity of reasoning, where blow is in one state, death in another, the state of the blow can not prosecute." Com. *v.* Linton, 2 Va. Cas. 205. Section 3890a, Va. Code, 1904, provides: "If a mortal wound or other violence or injury be inflicted by a person within this state upon one outside of the same or upon one in this state who afterwards dies from the effect thereof out of the state the offender shall be amenable to prosecution and punishment for the offense in the courts of the county or corporation in which he was at the time of the commission thereof as if the same had been committed in such county or corporation. Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 437. The object of this statute was to overrule the decision in Com. *v.* Linton, 2 Va. Cas. 205.

It was held in Strouther *v.* Com., 92 Va. 789, that one who steals property at a place beyond the jurisdiction of this state and brings the same into the state, can not be lawfully convicted of larceny in this state. From an early day it has been held, that where property is stolen in one county, and the thief has been found with the stolen property in his possession in another county, he may be tried in either; but this rule of the common law was never extended farther than to counties. See also, Brown *v.* Com., 2 Leigh 769. Section 3890, Va. Code, 1887, was amended by the acts of 1895, 1896, p. 576, so that a thief bringing into this state goods stolen in another state shall be liable to prosecution and punishment for his offense in any county or corporation in which he may be found as if the same had been wholly committed there. Section 3890, Va. Code, 1904. See the titles JURISDICTION; LARCENY; VENUE.

Offenses against the Commonwealth.—By the first clause of the seventh section of the act, 1 Rev. Code, 1792, ch. 136, all treasons, misprisons, etc., and other offenses against the commonwealth, except piracies and felonies on the high seas, though committed beyond the territorial limits of the commonwealth, are indictable and punishable in the general court; the words "in any place out of the jurisdiction of the courts of common law of this commonwealth," meaning a place out of the commonwealth. Com. *v.* Gaines, 2 Va. Cas. 172.

This statute was repealed in 1819. See Strouther *v.* Com., 92 Va. 389, 22 S. E. 852.

Offenses by a Citizen against a Citizen.—The second clause of the seventh section of the act, 1 Rev. Code, 1792, ch. 136, by the words, "all felonies committed by citizen against citizen in any such place," refers to such place as is spoken of in the first clause, and therefore means felonies committed by citizen against citizen, in any place out of the commonwealth, except on the high seas. Com. *v.* Gaines, 2 Va. Cas. 172. This statute was repealed in 1819. See Strouther *v.* Com., 92 Va. 789, 22 S. E. 852.

Therefore, if a citizen of Virginia steals a horse from another citizen in the District of Columbia, he may, under the said law, be indicted, tried, and sentenced in the general court. Com. *v.* Gaines, 2 Va. Cas. 172. See the title CONFLICT OF LAWS, vol. 3, p. 120. This statute was repealed in 1819. See Strouther *v.* Com., 92 Va. 789, 22 S. E. 852.

5. Course of Proceedings.

The course of proceeding in criminal cases pointed out by the statute may be more or less convenient; but it is the only legal mode; and courts have no power to carve out another. Nemo *v.* Com., 2 Gratt. 561.

B. LIMITATION.

See the title LIMITATION OF ACTIONS. See also, the specific criminal titles.

C. MERGER IN CRIMINAL CASES.

See also, the title MERGER.

Rules of the Common Law.—At common law a party indicted for felony could not be convicted on that indictment of a misdemeanor. The two offenses were of different grades, required different modes of trial, and were followed by different judgments. "This common-law rule continued to prevail in Virginia even after the distinctive features between these two grades of offense, which had given rise to the rule, had been abolished or changed, and the reason of the rule had entirely ceased. The effect of this rule was that if the felony charged in the indictment was not fully proved on the trial it was necessary to acquit and discharge the accused, though there might have been the fullest proof before the jury that he was guilty of a highly criminal act, which constituted part of the offense charged against him in the indictment. To be sure he might be indicted again for the misdemeanor. But then the risk, delay, trouble and expense of this course of proceeding constituted a serious objection to it. Hardy *v.* Com., 17 Gratt. 592. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

"It was a rule of the common law, that while more than one offense, even though of the same grade, could not be included in the same count of an indictment, yet as it was necessary to set out all the facts constituting an offense in an indictment for it, and as those facts often in themselves are separate offenses, a party might be convicted of any offense substantially charged in the indictment, provided it was of the same grade with the principal or total offense charged. So that if a party were indicted for one felony, as for example murder, he might be found not guilty of murder, but guilty of manslaughter, which is embraced in the charge. The

only reason why he could not be convicted of a misdemeanor on such an indictment was the distinction, before referred to, between the two grades of offense." Hardy *v.* Com., 17 Gratt. 592.

Parts of the Felony Charged.—"If a person indicted of felony be by the jury acquitted of part and convicted of part of the offense charged, he shall be sentenced for such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." Va. Code, 1094, § 4040. Reynolds *v.* Com., 94 Va. 816, 27 S. E. 427; Hardy *v.* Com., 17 Gratt. 592; Scott *v.* Com., 14 Gratt. 687; Canada *v.* Com., 22 Gratt. 899; Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371; W. Va. Code, ch. 152, § 18; State *v.* Howes, 26 W. Va. 110, citing Canada *v.* Com., 22 Gratt. 905; State *v.* McClung, 35 W. Va. 280, 13 S. E. 654. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; SENTENCE AND PUNISHMENT; VERDICT.

Whenever on an indictment for felony it is proved that the accused committed some act therein stated as part of the felony therein charged, which act is in itself a criminal offense, but that he did not commit the felony nor intend to commit it, he may be convicted of such act and sentenced accordingly. Hardy *v.* Com., 17 Gratt. 592.

To ascertain whether a party can be convicted of a lesser offense under § 4040, Va. Code, 1904, the first question must always be whether it is substantially charged. If the principal felony charged is one which necessarily and in all cases, includes the lesser offense, then every indictment for the principal felony substantially charges the lesser offense. If the principal felony is such as does not necessarily, and in all cases, include the lesser offense, then it would seem that an indictment for the principal felony would not substantially charge the lesser offense unless it be embraced in the mode in which the principal offense is charged. Hardy *v.* Com., 17 Gratt. 591.

"A person can not be convicted of any offense, even though it be of a misdemeanor, under an indictment for felony, unless the offense, or the acts constituting it, be charged in the indictment." Canada *v.* Com., 22 Gratt. 899.

An indictment for robbery charged that the prisoners "did make an assault" upon G. and one gold watch, etc., from the person and against the will of G., etc., "feloniously and violently did steal," etc. The jury acquitted the prisoners of the felony charged, but found them guilty of "assault and battery." On motion in arrest of judgment, it was held, that the finding is valid under ch. 208, § 27, of the Code. Hardy *v.* Com., 17 Gratt. 592.

On an indictment for malicious cutting and wounding with intent to maim, disfigure, disable, and kill, the defendant may be convicted of unlawful cutting and wounding with like intent, or of assault and battery. Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371; Canada *v.* Com., 22 Gratt. 899.

Attempts to Commit the Felony Charged.—"Section 4044 of the Code expressly enacts that on an indictment for felony, the jury may find the accused not guilty of the felony, but guilty of an attempt to commit such felony." Glover *v.* Com., 86 Va. 384, 10 S. E. 420; Hardy *v.* Com., 17 Gratt. 592; W. Va. Code, ch. 159, § 22. State *v.* Meadows, 18 W. Va. 658.

Refusal to instruct jury that if they believed from the evidence that prisoner intended to commit a felony, but before committing it, he voluntarily abandoned it, they were to find him not guilty, and instructing them that, on an indictment for felony, prisoner might be found guilty of an attempt to commit a felony; held, not error. Va. Code 1887, § 4044. Glover *v.* Com., 86 Va. 382, 10 S. E. 420.

It is not error for the court to instruct the jury on an indictment for felony, that under § 22, ch. 159, of the West Virginia Code they can acquit of the felony and find the prisoner guilty of the attempt to commit such felony. State *v.* Meadows, 18 W. Va. 658.

Whenever on an indictment for felony it is proved that the accused intended to commit a felony and did some act towards its commission, but without committing it, it is the plain duty of the jury to convict the accused of an attempt to commit such felony. Now an attempt to commit a felony is by statute made a felony or misdemeanor, according to the nature of the felony attempted to be committed. Hardy *v.* Com., 17 Gratt. 592. See the title ATTEMPTS AND SOLICITATION TO COMMIT CRIME, vol. 2, p. 135; SENTENCE AND PUNISHMENT.

Conviction of Higher Barring Prosecution for Lower.—"When one crime necessarily includes another and lower crime, if the accused be convicted of the higher offense, he can afterwards never be prosecuted for the lower offense." Moundsville *v.* Fountain, 27 W. Va. 182.

If a party be charged with an assault and convicted thereof, he can not afterwards be punished for the battery committed at the same time. "The battery includes the assault, and for the assault the defendant has received the legal punishment. He can not now be punished for the battery, because it can not be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery he will thereby be twice punished for the assault; that is, twice punished for the same offense, which can not be done." Hardy *v.* Com., 17 Gratt. 592.

Conviction of Lesser Barring Prosecution for Higher.—Where one crime necessarily includes another and lower crime, if the accused be convicted of the lower crime, the decided weight of authority as well as reason is, that in such case the accused can not afterwards be prosecuted for the higher offense; for, if he were so prosecuted, he would be again put in jeopardy for the lower crime which is a part of the higher crime. Moundsville *v.* Fountain, 27 W. Va. 182; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527. See Canada *v.* Com., 22 Gratt. 899; Stuart *v.* Com., 28 Gratt. 950; Livingston *v.* Com., 14 Gratt. 592-606; Com. *v.* Lambert, 9 Leigh 603-606; Montgomery *v.* Com., 98 Va. 840, 36 S. E. 371; Forbes *v.* Com., 90 Va. 550, 19 S. E. 164. See also, Benton *v.* Com., 91 Va. 790, 21 S. E. 495; Ball *v.* Com., 8 Leigh 726.

"If, for instance, one be indicted for manslaughter, he can not afterwards be indicted for the murder; for if he was so indicted, he would be twice put in jeopardy for the manslaughter, which is necessarily included in a murder, in violation of the constitution. (People *v.* Hancheller, 48 Cal. 331.) So if one be indicted for an attempt to commit a rape, he can not afterwards be indicted for the rape, as the rape necessarily includes the attempt to commit rape, and if indicted for it he would be twice put in jeopardy for the attempt to rape. (State *v.* Sheppard, 7 Conn. 54.) So if the first indictment be for burning a dwelling house uninhabited, it will bar an indictment for the same burning of the dwelling house, which charges that it was inhabited. (Com. *v.* Squire, 1 Metc. 258.) So an indictment for an assault and battery will bar a subsequent indictment for a riot, in which such assault and battery was committed; for otherwise the accused might be twice punished for the battery, which was a part of the riot, and it may be the greater part of it. (Com. *v.* Kinney, 2 Va. Cas. 139.) So if the riot occurred at a religious meeting, the rioters could not be indicted for both the riot and for disturbing a religious meeting, though they could be indicted for either. [2 Harring (Del.) 543.] So it is decided in State *v.* Cooper, 1 Green, N. J. 362, that a de-

fendant can not be indicted and punished for two distinct felonies growing out of the same identical act, and when one is a necessary ingredient of the other, and the state has selected and prosecutes one to conviction. So it was decided in State *v.* Smith, 43 Vt. 324, when an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." Moundsville *v.* Fountain, 27 W. Va. 182. See ante, "Definitions and Nature," I, A.

A conviction against one under an indictment for an assault and battery on H. M. may be pleaded by him in bar to an indictment against the same defendant and two others, for a riot and beating the said H. M., the assault and battery in each case being identically the same. Com. *v.* Kinney, 2 Va. Cas. 137. In this case the court was of opinion, that as the inferior offense of an assault and battery was included in the higher offense of a riot, and constituted a part of it, and the commonwealth had already elected to indict, and had actually convicted the defendant of that inferior offense, it was barred from prosecuting the defendant for the higher offense, for if this proceeding were allowed, then the defendant having been already fined and imprisoned for the battery, might be again placed in peril of another fine and imprisonment for a riot, of which the battery of which he had been before convicted was a part, and perhaps the chief part.

Acquittal of Lesser Offenses Bars Prosecution for Greater.—An acquittal of manslaughter is a bar to a prosecution for murder, and an acquittal of murder is a bar to a prosecution for petit treason. Com. *v.* Lambert, 9 Leigh 603-606.

Distinct Offenses Are Distributively Prosecuted.—Two offenses, being separate and unconnected, and resulting from different and distinct impulses, can not be regarded as parts of one and the same act and punished as such, but can only be prosecuted distributively and punished as separate offenses. State *v.* Porter, 25 W. Va. 685, citing 1 Wheat Crim. Law 27. Walker's Case, 1 Leigh 574. See also, Smith *v.* Com., 7 Gratt. 593; Com. *v.* Kinney, 2 Va. Cas. 140; Vaughan *v.* Com., 2 Va. Cas. 273.

To obtain by false pretenses two ten-dollar notes at different times and places and from different persons constitutes two distinct offenses. State *v.* Porter, 25 W. Va. 685.

A conviction for advising, etc., one slave to abscond, is not a bar to a prosecution for advising, etc., another slave to abscond; though the advising, etc., was to both at one time, and by the same words and acts. Smith *v.* Com., 7 Gratt. 593.

D. EFFECT AS BARRING OR SUSPENDING CIVIL ACTIONS.

See the title ACTIONS, vol. 1, p. 129.

Section 3884, Va. Code, 1904, and ch. 152, § 5, W. Va. Code, each provides that: "The commission of a felony shall not stay or merge any civil remedy."

The felony of one is not a bar to, or a suspension of, a civil remedy for the same act. Per Greene, J. Allison *v.* Farmers' Bank, 6 Rand. 204. See quære in Cook *v.* Darby, 4 Munf. 444.

E. WHEN PROSECUTION CONSIDERED AS PENDING.

See post, "Manner of Instituting Prosecution," V, H.

Where a criminal prosecution is instituted upon a presentment, the presentment must be regarded as the primal accusation of the defendant, as the commencement and institution of the prosecution. Whether the process upon the presentment be a summons to answer or be a rule and summons to show cause why an information should not be filed upon it the subsequent proceedings by way of infor-

mation, must in either case equally rest upon it, for the rule for the information has nothing else to rest upon but the presentment. The date of the prosecution is the time of the presentment, not the time of filing the information upon it. Com. *v.* Christian, 7 Gratt. 631, 637. See the titles ACTIONS, vol. 1, p. 132; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; LIMITATION OF ACTIONS; SUMMONS AND PROCESS.

F. SIMILARITY OF CRIMINAL TO CIVIL PROCEEDINGS.

Criminal proceedings so far as practicable, and not repugnant thereto, always correspond to civil proceedings unless otherwise provided. Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152.

General Rules of Pleading.—There is no material difference in the general rules of pleading in civil and criminal causes. State *v.* Evans, 33 W. Va. 417, 10 S. E. 792, citing Vanwinkle *v.* Blackford, 28 W. Va. 670; Fant *v.* Miller, 17 Gratt. 47. See also, the title PLEADING.

G. RULE AS TO PROCEEDINGS AGAINST INFANTS.

See also, the title INFANTS.

"Criminal proceedings against infants, ought, in all cases, to be conducted in the same manner as against persons of full age." Word *v.* Com., 3 Leigh 743.

H. MANNER OF INSTITUTING PROSECUTION.

1 In General.

There are two modes of instituting prosecutions for felonies in Virginia; one by warrant emanating from a justice, the other by indictment, presentment or information, and a warrant thereupon issued by a judge. Chahoon *v.* Com., 20 Gratt. 733. See post, "Arrest or Summons," V, H, 2. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

"Generally, a prosecution for felony is commenced by a complaint before a justice of the peace, and a warrant issued by him to arrest the accused and bring him before the same or some other justice to be examined and disposed of according to law." Chahoon *v.* Com., 20 Gratt. 733. See ante, "When Prosecution Considered as Pending," V, E; "Prosecution upon Warrant of Arrest," V, H, 6. See the titles JUSTICES OF THE PEACE; WARRANTS.

As to mode of instituting prosecutions for misdemeanors, see § 4106, Va. Code, 1904; ch. 50, §§ 219-239. See post, "Prosecution upon Warrant of Arrest," V, H, 6. See also, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

2. Arrest or Summons.

See ante, "Manner of Instituting Prosecution," V, H.

Arrest without Warrant.—As to arrest without warrant, see the title ARREST, vol. 1, p. 720.

Arrest on Warrant before Indictment, etc., Found.—See the titles ARREST, vol. 1, p. 719; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1; JUSTICES OF THE PEACE; WARRANTS.

Statutory Provisions as to Summons and Process after Indictment, etc., Found.—When an indictment or presentment is found or made, or information filed, the court, or the judge thereof in vacation, shall award process against the accused to answer the same, if he be not in custody. Such process, if the prosecution be for a felony, shall be a capias; if it be for a misdemeanor, for which corporal punishment may be inflicted, it may be a capias or summons, in the discretion of the court or judge; in all other cases it shall be, in the first instance, a summons, but if a summons be returned executed and the defendant do no appear, or be returned not found, the court or judge may award a capias. (Code 1849, p. 771, ch. 207, § 18; 1866, 1867, p. 929; 1874, p.

159; 1877, 1878, p. 336; 1885, 1886, p. 522. Va. Code, 1904, § 4003. Chahoon *v.* Com., 20 Gratt. 733.

When an indictment or presentment is found or made, the court shall award process against the accused to answer the same if he be not in custody. Such process if the prosecution be for a felony, shall be a capias; if it be for a misdemeanor, for which an infamous or corporal punishment may be inflicted, it may be a capias or a summons, at the discretion of the court; in all other cases it shall be, in the first instance, a summons; but if a summons be returned executed, or two be returned not found, and the defendant do not appear, the court may award a capias. West Va. Code, ch. 158, § 14. Chahoon *v.* Com., 20 Gratt. 733.

Process upon Indictment for Felony.—As to form, requisites and sufficiency of capias for the arrest of a person indicted for felony, see the title WARRANTS.

When an indictment is found, if the prosecution be for a felony the court or judge thereof in vacation, shall award process against the accused to answer the same, if he be not in custody. Such process shall be a capias. Va. Code, 1904, § 4003. Chahoon *v.* Com., 20 Gratt. 733; Buskirk *v.* Judge of Circuit Court, 7 W. Va. 91; State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657.

"A capias is the only process for the arrest of the accused the circuit court is authorized to issue upon an indictment for felony. This is true now and has been, continuously, since the first of April, 1869." Buskirk *v.* Judge of Circuit Court, 7 W. Va. 91.

"Section 14 of chapter 158, relating to indictments and process thereon, makes it the duty of the court to issue a capias for the arrest of a person indicted for a felony and not in custody." State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657; Va. Code, 1904, § 4003. See the title WARRANTS.

It is the duty of the officer making an arrest upon a capias for a person, who has been indicted for felony, to deliver such person, when arrested, to the court if sitting, or to the jailer of the county. State *v.* Mooney, 49 W. Va. 702, 39 S. E. 657; Jones *v.* Com., 86 Va. 661, 10 S. E. 1005; Wilson *v.* Com., 86 Va. 660, 10 S. E. 1007. See the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

Proper Process in Misdemeanor Cases.—Generally, as to form, requisites and sufficiency of summons, see the title SUMMONS AND PROCESS.

"Proper process, unless otherwise ordered by the court, in all misdemeanor cases, is a summons, to be followed by a capias when necessary (§ 14, ch. 158, W. Va. Code), and in the name of the state as plaintiff." Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; State *v.* Mooney, 49 W. Va. 712, 39 S. E. 657. See also, Buskirk *v.* Judge of Circuit Court, 7 W. Va. 91; Chahoon *v.* Com., 20 Gratt. 733; Com. *v.* Goode, 2 Va. Cas. 200; Com. *v.* McClenegan, 1 Va. Cas. 155.

If a defendant be presented for a misdemeanor, and summoned to show why an information should not be filed, and upon the return of that summons executed, the defendant fails to appear, and the rule be made absolute, and the information filed, the court can not proceed to try it, but the defendant must be summoned to answer the information, or if he be charged with an offense to which an infamous or corporal punishment is affixed, or may enure, the court may award a capias instead of a summons. Com. *v.* Goode, 2 Va. Cas. 200.

Object of Summons.—"In Wood's Case, Scott, J., delivering the opinion of the court, held: 'The object of the summons is to give the party notice, that he is prosecuted for an offense of a particular character, and to apprise him of the time when, and the place where, he must appear to make his de-

fense. The detail of the particular facts charged with the accompanying circumstances of time and place is supplied by the presentment.'" State *v.* Gilmore, 9 W. Va. 641.

Sufficiency of Summons.—The summons is sufficient if it gives the defendant notice of the character of the offense with which he is charged, and apprises him of the place where, and the time he must appear to make his defense. State *v.* Gilmore, 9 W. Va. 641. See also, the title SUMMONS AND PROCESS.

Upon a presentment for unlawful gaming at cards at a particular place within six months next preceding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally, without specifying place or time. Held, such process is good and sufficient. Word *v.* Com., 3 Leigh 743.

Sufficiency of Return.—A return of a summons to answer an indictment, directed to the sheriff of a particular county, is not bad because it omits to state that it was served in that county. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. See also, the title SERVICE OF PROCESS.

Insufficient Foundation for Summons.—An indictment being quashed because one of the grand jurors who found it was not a freeholder, the indictment is not a sufficient foundation for a rule upon the party to show cause why an information should not be filed against him. Com. *v.* Ayres, 6 Gratt. 668. See also, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

3. Preliminary Examination.

As to the preliminary examination of the accused, see the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

4. Commitment.

See the title COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

5. Indictment, Information or Presentment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Doctrine in Virginia.—A person can not be put upon trial for any felony unless an indictment shall have first been found against him therefor by a grand jury in a court of competent jurisdiction. A felony can not be prosecuted by information. Simmons *v.* Com., 89 Va. 156, 15 S. E. 386; Watson *v.* Com., 87 Va. 608, 13 S. E. 22; Com. *v.* Cawood, 2 Va. Cas. 527; Com. *v.* Barrett, 9 Leigh 665; Matthews *v.* Com., 18 Gratt. 989; Jones *v.* Com., 19 Gratt. 478; Chahoon *v.* Com., 20 Gratt. 733; Va. Code, § 3990.

"No man can be considered as indicted unless it appear of record that an indictment against him was delivered in open court, and the fact recorded. Cawood's Case, 2 Va. Cas. 527." Simmons *v.* Com., 89 Va. 156, 15 S. E. 336. See State *v.* Whitt, 39 W. Va. 468, 19 S. E. 873.

The indictment for an offense for which the punishment may be death or confinement in the penitentiary must describe it as having been done "feloniously." Randall *v.* Com., 24 Gratt. 644. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

A misdemeanor may be tried on a presentment or information as well as on an indictment. Jones *v.* Com., 19 Gratt. 478; § 3989, 3990, Va. Code, 1904. See post, "Prosecution upon Warrant of Arrest," V, H, 6.

Doctrine in West Virginia.—Chapter 158, § 1, W. Va. Code, reads, in part: "The trial of a person on a charge of felony shall always be by indictment; and the indictment may be found in the first instance, whether the accused has been examined or committed by a justice or not." State *v.* Mooney, 49

W. Va. 712, 39 S. E. 657. See also, Com. *v.* Barrett, 9 Leigh 665.

When Indictment, etc., Must Be Found.—An indictment, information or presentment must be made within the period limited by the statute which the nature of the offense requires. Jones *v.* Com., 19 Gratt. 478. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; LIMITATION OF ACTIONS.

Discharge for Failure to Indict.—As to discharge from imprisonment for failure to indict in time, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Loss of Indictment or Information.—In a prosecution for a felony or misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party can not be tried. Bradshaw *v.* Com., 16 Gratt. 507. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; LOST INSTRUMENTS AND RECORDS. See also, ch. 165, Va. Code, 1904; ch. 130, W. Va. Code, § 14; and ch. 152, § 10 as to procedure in case of loss of an indictment. That where an indictment is lost, it can not be supplied by a copy, seems to be the minority rule.

Forms, Requisites, Sufficiency, etc.—Generally, as to form, requisites, sufficiency, etc., of indictments, informations and presentments, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

As to indictments, etc., for particular offenses, see the specific titles, as for instance as to indictments for assault and battery, see the title ASSAULT AND BATTERY, vol. 1, p. 729; as to indictment for homicide, see the title HOMICIDE.

Election of Counts.—See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

6. Prosecution upon Warrant of Arrest.

See ante, "In General," V, H, 1; "Indictment, Information or Presentment," V, H, 5.

In Virginia.—Except when it is otherwise specially provided the several police justices and justices of the peace have exclusive original jurisdiction for the trial upon warrant of arrest of all misdemeanor cases occurring within their jurisdiction in their respective magisterial districts, except violations of the revenue and election laws of the state, violations of the Sunday transportation laws, violations of the Sunday liquor laws and of offenses against public policy arising under the provisions of ch. 187, Va. Code, in which cases they have concurrent jurisdiction with the circuit court of the county and the corporation or hustings courts of the corporations of the state. Section 4016, Va. Code, 1904. For construction and application of this section prior to the constitution of 1902, see the cases: Lacey *v.* Palmer, 93 Va. 159, 24 S. E. 930; Brown *v.* Epps, 91 Va. 726, 21 S. E. 119; Miller *v.* Com., 88 Va. 618, 14 S. E. 161. See the titles JURISDICTION; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS; WARRANTS.

In West Virginia.—As to jurisdiction of justices of the peace in West Virginia to try upon warrant of arrest cases of assault and battery, cases of trespass to personal property, offenses against morality and decency arising under § 19, ch. 149, of the Code, cases of adultery and fornication, and any other case where the punishment is limited to a fine not exceeding ten dollars or to imprisonment not more than ten days; cases of petit larceny, offenses against the peace arising under § 7, ch. 48, of the Code; and cases under §§ 9, 10, ch. 56, of the Code relating to the Cumberland and other turnpikes; and violations of ordinances, see ch. 50, §§ 219-239. See also, the titles JURISDICTION; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS; WARRANTS.

As to the recovery of fines upon warrant, or in a summary way, where fine without corporal punishment is pre-

scribed and where the same is limited to an amount not exceeding twenty dollars, see the title FINES AND COSTS IN CRIMINAL CASES.

I. PROCEEDINGS PRELIMINARY TO TRIAL.

1. Furnishing Accused with Copy of Indictment.

The accused is now entitled to a copy of the indictment. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; Craft *v.* Com., 24 Gratt. 602; Bradshaw *v.* Com., 16 Gratt. 507. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

If a prisoner receives a copy of the indictment at any time before the trial is commenced, though not until the case is called, it would be proper to give the prisoner a reasonable time to examine such indictment, if he asks it; but it is not a ground for continuing the cause until the next term of the court. Craft *v.* Com., 24 Gratt. 602. See the title CONTINUANCES, vol. 3, p. 270.

"It is objected that the counsel for accused asked to see the indictment, but was refused. It was late at night, and the court was to adjourn; and the judge says he thought prudent to take care of the paper, and, instead of allowing the original indictment to go into the hands of the attorneys, at once ordered the clerk to furnish a copy within an hour, and it was furnished. This was a reasonable provision. The Code (ch. 159, § 1) does not give an accused or his counsel the original indictment, but a copy. I fail to see the effect of this to invalidate the indictment." Eastham *v.* Holt, 43 W. Va. 599, 27 S. E. 883. See post, "Constitutional and Statutory Right," V, J, 2, b, (2).

2. Furnishing Accused with List of Jurors.

The law entitles the accused to a list of the persons summoned as jurors to try him, but it prescribes no time in which this list shall be furnished. If the prisoner receives a list of the persons summoned as jurors at any time before the trial is commenced, though not until the case is called, it is sufficient; but it would be proper to give him a reasonable time to examine the list of jurors, if he asks it, but is no ground for continuing the cause until the next term of the court. It was said in this case whether a reasonable time to examine the list should have been one day or less is not a question before the court because no such motion was made to the court below. The motion was for a continuance, not for reasonable delay to examine the list. Craft *v.* Com., 24 Gratt. 602. See the titles CONTINUANCES, vol. 3, p. 270; JURY.

3. Assignment of Counsel to Indigent Persons.

See post, "Presence and Benefit of Counsel," V, J, 2, b, (3), (d).

If a prisoner is unable to employ counsel, the court may appoint some one to defend him, and it is a duty which counsel owes to his profession, to the court engaged in the trial, to the administration of justice, and to humanity, not to withhold his aid, nor spare his best efforts in the defense of one "who has the double misfortune to be stricken with poverty and accused of crime. No one is at liberty to decline such an appointment, and few, it is to be hoped, would be disposed to do so." Cooley's Const. Lim. 406. Barnes *v.* Com., 92 Va. 794, 803, 23 S. E. 784. See also, Early *v.* Com., 86 Va. 921, 11 S. E. 795.

4. Procedure upon Suggestion of Insanity of Accused.

As to procedure upon a mere suggestion of present insanity of accused, see the title INSANITY.

5. Exceptions to Indictments, Informations and Presentments.

a. Defects of Form Which Are Disregarded.

See the titles APPEAL AND ERROR, vol. 1, p. 418; INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Statutory Provision.—Our statute provides, ch. 201, § 12, Va. Code, now § 4000, Va. Code, 1904: "Judgment in any criminal case, after the verdict, shall not be arrested or reversed upon any exception to the indictment or other accusations, if the offense be charged therein with sufficient certainty for judgment to be given thereon according to the very right of the case." Puryear *v.* Com., 83 Va. 57, 1 S. E. 512.

Section 4011 of the Code of Virginia, 1887, same § Va. Code, 1904, provides that "no exception shall be allowed for any defect or want of form in any presentment, indictment, or information mentioned in either of the two preceding sections: § 4009, petty offenses limited to a fine not exceeding $20; § 4010, the gaming act, but the court shall give judgment thereon according to the very right of the case" Lawrence *v.* Com., 86 Va. 573, 10 S. E. 840.

b. Manner of Excepting.

(1) Showing Cause against Filing Informations.

As to showing cause against the filing of an information, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

(2) Motions to Quash.

As to motions to quash indictments, presentments and informations, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

(3) Pleas in Abatement.

Generally, as to pleas in abatement as a manner of excepting to indictments, informations and presentments, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24. See also, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

(4) Demurrers.

As to demurrers as a mode of excepting to indictments, and presentments, see the titles DEMURRERS; INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

c. Waiver of Defects by Failure to Except in Proper Manner.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24; INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

6. Arraignment and Plea.

a. Arraignment.

(1) Definition, Nature and Purpose.

In the criminal practice the arraignment is "the calling the defendant to the bar of the court to answer the accusation contained in the indictment." Stoneham *v.* Com., 86 Va. 523, 10 S. E. 238; Sutton *v.* Com., 85 Va. 128, 7 S. E. 322; Whitehead *v.* Com., 19 Gratt. 640; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Various Steps and Their Purpose.—The first step in the arraignment consists in calling the accused to the bar by his name, and commanding him to stand up. The second step is the reading the indictment to him in full. The third step is to ask him: "How say you (naming the prisoner); are you guilty, or not guilty?" Technically, the arraignment is now completed, and he must answer. Sutton *v.* Com., 85 Va. 128, 7 S. E. 323. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

The indictment is read to the prisoner in full so that he may know with what he is charged. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

The prisoner is called to the bar by his name, and commanded to stand up so that he may be completely identified as the person named in the indictment. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Distinguished from Plea.—The arraignment and the plea of the accused are separate stages of the proceedings. The arraignment of the prisoner is the act of the court. This accords with the general idea of the word, arraign, which is regarded as meaning to accuse. Arraignment precedes the plea. It can not be said that the plea is the arraignment or a part of it, and, there-

fore, the act of the court. The plea is the act of the prisoner. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; Whitehead *v.* Com., 19 Gratt. 640.

Blackstone says, book 4, p. 324: "When a criminal is arraigned, he either stands mute or confesses the fact, which circumstances we may call incidents to the arraignment, or else he pleads to the indictment, which is to be considered as the next stage of the proceeding." Whitehead *v.* Com., 19 Gratt. 640. See also, State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

(2) Dispensed with in West Virginia.

Arraignment of the prisoner in this state has been dispensed with by statute. Section 2, ch. 159, W. Va. Code. The prisoner is now entitled to a copy of the indictment; his witnesses and counsel must be personally present during the trial, but no arraignment is necessary. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Section 2, ch. 159, W. Va. Code, provides: "The formal arraignment of the prisoner, the proclamation by the sheriff, and the charge of the clerk to the jury, as heretofore practiced, shall hereafter be dispensed with." State *v.* Conkle, 16 W. Va. 751; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

"When the indictment is read to the prisoner the question is put to him personally, 'What say you, guilty, or not guilty.'" State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427.

(3) Joint Arraignment of Two Persons.

Two persons may be arraigned together. This does not prevent their pleading separately, and electing to be tried separately. Whitehead *v.* Com., 19 Gratt. 640. See post, "Severance," V, I, 11.

(4) Election to Be Tried in Circuit Court.

Formerly under § 4016 of the Virginia Code of 1887 a person charged with a felony might in certain instances, when called to the bar to answer indictment, elect to be tried in the circuit court. An amendment of this section [acts, 1893, 1894, p. 270] was passed depriving the prisoner of the right to elect to be tried in the circuit court. The constitution of 1902 abolished the county court, and at present § 4016, Va. Code, 1904, confers exclusive original jurisdiction of all felonies committed within the counties and within the cities which may not have corporation courts upon their respective circuit courts. The following cases construed and applied the law as it stood prior to the act of 1893, 4, p. 270. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Mitchell *v.* Com., 89 Va. 826, 17 S. E. 480; Drier *v.* Com., 89 Va. 529, 16 S. E. 672; Watson *v.* Com., 87 Va. 608, 13 S. E. 22; Early *v.* Com., 86 Va. 921, 11 S. E. 795; Stoneham *v.* Com., 86 Va. 523, 10 S. E. 238; Howell *v.* Com., 86 Va. 817, 11 S. E. 238; Sutton *v.* Com., 85 Va. 128, 7 S. E. 323; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Joyce's Case, 78 Va. 287; Price *v.* Com., 21 Gratt. 846; Boswell *v.* Com., 20 Gratt. 860; Whitehead *v.* Com., 19 Gratt. 643.

(5) Courses Open to Accused When Called upon to Plead.

Upon being called upon to plead there are several courses which the accused may take. He may plead as he is advised; he may demur or move to quash; he may plead to the jurisdiction or otherwise, or he may plead not guilty. Sutton *v.* Com., 85 Va. 128, 7 S. E. 323. See post, "Plea of Not Guilty," V, I, 6, c, (7). See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24; INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

He may plead a special plea in bar, such as former conviction or acquittal. He may demur. Whitehead *v.* Com., 19 Gratt. 640. See post, "Pleas in Bar," V, I, 6, c, (4).

When a criminal is arraigned, he

may stand mute or confess the fact. Whitehead *v.* Com., 19 Gratt. 640. See post, "Entry by the Court," V, I, 6, c, (7), (c).

It is said, however, in State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434: "Formerly in response to the question (how say you, naming the prisoner, are you guilty or not guilty?) the accused was compelled to answer ore tenus either guilty or not guilty."

b. In County to Which Venue Is Changed.

A prisoner having been arraigned, and pleaded in the county in which the offence was committed, need not be arraigned, nor required to plead, in the county to which the venue is changed. Vance *v.* Com., 2 Va. Cas. 162. See the title CHANGE OF VENUE, vol. 2, p. 780.

c. Plea.

(1) In General.

Necessity for Plea.—One of the essential steps required by law to be taken for the conviction of a person on a criminal charge is that he shall be given an opportunity to plead; there can be no conviction unless a plea has been entered, although every other step necessary to convict shall have been taken. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

"The plea commonly put in at the arraignment is an essential part of the proceedings, so that, until an indicted person has pleaded, he is not in jeopardy, though a jury has been sworn to try him, or even though there has been an actual trial." State *v.* Aler, 39 W. Va. 549, 20 S. E. 585. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

Form and Sufficiency.—"Every plea, whether in bar or abatement, must show matter which, if confessed by demurrer or found by a jury, will authorize the judgment prayed by the plea." Moran *v.* Com., 9 Leigh 651, cited in Tilley *v.* Com., 89 Va. 136-153, 15 S. E. 526. See also, Smith *v.* Com., 85 Va. 924, 9 S. E. 148.

"Although the plea may be in the words of the statute relied on, yet if the averments be omitted which are necessary to show that the matter of the plea, under such statute, forms a full defense, or warrants the judgment prayed for, such omission is fatal." Moran *v.* Com., 9 Leigh 651.

Manner of Taking Advantage of Defects.—In criminal cases defects of form in a plea interposed by a defendant may be taken advantage of by a general demurrer. Com. *v.* Jackson, 2 Va. Cas. 501; Moran *v.* Com., 9 Leigh 651. See also, Page *v.* Com., 27 Gratt. 954. See post, "In General," V, I, 6, c, (4), (a). See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24; DEMURRERS.

Pleas Properly Rejected. — It is proper to reject a plea presenting in different language the same defense already presented in another plea. Smith *v.* Com., 85 Va. 924, 9 S. E. 148.

(2) When Collateral Issue Allowed.

In a capital case, a collateral issue to which the accused is not a party, may be made up, when it operates in favorem vitæ, as whether the accused be non compos, mute by the visitation of God, etc., but not where it is against life. Com. *v.* Tyree, 2 Va. Cas. 262.

If a black man be sent on for trial by the examining court to the superior court (charged with a crime, which in a slave is punishable with death, and in a free man by penitentiary confinement), as a free man, the court will not allow, in any other person who claims him as his slave, to make up a collateral issue, or to give evidence on a collateral motion, which has for its object the decision of the question whether or not the accused be a slave; the accused not being a party to such proceeding, ought not to be affected by it. Com. *v.* Tyree, 2 Va. Cas. 262. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 27.

(3) Pleas in Abatement and Objection to Jurisdiction.

Generally, as to pleas in abatement in criminal cases, see the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24, et seq.

As to objections to jurisdiction, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 28.

(4) Pleas in Bar.

See ante, "Courses Open to Accused When Called upon to Plead," V, I, 6, a, (5).

(a) In General.

Nature and Purpose.—By a plea in bar the defendant shows by matter extrinsic of the record, that the indictment is not maintainable. Tilley *v.* Com., 89 Va. 136, 15 S. E. 526.

Effect on Dilatory Plea.—A plea in bar admits whatever is grounds of abatement. It is a waiver of all dilatory defenses. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73. See also, Early *v.* Com., 86 Va. 921, 11 S. E. 795. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24.

Demurrer to Pleas in Bar.—Where the defendant interposes a plea in bar, the attorney for the commonwealth may demur to the plea. Com. *v.* Faris, 5 Rand. 691; Com. *v.* Jackson, 2 Va. Cas. 501. See also, Moran *v.* Com., 9 Leigh 651. See ante, "In General," V, I, 6, c, (1). See the title DEMURRERS.

Demurrer and Rejoinder to Replication.—On the arraignment of a prisoner on a charge of felony, he files a special plea, to which the attorney for the commonwealth files a special replication; and to this replication the prisoner demurs. The demurrer being overruled, the prisoner can not rejoin to the replication without withdrawing his demurrer. Page *v.* Com., 27 Gratt. 954.

"The prisoner had no right to demur and rejoin to the same replication at the same time. He had his election to do either. He elected to demur; when his demurrer was decided against him, all he could then ask was to withdraw his demurrer and rejoin, and this the court offered to permit him to do." Page *v.* Com., 27 Gratt. 953.

"The right of respondeat ouster does not authorize a party whose demurrer to a replication has been decided against him to put in a rejoinder without withdrawing his demurrer. That would be a case of palpable duplicity; and would be the same thing as if he had offered to demur and rejoin at the same time to the replication. He may plead double in the first step in a line of pleading. For example, he may plead autrefois acquit and not guilty. But he can not plead double in any subsequent step in that line." Page *v.* Com., 27 Gratt. 953.

(b) Special Plea of Matter Proper under Plea of Not Guilty.

A special plea in a criminal case which amounts only to the general issue ought to be rejected. There is no material difference in this respect in the general rule of pleading in civil and criminal cases. In a trial for homicide there was offered by the prisoner a special plea, setting out that there was a conspiracy between the deceased and one H., in pursuance of which they were assailing the prisoner when he killed the person in self-defense. It was held, that this was embraced in and equivalent to the general issue of not guilty, and that it was properly rejected by the court. State *v.* Evans, 33 W. Va. 417, 10 S. E. 792, citing Vanwinkle *v.* Blackford, 28 W. Va. 670; Fant *v.* Miller, 17 Gratt. 47.

A special plea, which is equivalent to the general issue of "not guilty," may be rejected by the court in a criminal case without error. State *v.* Evans, 33 W. Va. 417, 10 S. E. 792.

Insanity.—Generally, as to mode of taking advantage of insanity as defense to a criminal prosecution, see post, "Effect as Putting in Issue Ma-

terial Facts," V, I, 6, c, (7), (h). See the title INSANITY.

(c) Plea of Pardon.

As to a pardon as a defense, see generally, the title PARDON.

(d) Plea of Autrefois, Acquit or Convict.

aa. In General.

Generally, as to a plea of autrefois, acquit or convict as a bar to a criminal prosecution, see the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

bb. When Unnecessary.

Where a former conviction or acquittal was on the same indictment still being further prosecuted, no plea of former conviction or acquittal is necessary. Objection to be further tried, or a motion in arrest of judgment, gives the accused the benefit of the former acquittal or conviction. Otherwise where former trial was upon another indictment in the same or other court. State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

cc. Plea of Acquittal of Codefendant.

See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 190. See also, ante, "Other Persons Being Equally Guilty," IV, F, 9.

(5) Plea of Nolo Contendere.

See post, "Plea of Guilty," V, I, 6, c, (6).

An implied confession or a plea nolo contendere is, where in a case not capital, the defendant, without pleading guilty, or expressly confessing the truth of the indictment, throws himself on the mercy of the court, and desires to submit to a small fine. This request may be granted or refused by the court, as it may think proper. If the court grants the request, the entry on the record is not quod cognovit indictamentum, as in the case of an express confession, but quod non vult contendere cum domino rege, et se posuit in gratiam curiæ, and the defendant is not put to a more direct confession. 1 Chit. Cr. Law 431. The effect of such an implied confession is not the same as that of a direct and express confession by the plea of guilty. Honaker *v.* Howe, 19 Gratt. 50.

Nature and Effect.—"The plea of nolo contendere, like a demurrer, admits, for the purposes of the case, all the facts which are well stated, but is not to be used as an admission elsewhere." Honaker *v.* Howe, 1 Gratt. 50.

"The essential difference between the effect of a direct or express confession, and that of a confession implied upon a nolo contendere, seems to be clearly marked by the difference in the form of the entry. The direct confession is an acknowledgment of the fact charged in the indictment, and accordingly the entry is cognovit indictamentum. No such entry is made upon the plea of nolo contendere, which indicates that it is not understood as an acknowledgment of the fact charged. The entry in such a case imports merely, that the defendant is willing and desirous, if the court will allow it, to pay a small fine in order to get rid of the prosecution. Such a proceeding on the part of defendant implies a confession 'in a manner,' as Hawkins says, of the truth of the charge. But it is, strictly speaking, only an agreement on the part of the defendant that the fact charged may be considered as true for the purposes of the case, but for them only. Being unwilling to confess the truth of the charge, he will not plead guilty; thinking it best for him not to submit to a trial, he will not plead not guilty; but desiring to make his peace on the best terms, he throws himself on the mercy of the court, and declares his willingness to pay a fine, without confessing or denying his guilt. He agrees that the court may consider him guilty for the purpose of imposing a fine upon him, but the agreement goes no further." Honaker *v.* Howe, 19 Gratt. 50.

Practice in Virginia.—"This practice of pleading nolo contendere, or 'submitting,' as it is familiarly termed, does not prevail in Virginia. The reason is,

as I apprehend, that in Virginia the fine, in cases of misdemeanor for which no specific fine is prescribed by statute, is assessed by the jury, and not by the court, as it is in England, and in the states which follow the common law in this respect. The same substantial purpose, however, is effected here by an arrangement with the attorney for the commonwealth, in pursuance of which the defendant, with the assent of the court, confesses a judgment for such fine as the attorney agrees to accept. The amount of the fine is thus ascertained beforehand; while on a submission, under the common-law practice, it is left to the court to fix the amount of the fine in its discretion." Honaker *v.* Howe, 19 Gratt. 50.

(6) Plea of Guilty.

See ante, "Plea of Nolo Contendere," V, I, 6, c, (5).

If in response to the question: "How say you (naming the prisoner); are you guilty, or not guilty?" he answered guilty, that was a confession of the offense. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; Granger *v.* Com., 78 Va. 212.

When Received.—"A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon, if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests." State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428, from opinion of Johnson, P. See § 3895, Va. Code, 1904; W. Va. Code, ch. 143, § 1; ch. 152, § 16.

Entry before Withdrawing Plea of Not Guilty.—On an indictment for a violation of the state revenue law in selling spirituous liquors without a license, the plea of guilty may be entered without formally and expressly withdrawing a plea of not guilty theretofore entered. State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734. See post, "Withdrawal," V, I, 6, c, (7), (j). See the title INTOXICATING LIQUORS.

Withdrawal of Plea of Guilty.—In a criminal case, the court may permit the plea of guilty to be withdrawn, and another plea to be entered in its place, in the exercise of a sound discretion, if justice and a fair trial on the merits require it; but it must be in time, and the reason for it must be made to appear clearly and distinctly. State *v.* Shanley, 38 W. Va. 516, 18 S. E 734.

Effect as Regards Penalty.—Where a prisoner pleads guilty to the charge whereof he stands indicted, he thereby subjects himself to the full legal penalty for that offense, as if he had been tried and convicted. Granger *v.* Com., 78 Va. 212; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434. See the title SENTENCE AND PUNISHMENT.

Evidence in Mitigation of Sentence.—After pleading guilty to the charge whereof he stands indicted, the prisoner may introduce evidence in mitigation of the sentence. Granger *v.* Com., 78 Va. 212. See the titles EVIDENCE; SENTENCE AND PUNISHMENT.

(7) Plea of Not Guilty.

See ante, "Courses Open to Accused When Called upon to Plead," V, I, 6, a, (5).

(a) Entry by Defendant in Person.

In a prosecution for felony, a plea of not guilty must be pleaded by the defendant in person. State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Sheppard, 49 W. Va. 582, 39 S E. 676; State *v.* Allen, 45 W. Va. 65, 30 S. E. 211; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875; Parsons *v.* State, 39 W. Va. 464, 19 S. E. 876; State *v.* Sutfin, 22 W. Va. 771; State *v.* Greer, 22 W. Va. 800; State *v.* Conkle, 16 W. Va. 736; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579; Gilligan *v.* Com., 99 Va. 816, 37 S. E.

962; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Bond *v.* Com., 83 Va, 581, 3 S. E. 149; Cluverius *v.* Com., 81 Va. 848; Lawrence *v.* Com., 30 Gratt. 845; Boswell *v.* Com., 20 Gratt. 860; Jackson *v.* Com., 19 Gratt. 656; Pifer *v.* Com., 14 Gratt. 710; Hooker *v.* Com., 13 Gratt. 763; Sperry *v.* Com., 9 Leigh 623; Com. *v.* Crump, 1 Va. Cas. 172. See also, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Jones *v.* Com., 79 Va. 213; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Longley *v.* Com., 99 Va. 807, 37 S. E. 339. See post, "Modern Practice," V, I, 6, c, (7), (g), bb; "Presence of Accused and Counsel," V, J, 2, b, (3).

(b) Entry by Attorney.

See post, "Modern Practice," V, I, 6, c, (7), (g), bb; "Record Showing Appearance by Attorney," V, J, 2, b, (3), (b), cc, (bb).

In a prosecution for felony a plea of not guilty by an attorney is a nullity. State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Allen, 45 W. Va. 65, 30 S. E. 211; State *v.* Cross, 44 W. Va. 331, 29 S. E. 527; State *v.* Campbell, 42 W. Va. 251, 24 S. E. 875; State *v.* Sutfin, 22 W. Va. 771; State *v.* Greer, 22 W. Va. 800; State *v.* Conners, 20 W. Va. 1; State *v.* Conkle, 16 W. Va. 736; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Cluverius *v.* Com., 81 Va. 848; Lawrence *v.* Com., 30 Gratt. 845; Boswell *v.* Com., 20 Gratt. 860; Jackson *v.* Com., 19 Gratt. 656; Hooker *v.* Com., 13 Gratt 763; Sperry *v.* Com., 9 Leigh 623; Crump *v.* Com., 1 Va. Cas. 172. See also, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Jones *v.* Com., 79 Va. 213; Jones *v.* Com., 87 Va. 63, 12 S. E. 226; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Longley *v.* Com., 99 Va. 807, 37 S. E. 339. See ante, "Entry by Defendant in Person," V, I, 6, c, (7), (a).

Bishop on Criminal Law, § 268, vol. 1, says: "And as a general proposition the defendant must present himself at the arraignment and plead personally to the indictment; he can not do it by attorney. The exception is, that for special cause shown, and as a favor to the defendant, he will be permitted to plead by attorney in the case of a misdemeanor punishable only by fine, and not by imprisonment; and in such a case the court may permit the trial to go on in his absence." State *v.* Conkle, 16 W. Va. 748.

Where a judgment against the defendant on a verdict of guilty on an indictment for felony is reversed, and the verdict set aside because the plea of not guilty pleaded was pleaded by the defendant by attorney and not by the defendant in person, the cause will be remanded to the court below to be further proceeded with to final determination according to law upon the said indictment, as if no plea of not guilty had been pleaded. State *v.* Conkle, 16 W. Va. 736.

"Where a judgment against the defendant on a verdict of guilty on an indictment for felony is reversed by the appellate court because the verdict was rendered upon a plea of not guilty, pleaded by the defendant by his attorney and not in person, the prisoner is not entitled to a discharge under the

constitutional provision, that no person shall be twice put in jeopardy for the same offense." State *v.* Conkle, 16 W. Va. 736. See post, "Record Showing Appearance by Attorney," V, J, 2, b, (3), (b), cc, (bb). See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

(c) Entry by the Court.

See ante, "Courses Open to Accused When Called upon to Plead," V, I, 6, a, (5).

"If the prisoner stand mute and refuse to plead or answer and do not confess his guilt, the court shall have the plea of not guilty entered and the trial shall proceed as if the accused had put in that plea." Judgment upon the verdict in any such trial is entered up as in cases of misdemeanor. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Conkle, 16 W. Va. 751. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c). See the titles JUDGMENTS AND DECREES; SENTENCE AND PUNISHMENT; VERDICT.

"The court may, upon the refusal of the accused to plead, enter for him the plea of not guilty; but this is done in his behalf. It is an act performed for the accused." Whitehead *v.* Com., 19 Gratt. 640.

Standing Mute.—"Anciently, if the prisoner stood mute and refused to answer and say whether he was guilty or not guilty in capital felonies, and it was found upon a formal inquiry by jury that he stood obstinately mute and was not dumb ex visitatione Dei, he received the terrible sentence of penance, which was in substance, that he was put into a low dark chamber, laid on his back, naked, and a weight of iron, as great as he could bear placed on his body, and was to have no sustenance except on one day three morsels of the worst bread, and on the second day three draughts of standing water, that should be nearest to the prison door, and with only these given, on alternate days, he should so remain until he died. United States *v.* Gibbert, 2 Sumner (U. S.) 67. All this useless formality and brutality has been done away with." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

(d) Pleading Not Guilty and Autrefois Acquit.

A plea of not guilty and a special plea of autrefois, acquit or convict may be pleaded at the same time. State *v.* Hudkins, 35 W. Va. 247, 13 S. E. 367; Com. *v.* Myers, 1 Va. Cas. 187.

As to manner of trying each of the issues, see the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 192.

(e) Puts Accused upon Trial by Jury.

See post, "Omission of Similiter," V, I, 6, c, (7), (g), cc.

"It appears that by a recent statute in England (Stat. 8, Geo. 4, ch. 28) it is provided that, if a person being arraigned upon an indictment for treason, felony or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without further form, be deemed to have put himself upon the country for trial. And this is precisely what our laws, in my judgment, do in effect prescribe. The provision was indispensable in England, since the refusal of the prisoner to state, after he had pleaded not guilty, how he would be tried, was deemed in law as standing mute. In our law he can not be deemed to stand mute, when he has pleaded not guilty. The constitution decides how he shall be tried, independent of any election on his part. The plea of not guilty puts the party for all purposes upon his trial by jury." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

"It is said that the English practice is that in cases of treason and felony no issue is joined with the prisoner on behalf of the crown. Whar. Prec. Ind. & Pl. 1138, note, citing Stark, C. P. 742." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

(f) Entry on Indictment.

If on his arraignment an accused party answered not guilty, the clerk made a minute of it on the indictment and put it in form if it afterwards became necessary to make up the record. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434. See post, "Entry on the Record," V, I, 6, (7), (g).

(g) Entry on the Record.

See ante, "Entry on Indictment," V, I, 6, c, (7), (f).

aa. At Common Law.

It seems that at common law it was only necessary that a minute of the plea be preserved and that it was not the practice to enter it in full except when it became necessary to make up the record. It was a mere minute on the indictment, which the clerk put in form if it afterwards became necessary to make up the record. When written out it appeared in the record as follows: "He being immediately asked how he will acquit himself of the premises above laid to his charge, says he is not guilty thereof, and therefore for good and for ill he puts himself upon the country." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

bb. Modern Practice.

See ante, "Entry by Attorney," V, I, 6, c, (7), (b); post, "Record Showing Appearance by Attorney," V, J, 2, b, (3), (b), cc, (bb).

The record of a prosecution for felony must show that the accused entered his plea of not guilty in his own proper person. State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Sheppard, 49 W. Va. 582, 39 S E. 676; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; State *v.* Cross, 44 W. Va. 331, 29 S. E. 527; State *v.* Campbell, 42 W. Va. 251, 24 S. E. 875; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Sutfin, 22 W. Va. 771; State *v.* Greer, 22 W. Va. 800; State *v.* Conners, 20 W. Va. 1; State *v* Conkle, 16 W. Va. 736; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Cluverius *v.* Com., 81 Va. 848; Lawrence *v.* Com., 30 Gratt. 845; Boswell *v.* Com., 20 Gratt. 860; Jackson *v.* Com., 19 Gratt. 656; Pifer *v.* Com., 14 Gratt. 710; Hooker *v.* Com., 13 Gratt. 763; Sperry *v.* Com., 9 Leigh 623; Com. *v* Crump, 1 Va. Cas. 172. See also, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Jones *v.* Com., 79 Va. 213; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Longley *v.* Com., 99 Va. 807, 37 S. E. 339. See post, "Must Be Shown by the Record," V, J, 2, b, (3), (b), cc.

If, in a felony case, the record show that the defendant "plead not guilty" instead of saying, "The said defendant says he is not guilty," etc., the record is sufficient, as to the plea, to sustain a conviction. It was never necessary for the record to show more than that the defendant entered his "plea of not guilty." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

When the record shows that the prisoner was led to the bar of the court in the custody of the sheriff, and "thereupon the prisoner, for plea, says that he is not guilty in manner and form as the state in her indictment against him has alleged, and of this he puts himself upon the country," it is sufficiently shown that he pleaded in person. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

"An order entered in a case on the 6th day of April, 1883, appears as follows: 'This day came the state by her prosecuting attorney as well as the defendant by counsel; thereupon the de-

fendant for plea says he is not guilty in manner and form as alleged in said indictment, and of this he puts himself upon the country, and the state doth the like, and the issue is thereon joined.'" It was held, that so far as this record shows, the defendant was not present when the plea was entered. State *v.* Sutfin, 22 W. Va. 771. See post, "Record Showing Appearance by Attorney," V, J, 2, b, (3), (b), cc, (bb).

Correction of Record.—Where the record shows that "T. who stands indicted for felony, was this day set to the bar in custody of the jailer of W. county, thereupon the said prisoner for plea says he is not guilty as in the indictment against him is alleged and of this he puts himself upon the country, and the prosecuting attorney doth the like and issue is thereon joined," and on the 14th day of February the jury rendered a verdict of guilty on said plea, and on the 14th day of March following defendant moved the court to correct the record of the plea of not guilty entered January 30, and tendered affidavits of defendant, of defendant's counsel and others in support of the motion to show that the plea of not guilty was entered by defendant's attorney and not by him in person; held, not error to refuse the filing of such affidavits. State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427.

cc. Omission of Similiter.

See ante, "Puts Accused upon Trial by Jury," V, I, 6, c, (7), (e).

The omission from the record of the similiter or joinder of issue, in such case, does not vitiate the judgment; for the plea of not guilty, without more, legally puts the defendant on trial by jury, and the similiter is a mere form, although the better practice is to insert it. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

"It has been held by this court in State *v.* Aler, 39 W. Va. 549, that 'the omission of the similiter or joinder by the prosecuting officer is, at most, a mere formal defect, at any time amendable, and it does not render the verdict bad.' Judge English, who delivered the opinion of the court in that case, cites in support of his views, Gould on Pleading, 290, s. 20; Babcock *v.* Huntington, 2 Day 392; Whitney *v.* Cochran, 9 Mass. 532; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Bishop Cr. Proc. s. 1354." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

(h) Effect as Putting in Issue Material Facts.

See ante, "Special Plea of Matter Proper under Plea of Not Guilty," V, I, 6, c, (4), (b).

"The words 'Not Guilty,' are a full and complete answer and response to every allegation contained in the indictment. They are so understood by the court and the prisoner is fully protected in the progress of the trial by the rulings of the court in reference to the admission and rejection of testimony, and the prisoner may have the benefit of the court's instructions to the jury upon every proposition of law arising in the case by simply asking for them. His protection lies not in the formal words of his plea but in its legal denial of his guilt of the charge laid against him in the indictment and in the fair, impartial and legal trial of the issue thus raised, by jury under the supervision and direction of the court." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

The plea of not guilty operates as a legal denial of the charge laid in the indictment, going to all its allegations. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

The plea of not guilty to an indictment does not traverse allegations in the indictment of matter outside of the issue. The plea of not guilty puts in issue the guilt or innocence of the offense charged in the indictment. Thomas *v.* Com., 22 Gratt. 912.

Upon the plea of not guilty the issue is, guilty or not guilty of the offense charged in the indictment. "Not

whether he is guilty or not guilty of a like offense, of which it is alleged in the indictment he had been before convicted and sentenced. The plea of not guilty did not put in issue his guilt or innocence of that offense. It only puts in issue his guilt or innocence of the charge with which he was then to be tried. Nor does the plea of not guilty traverse the allegation in the indictment, that he had been previously convicted and sentenced for a like offense. That was a matter outside of the issue." Thomas *v.* Com., 22 Gratt. 913.

Territorial Jurisdiction.—The fact that the court is without jurisdiction upon the ground that the offense if committed at all was committed beyond the jurisdiction of the court, is a matter of defense under the general issue—the plea of not guilty. The burden is just as great on the commonwealth to prove that the offense was committed within the jurisdiction of the trial court as it is to prove the commission of the offense itself. The failure to prove either entitles the accused to an acquittal. Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Richardson *v.* Com., 80 Va. 124; Anderson *v.* Com., 100 Va. 860, 42 S. E. 865; Butler *v.* Com., 81 Va. 159; Savage *v.* Com., 84 Va. 585, 5 S. E. 563; Hoover *v.* State, 1 W. Va. 336; State *v.* Mills, 33 W. Va. 455, 10 S. E. 808; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380. See post, "Corpus Delicti," V, J, 5, a, (2), (b); "Territorial Jurisdiction," V, J, 5, a, (2), (g). See the titles JURISDICTION; VENUE.

Sanity of Accused.—The sanity of one accused of crime is put in issue by his plea of "not guilty," and a verdict of "guilty" is finding that the accused was sane at the time the offense was committed. Stover *v.* Com., 92 Va. 780, 22 S. E. 874. See the title INSANITY.

Former Jeopardy.—The doctrine of former jeopardy is not available as a defense under the general issue raised by a plea of not guilty. Justice *v.* Com., 81 Va. 209; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527. See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181.

(i) As a Waiver or Curing of Objections.

See post, "Withdrawal," V, I, 6, c, (7), (j).

A plea of not guilty upon arraignment pleaded by the prisoner, does not cure an omission to record the finding of an indictment by the grand jury against the accused. Com. *v.* Cawood, 2 Va. Cas. 527. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Dilatory Defenses.—Whenever the defendant in a criminal prosecution enters a plea of not guilty he waives all dilatory defenses. It admits whatever is grounds of abatement. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73. See also, Early *v.* Com., 86 Va. 921, 11 S. E. Rep. 795; Com. *v.* Scott, 10 Gratt. 749; State *v.* Riffe, 10 W. Va. 794. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24.

(j) Withdrawal.

See ante, "Plea of Guilty," V, I, 6, c, (7).

The settled doctrine is that the judge may permit a plea of not guilty to be withdrawn, and another one to be substituted whenever by so doing he does not violate any positive rule of law, or of established practice. Such discretion will rarely if ever be exercised in aid of an attempt to rely upon a merely dilatory or formal defense. When refused, the action of the trial court will not be reversed unless it appears that it has abused the discretion vested in it. Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Early *v.* Com., 86 Va. 921, 11 S. E. 795; Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Watson *v.* Com., 87 Va. 612, 13 S. E. 22; State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734. See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24; NEW TRIALS

"In Com. *v.* Mahoney, 115 Mass. 151, 152, Gray, C. J., delivering the opinion, says: 'A defendant in a criminal case, who has once pleaded to the charge against him, has no right to withdraw his plea, but is confined to the issues of law or fact thereby raised or left open, unless the court in which the case is pending sees fit to exercise the discretion of allowing him to withdraw it, and plead anew." State *v.* Shanley, 38 W. Va. 516, 18 S. E. 734.

In Favor of Motion to Quash.—The proper course is to move to quash before pleading, but the court may, at any time before the trial upon the plea, permit the plea to be withdrawn, and enter the motion to quash at the instance of the defendant. State *v.* Riffe, 10 W. Va. 794. See ante, "As a Waiver of Curing of Objections," V, I, 6, c, (7), (i). See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Illustration.—The presentment in a case describes the defendant as a free negro; as for this offense, white persons, Indians and free negroes are to be prosecuted and punished in the same manner, a plea that the defendant is an Indian and not a free negro, is an immaterial plea, and was properly excluded. The presentment was made at the March term, 1851, of the county court, and at the May term the defendant appeared and demurred to the presentment, and the demurrer was overruled; and he then pleaded not guilty. At the August term, 1852, when the cause was called for trial, he moved for leave to withdraw his plea of not guilty, and plead that he was not a free negro, but an Indian. Held, the plea was tendered too late even if it was a good plea. Com. *v.* Scott, 10 Gratt. 749.

(k) Not Expunged by Awarding New Trial.

The prisoner upon his arraignment in the circuit court pleaded not guilty, upon which plea alone the trial was had. The verdict was afterwards set aside and a new trial awarded. It was held, that the case was in the same situation in which it was when the first trial begun; that is to say, all the proceedings subsequent to the joinder of issue on the plea having been set aside, the commonwealth and the prisoner were at issue on the plea of not guilty. To say that the effect of granting a new trial is to "expunge," as has been claimed in this case, the plea previously entered, and to leave the case just as if there had been no plea entered at all, is to assert a proposition not founded in reason, and one that has never been recognized in any jurisdiction where the rules and practice of the common law prevail. If the plea of the general issue in such a case is "expunged," so also is the indictment, for the latter is no more a part of the pleadings than the former. Curtis *v.* Com., 87 Va. 589, 13 S. E. 73. See the title NEW TRIALS.

7. Discontinuance of Prosecution.

a. What Not to Work Discontinuances.

Failure to Award Process.—There shall be no discontinuance of any criminal prosecution by reason of the failure of the court to award process. Harrison *v.* Com., 81 Va. 491; Com. *v.* Gourd, 2 Va. Cas. 470; Cleek *v.* Com., 21 Gratt. 777; Hill *v.* Com., 2 Va. Cas. 61. See also, Bolanz *v.* Com., 24 Gratt. 38; § 4013, Va. Code, 1904; ch. 158, § 23, W. Va. Code.

The adjournment of a court, without awarding any process, on an indictment found by the grand jury, is no discontinuance of the prosecution. Com. *v.* Gourd, 2 Va. Cas. 470; Hill *v.* Com., 2 Va. Cas. 61.

When there is a general order of continuance of cases, an omission to direct venire facias, or capias to be issued is no discontinuance of prosecution for misdemeanor. Com. *v.* Gourd, 2 Va. Cas. 470.

Failure to Enter a Continuance.—There shall be no discontinuance of any criminal prosecution by reason of

the failure of the court to enter a continuance on the record. Sections 3124, 4013, Va. Code; W. Va. Code, ch. 158, § 23. Harrison *v.* Com., 81 Va. 491; Bolanz *v.* Com., 24 Gratt. 38; Sands *v.* Com., 20 Gratt. 800; Hill *v.* Com., 2 Va. Cas. 61; VanCunden *v.* Kane, 88 Va. 591, 14 S. E. 334; Cleek *v.* Com., 21 Gratt. 777; Moss *v.* Barham, 94 Va. 14, 26 S. E. 388. See the title CONTINUANCES, vol. 3, p. 270.

Adjournment of court after verdict without an order of continuance does not discontinue cause and prevent judgment on the verdict at the next term. Cleek *v.* Com., 21 Gratt. 777.

The omission to continue a cause, in which there was a verdict, on the records of a county court for two quarterly terms, is no discontinuance of the prosecution. Hill *v.* Com., 2 Va. Cas. 61.

A prisoner charged with a felony in the county court appeared at the August term and on his motion, his case was continued until the first day of the October term, passing over the September term. This was held, not to be error. Bolanz *v.* Com., 24 Gratt. 38. See also, Sands *v.* Com., 20 Gratt. 800; Harrison *v.* Com., 81 Va. 493, explaining the decision in Amis *v.* Koger, 7 Leigh 223.

Omission to File Information.—The omission to file an information at the same term of the superior court at which the rule is made absolute, and leave given to file it, is no discontinuance of the prosecution. Com. *v.* Varner, 2 Va. Cas. 62. See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

b. Retiring Indictment for Felony from Docket.

An order retiring an indictment for felony from the trial docket of a court is equivalent to the dismissal thereof, and the same may not thereafterwards on motion of the state be restored to the docket for trial. Dudley *v.* State, 55 W. Va. 472, 47 S. E. 285. See also, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

"Prosecuting attorneys may not retire felony cases from the docket, and restore them at their pleasure. Their duty requires them to prosecute or dismiss, and they can not at their pleasure adopt an intermediate practice to avoid the necessity of a trial, and yet prevent the dismissal of the indictment. If they fail to prosecute when they can, the law discharges the accused and an order retiring an indictment from the docket dismisses it." Dudley *v.* State, 55 W. Va. 472, 47 S. E. 285. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

c. Nolle Prosequi.

As to nolle prosequi as a discontinuance of a prosecution, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

8. Designation of Time for Trial.

"It shall be the duty of the judge of each circuit and corporation court to fix a day in court when the trial of criminal cases will commence, and to make such general or special order in reference thereto, and to the summoning of witnesses, as may seem proper; but this act shall not be so construed as to deprive the court of the right to proceed with the trial of any case at the same term at which an indictment is found, provided the defendant is in actual custody or out on bail. (1889, 1890, p. 79; 1902-3-4, p. 862.)" 2 Va. Code, § 4089a. Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Curtis *v.* Com., 87 Va. 589, 13 S. E. 73; Benton *v.* Com., 90 Va. 338, 18 S. E. 282.

This statute, is merely directory, and the omission to comply with it was held to be no ground to set aside a verdict of guilty. Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

This statute is not otherwise intended for the benefit of the accused than as a means of insuring a speedy trial. Hall *v.* Com., 89 Va. 171, 15 S. E. 517, citing Wash *v.* Com., 16 Gratt. 530;

Benton *v.* Com., 90 Va. 328, 18 S. E. 282. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

9. Discharge for Delay in Bringing to Trial.

A full and complete treatment of the statutory enactments to insure speedy trials will be found under the head of speedy trial in the title CONSTITUTIONAL LAW, vol. 3, pp. 190-197.

10. Continuances and Postponement.

See the title CONTINUANCES, vol. 3, p. 270.

In the Absence of the Prisoner.—As to continuance in the absence of the prisoner, see post, "Presence at Trial for Felony," V, J, 2, b, (3), (b). See the title CONTINUANCES, vol. 3, p. 270.

11. Severance.

At Common Law.—"By the common law, until it was changed by a recent act for the summoning of venires and impaneling juries in criminal cases, the commonwealth and not the prisoner, in case of joint indictments, had the right of election subject to the control and discretion of the court, whether to arraign and try prisoners or defendants jointly indicted, separately or jointly." Curran *v.* Com., 7 Gratt. 619; Kemp *v.* Com., 18 Gratt. 969.

"On a joint indictment against two or more for felony, the defendants were not entitled, as matter of right at common law, to have a several trial, but the court, or officer prosecuting for the crown or the commonwealth, might at its or his election, have a joint or several trial in such a case; though such election was always exercised with due regard and tenderness to the accused. 3 Rob. Pr., old Ed., 150-152, and the cases there cited. In the United States *v.* Marchant, 12 Wheat. R. 480, this question was fully considered, all the authorities bearing upon it were reviewed, and the practice was settled by the supreme court in an opinion delivered by Mr. Justice Story." Com. *v.* Lewis, 25 Gratt. 938.

Right to Separate Trial.—"Each and every person indicted jointly for a felony may elect, as a matter of right, to be tried separately, under § 4029 of the Code." Barnes *v.* Com., 92 Va. 794, 23 S. E. 784, citing Curran *v.* Com., 7 Gratt. 619, 626, 627; Com. *v.* Lewis, 25 Gratt. 938; Kemp *v.* Com., 18 Gratt. 969; Jones *v.* Com., 31 Gratt. 836. See ante, "Joint Arraignment of Two Persons," V, I, 6, a, (3).

The common law on this subject, in cases of felony, was changed no doubt in consequence of the difficulties arising from the exercise of the right of peremptory challenge on joint trials in such cases. Curran *v.* Com., 7 Cratt. 627; Com. *v.* Lewis, 25 Gratt. 938.

Upon a joint indictment for felony against several persons any defendant may elect, under § 8, ch. 159 of W. Va. Code, to be tried separately. (p. 424.) State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484. See also, State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

In Com. *v.* Lewis, 25 Gratt. 942, it was held, that the statute which, changing the common law, allowed persons in a joint indictment for felony at their election to have a joint or several trial, did not apply to misdemeanors. Jones *v.* Com., 31 Gratt. 836.

When two persons are indicted jointly for a conspiracy to prosecute another for a larceny, neither of them is entitled to a separate trial. Jones *v.* Com., 31 Gratt. 836.

Right of State to Try Separately.—Where persons are jointly indicted for felony, the attorney for the commonwealth has the right, subject to the control of the court, to try them separately even though they elect to be tried jointly. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784, citing Curran *v.* Com., 7 Gratt. 619-627; and Com. *v.* Lewis, 25 Gratt. 938; Jones *v.* Com., 31 Gratt. 836.

On a joint indictment of two or more persons, the state, with the permission of the court, may elect to try any or

all of them separately. State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484, citing Curran *v.* Com., 7 Gratt. 619. See also, State *v.* Foster, 21 W. Va. 767.

Joint Trial.—Persons jointly indicted for felony are not entitled either under the Virginia or the West Virginia statutes, to demand to be tried jointly. State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; Curran *v.* Com., 7 Gratt. 619; Com. *v.* Lewis, 25 Gratt. 938.

"Persons jointly indicted can not be tried jointly without the concurrent election of themselves, on the one hand, and the attorney for the commonwealth or the court, on the other." Barnes *v.* Com., 92 Va. 794, 23 S. E. 784, citing Curran *v.* Com., 7 Gratt. 619-626; and Com. *v.* Lewis, 25 Gratt. 938.

Joint defendants must necessarily be tried separately unless they elect a joint trial and agree in their challenges. Curran *v.* Com., 7 Gratt. 619; Com. *v.* Lewis, 25 Gratt. 938. See the title JURY.

Single Venire Facias Issues.—"When several persons have been examined and remanded for trial jointly, a single venire facias issues for the trial of all of them. If they elect to be tried separately, the venire summoned for all, is used for the one first tried, and a several venire facias issues for trial of each of the others." Kemp *v.* Com., 18 Gratt. 969; § 402, 7 Va. Code, 1904. This section changes the rule in McWhirt *v.* Com., 3 Gratt. 594. See also, State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; Com. *v.* Lewis, 25 Gratt. 938. See the title JURY.

Verdict as to Any as to Whom Jury Agree.—"By our statute, where two or more persons are charged and tried jointly, the jury may render a verdict as to any of them as to whom they agree, whereupon judgment shall be entered according to the verdict; and as to the others, the case shall be tried by another jury. Code, ch. 208, § 35." Kemp *v.* Com., 18 Gratt. 969. See the title VERDICT.

May Acquit One and Convict Other.—Where two persons are indicted and tried jointly for the same offense, the same jury may, by separate verdicts, acquit the one and convict the other. State *v.* Lilly, 47 W. Va. 496, 35 S. E. 837. See the title VERDICT.

New Trial.—Several prisoners having been tried together for the same felony, and found guilty, the court may grant a new trial to one of them, and render a judgment against the others. Kemp *v.* Com., 18 Gratt. 967. See the title NEW TRIALS.

Denial of Right—Appellate Review.—If a defendant jointly indicted with another for felony is denied the right to a separate trial, that fact must appear in the record. If the record is silent on the subject of election, the appellate court will not presume that any right has been denied the accused. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784. See the title EXCEPTIONS, BILL OF.

As Effecting Cost.—In Com. *v.* Hooper, 2 Va. Cas. 223, the court decided that an attorney's fee of $10 ought not to be taxed in the bill of cost against each defendant, it not appearing that the two defendants against whom the judgment was rendered had severed in their defense.

12. Impaneling Jury.

Generally, as to the manner of impaneling juries in criminal cases, challenging administration of oathes, etc., see the title JURY.

J. TRIAL.

1. In General.

a. What Constitutes.

The trial of a criminal case begins with the arraignment of the prisoner and ends with the sentence pronounced upon him by the court. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962. But see Curtis *v.* Com., 87 Va. 589, 13 S. E. 73, where the court said: "Black-

stone says that after the prisoner in a felony case has been arraigned, and has pleaded not guilty, 'they then proceed, as soon as conveniently may be, to the trial;' which is tantamount to saying that not until after the pleadings have been made up does the trial begin." See ante, "Not Expunged by Awarding New Trial," V, I, 6, c, (7), (k). See the title NEW TRIALS.

b. Choosing Mode of Trial.

"Anciently, the prisoner was allowed to choose his mode of trial. That was when there might be a trial by wager of battle or by jury. Now, there is but one method, by jury, the trial by wager of battle having been abolished, and there is no longer any reason why the clerk, after the prisoner has entered his plea, should say 'How will you be tried?' and to receive in answer thereto the response, 'By God and my country,' and to reply, 'God send you a good deliverance.'" State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

c. Time of Trial.

See ante, "Designation of Time for Trial," V, I, 8.

"The statute of (Va. Code, ch. 159, § 1) commands a trial at the same term at which the indictment is found, unless good cause be shown for continuance. Fiott *v.* Com., 12 Gratt. 576; Hewitt's Case, 17 Gratt. 627; Betsall's Case, 11 W. Va. 703; Davis *v.* Walker, 7 W. Va. 447; Buster *v.* Holland, 27 W. Va. 511." State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982.

Where a prisoner has been convicted of a felony, and a new trial is granted him, the court may proceed to try him at the same term, against his consent. Craft *v.* Com., 24 Gratt. 602.

Though a summons upon an indictment requires the defendant to appear on a given date, it is not necessary that the case be tried that day, or that any note of it be made on the record that day. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

2. Requisites of Valid Trial.

a. Legally Constituted Tribunal.

Every prosecution involving the life and liberty of the accused must be before a court of competent jurisdiction, properly constituted and empowered to pass upon the question arising therein. State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983.

A conviction for a crime by a court which has no jurisdiction of the offense is void. Cropper *v.* Com., 2 Rob. 842. See post, "Territorial Jurisdiction," V, J, 5, a, (2), (g). See the titles HABEAS CORPUS; JURISDICTION.

b. Observance of Rights of Accused.

(1) In General.

Right to Fair and Legal Trial.—"Every one is entitled to a fair and legal trial. If convicted, it should be according to the law and evidence." Ball *v.* Com., 8 Leigh 728.

Trial before Lawful Jury.—As to the right of a trial before an impartial jury, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

As to what constitutes a lawful jury in criminal cases, see the title JURY.

Trials in Magistrates' Courts.—See the titles JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS.

To Appear Free from Manacles.—"By the common law the prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape. To require a prisoner, during the progress of his trial, to appear and remain with chains and shackles upon his limbs, without evident necessity as a means of securing his presence for judgment, is a violation of the common-law rule." State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

While the practice of keeping a prisoner manacled when on trial before a jury, has always been held in disfavor in England, and also in this

country, yet the trial court has a discretionary power therein but a power which should not be exercised under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous, or escape be threatened; and such restraint should not be imposed except in cases of immediate necessity. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

When the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

No Right to Take Down Evidence in Longhand.—The prisoner by his counsel, moved the court to permit him to take down the evidence in the cause in writing. At the time of such motion no exception had been taken to any portion of the testimony. The court stated to the counsel that as soon as any exception was taken which would require the statement of the evidence to be set forth in writing, it would, according to its custom, stop the trial, and in the presence of the witnesses have the bill or bills of exceptions, with the evidence, prepared, etc., and accordingly overruled said motion; to which ruling of the court the prisoner excepted. It was held, this ruling of the court was plainly right. Nuckolls *v.* Com., 32 Gratt. 884.

Transcript of Evidence upon Preliminary Examination.—Upon a trial for felony it is not error for the trial judge to refuse to compel the attorney for the commonwealth to furnish the prisoner with stenographic notes of the evidence taken before the examining magistrate, where it appears that the notes were taken at the instance of the attorney for the commonwealth, for his own use, and at his own expense by a private stenographer. The prisoner had no more right to them than to any other private property of the prosecuting attorney. Com. *v.* Brown, 90 Va. 671, 19 S. E. 447.

Violation of Legal Rights as Error.—The prisoner has the unquestioned right to rely upon and avail himself of any error of commission or of omission made against him by the court. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962.

"In Montague's Case, 10 Gratt. 767, the principle was announced that where any legal right has been denied to a party on trial for a criminal offense, or any of the safeguards thrown around him by law for his protection have been disregarded, it is not for this court to say what might or might not have been the effect upon the case of the accused; that the law will intend prejudice if it be necessary to enable him to exercise his right to have the judgment of the court reviewed in the appellate tribunal, and will hold it impossible in such a case to say that a fair and impartial trial has been had. In that case the error was in the improperly setting aside by the trial court of a competent juror." Vaughan *v.* Com., 85 Va. 671, 8 S. E. 584; Payne *v.* Com., 31 Gratt. 855; Danville Bank *v.* Waddell, 27 Gratt, 448.

Presumptions of Prejudice Where Rights Denied.—"Where any legal right has been denied to a party on trial for a criminal offense, or any of the safeguards thrown around him by law for his protection have been disregarded, as where an erroneous instruction is given or a correct one refused, it is not for this court to say what might or might not have been the effect upon the case of the accused; that the law will intend prejudice, if it be necessary to enable him to exercise his right to have the judgment of the court reviewed in the appellate tribunal, and will hold it impossible in such a case to say that a fair and impartial trial has been had. Vaughan's Case, 85 Va. 671, 8 S. E. 584." (Montague *v.* Com.,

10 Gratt. 767; Honesty *v.* Com., 81 Va. 283.) Muscoe *v.* Com., 86 Va. 448, 10 S. E. 534.

(2) Constitutional and Statutory Rights.

Right to Appear and Defend.—As to right to appear and defend in person and with counsel, see post, "Presence of Accused and Counsel," V, J, 2, b, (3).

As to assignment of counsel to indigent prisoner, see ante, "Assignment of Counsel to Indigent Persons," V, I, 3.

Right to Demand Nature and Cause of Accusation.—The eighth section of the bill of rights, provides "That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation." Temple *v.* Com., 75 Va. 892; Mackaboy *v.* Com., 2 Va. Cas. 268.

Right to Confront Accusers and Witnesses.—In all criminal prosecutions, a man has the right to be confronted with his accusers, and the witnesses against him. Hooker *v.* Com., 13 Gratt. 763. See post, "Presence of Accused and Counsel," V, J, 2, b, (3). For full treatment, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

In all criminal prosecution the accused has a right to be informed of the "nature and cause of the accusation against him." The indictment must exhibit the "nature and cause of the accusation," that is, must set out the crime laid to the charge of the accused. State *v.* Schnelle, 24 W. Va. 767, 765. See ante, "Furnishing Accused with Copy of Indictment," V, I, 1. See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS.

Right to Refuse to Testify.—See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; WITNESSES. See post, "Incriminating Evidence," V, J, 5, b, (13).

Compulsory Process to Secure Witnesses.—It is an express provision of the bill of rights that in criminal prosecutions a man hath a right to call for evidence in his favor. Mackaboy *v.* Com., 2 Va. Cas. 268.

A defendant is entitled, under the fundamental law of the state to process to compel the attendance of witnesses. Hill *v.* Com., 88 Va. 633, 14 S. E. 330. See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; WITNESSES.

The prisoner's witnesses must be personally present during the trial. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Right to Speedy and Public Trial.—As to right to speedy and public trial, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

As to discharge for failure to try within the proper time, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

Former Jeopardy.—As to the provisions that accused shall not be twice put in jeopardy for the same offense, see the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 181; CONSTITUTIONAL LAW, vol. 3, p. 140.

Right to Be Tried in County Where Offense Was Committed.—It is the right of the prisoner in a criminal case to be tried in the county, where the alleged offense was committed; a right which the state can not take from him. State *v.* Greer, 22 W. Va. 800. See the titles CHANGE OF VENUE, vol. 2, p. 780; VENUE.

"The constitution of our state guarantees every man a right to be tried at his home, in his county, where the alleged offense was committed. Many men had been denied this right, and had been dragged from their homes to be tried by strangers for alleged offenses, thus denying to them the influence of a good life upon the men who were to try them. This clause in the bill of rights requiring a man to be tried for an offense in the

county, where the offense was committed, was inserted for the protection of the prisoner." State *v.* Greer, 22 W. Va. 800:

(3) Presence of Accused and Counsel.

See post, "Waiver of Rights," V, J, 2, c.

(a) Right to Be Present at Every Stage of Trial.

"It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses;' and it is within the scope of this right that he be present not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected." Hooker *v.* Com., 13 Gratt. 763. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

(b) Presence at Trial for Felony.

See ante, "Plea of Not Guilty," V, I, 6, c, (7).

aa. In General.

See post, "Must Be Shown by the Record," V, J, 2, b, (3), (b), cc.

It has been uniformly held in Virginia and West Virginia that, in a trial for felony, it is absolutely necessary to a valid conviction that the prisoner shall be present in court whenever anything is done in his case in any way affecting his interest. Thus, it is the well-established practice that a prisoner accused of felony must be arraigned in person, and must plead in person; and, in all the subsequent proceedings, he must appear in person, not by attorney; and such appearance in person must be shown by the record. Hooker *v.* Com., 13 Gratt. 764, 766; Va. Code, 1904; W. Va. Code, ch. 159, § 2; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Jones *v.* Com., 87 Va. 63, 12 S. E. 226; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Cluverius *v.* Com., 81 Va. 848; Jones *v.* Com., 79 Va. 213; Lawrence *v.* Com., 30 Gratt. 845; Boswell *v.* Com., 20 Gratt. 860; Pifer *v.* Com., 14 Gratt. 710; Com. *v.* Crump, 1 Va. Cas. 172; Sperry *v.* Com., 9 Leigh 623; State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Sheppard, 49 W. Va. 582-612, 39 S. E. 676; State *v.* Cross, 44 W. Va. 315, 29 S E. 527; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; State *v.* Campbell, 42 W. Va. 251, 24 S. E. 887; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Greer, 22 W. Va. 800; State *v.* Sutfin, 22 W. Va. 771; State *v.* Conners, 20 W. Va. 1; State *v.* Conkle, 16 W. Va. 761; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579.

"It was a principle of the common law, that a person tried for felony shall be personally present during the trial, and this has been expressly declared by statute in Virginia ever since the act of 1847, p. 148." Section 4017, Va. Code, 1904. Lawrence *v.* Com., 30 Gratt. 845.

Practice in England.—"The well-established practice in England and in this state, is, that a prisoner accused of felony must be arraigned in person, and must plead in person; and in all the subsequent proceedings it is required that he shall appear in person. This practice is stated in 1 Chit. Crim. Law. 411, 414. It is there laid down, that the accused, in capital felonies, can not be found guilty in his absence; that it is necessary that he should personally attend; and that the fact of such attendance should appear on the record. The rules applicable in England to trials for capital felonies are

believed, in general, to be equally applicable in this state to all felonies punishable by confinement in the penitentiary." State *v.* Conkle, 16 W. Va. 746, quoting Sperry's Case, 9 Leigh 623. See ante, "Entry by Defendant in Person," V, I, 6, c, (7). (a).

In all criminal trials of grade of felony, the prisoner has a right to be present in every stage from the arraignment to the rendition of the verdict. So imperative is the rule of the law, that no part of the trial can proceed without him. Jackson *v.* Com., 19 Gratt. 656; Sperry *v.* Com., 9 Leigh 623; Hooker *v.* Com., 13 Gratt. 763; Lawrence *v.* Com., 30 Gratt. 845; Bond *v.* Com., 83 Va. 587, 3 S. E. 149; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Shelton *v.* Com., 89 Va. 453, 16 S. E. 355.

"In a case of felony or treason, the prisoner must be present during the whole of the trial, including the giving in of the evidence and the rendition of the verdict." State *v.* Sheppard, 49 W. Va. 582, 612, 39 S. E. 676; Jackson *v.* Com., 19 Gratt. 656.

In felony cases the accused must be present in his own proper person from the inception of the trial upon the indictment to the final judgment, inclusive. State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Conkle, 16 W. Va. 736; State *v.* Greer, 22 W. Va. 800; Younger *v.* State, 2 W. Va. 579; State *v.* Sutfin, 22 W. Va. 771; Sperry *v.* Com., 9 Leigh 623; Jackson *v.* Com., 19 Gratt. 656; Lawrence *v.* Com., 30 Gratt. 845; Bond *v.* Com., 83 Va. 581, 3 S. E. 149.

Proceeding in a trial in the absence of the prisoner in a felony case is fatal to the verdict. State *v.* Greer, 22 W. Va. 800.

It is the right of a person indicted for felony to be personally present at every stage of the trial from his arraignment to the sentence. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962.

Right Can Not Be Denied.—"The prisoner can not be deprived of his right to be present at all stages of the trial." State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Greer, 22 W. Va. 800; Jackson *v.* Com., 19 Gratt. 656.

Can Not Be Waived.—The right of a person indicted for felony, to be present at all stages of the trial, is a constitutional right of the prisoner which he can not waive. State *v.* Sheppard, 49 W. Va. 583, 39 S. E. 676; State *v.* Greer, 22 W. Va. 800; Jackson *v.* Com., 19 Gratt. 656; Jones *v.* Com., 87 Va. 63, 12 S. E. 226; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Bond *v.* Com., 83 Va. 581, 3 S. E. 149. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c); "Waiver of Rights," V, J, 2, c.

Presumption of Prejudice.—Courts will not inquire whether the prisoner was unfavorably or otherwise affected by proceedings in his absence. State *v.* Greer, 22 W. Va. 800; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676.

Duty of Court.—Courts will not inquire whether the prisoner was unfavorably or otherwise affected by proceeding in his absence. It is the duty of the court to observe whether the prisoner is present, and to permit nothing to be done in his absence; and if the court through inattention is not observant of the absence of the prisoner as soon as it is observed, he should arrest the trial at once, direct a juror to be withdrawn, and commence the trial again or continue the case. Better the expense of a new trial than the obvious right of the prisoner should be invaded. State *v.* Greer, 22 W. Va. 800; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676. See ante, "In General," V, J, 2, b, (1).

Before Arraignment.—In Boswell's case, 20 Gratt. 860, "it was held, that the act (now § 4017, Va. Code, 1904) which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment," and therefore before his arraignment an order may be made

in his absence. Lawrence *v.* Com., 30 Gratt. 845. Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803.

Continuances before Arraignment.—Before arraignment the prisoner need not be present when his case is continued. Kibler *v.* Com., 94 Va. 804, 26 S. E. 858. See also, Anderson *v.* Com., 84 Va. 77, 3 S. E. 803. See post, "Must Be Shown by the Record," V, J, 2, b, (3), (b), cc. See the title CONTINUANCES, vol. 3 p. 270.

Continuances after Arraignment.—See post, "In General," V, J, 2, b, (3), (b), cc, (aa).

See the title CONTINUANCES, vol. 3, p. 270.

It is necessary that one indicted for felony shall be personally present when after arraignment a motion is made by his counsel for a continuance of his cause, and that the record shall show that; yet, if anything appears in the record from which his presence must be necessarily inferred, it is all that the law requires. Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355.

Examination of Witnesses.—In a case of felony, it is reversible error to proceed with the examination of a witness, in the absence of the prisoner, although the questions propounded and answered, in his absence, are preliminary questions, and, if, upon the return of the prisoner, the same questions are reasked and reanswered in exactly the same way, and no exception is taken on the ground of such irregularity at the time, such error can not be cured. State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Greer, 22 W. Va. 800; Jackson *v.* Com., 19 Gratt. 656.

"In Greer's Case, 22 W. Va. 800, * * * the prisoner, by permission of the court, retired in charge of the jailer, and, upon the prisoner's request, the jailer put him in his cell, without the knowledge of the court or the counsel on either side, and then returned to his seat in the court room. The court and counsel not observing the absence of the prisoner, and supposing he had returned with the jailer, proceeded with the cross-examination of a witness, and two questions were asked and answered before it was discovered that the prisoner was absent. The examination of the witness was immediately stopped, the jury were instructed to pay no attention to the evidence introduced in the absence of the prisoner and ruled out the same, and, when the prisoner returned, the same questions were put to the witness and the same answers received from him. This court held, in that case, that the court below erred in refusing to set aside the verdict because of the absence of the prisoner, while a part of the evidence was being introduced. Johnson, president, quotes and approves the strongest part of the opinion in Jackson's Case (19 Gratt. 656) and then says: 'We will not inquire whether the prisoner was unfavorably or otherwise affected by the cross-examination of the witness in his absence. He had the right to be present, which he did not and could not waive. He had the right to observe every look, gesture, or move of the witness while he was testifying; and it mattered not, that the court excluded the evidence and certified that it was repeated in his presence.' From these authorities it is clearly a matter of no consequence that the evidence introduced in this case in the absence of the prisoner may not have affected him and that he did not at the time take an exception. To be present during every part of the trial was a constitutional right which he could not waive. Until this time, this court has not only held that the right could not be waived but also that such an error can not be cured. Greer's Case, supra (22 W. Va. 800)." State *v.* Sheppard, 49 W. Va. 582, 614, 39 S. E. 676.

"The ground of complaint is that the

following testimony was given by a witness for the state, in the absence of the prisoner: Question—'What is your name?' Answer—'Flora Ayers.' Question—'What is your husband's name?' Answer—'Jont Ayers.' The court certifies that, while these questions were asked and answered, the prisoner was not in the courthouse, but was then in the jail and was afterwards brought into court, and then the prosecuting attorney asked the witness the same questions, and, to them, she gave the same answers, but that the witness was not sworn in the presence of the prisoner. The absence of the prisoner was noticed by the courts and the trial was suspended until he was brought in. No objection or exception was taken at the time, but after the verdict was brought in, the prisoner moved the court to arrest the judgment and set aside the verdict because he was not in court during all the trial, which motion the court overruled. This was a fatal error for which the judgment must be reversed, the verdict set aside and a new trial granted." State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676. See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; WITNESSES.

Reading Testimony to Jury.—"A leading Virginia case on this subject is Jackson *v.* Com., 19 Gratt. 656. There, after the evidence was closed and the jury had retired, they came back into court and the court permitted a portion of the testimony of one of the witnesses, as taken down during the trial, to be read to them, at their request, in the absence of the prisoner as well as of the witnesses. During the reading of the notes, the prisoner was brought back into court, and afterwards, the witness, being then present, was re-examined by consent of all parties." It was held, that the court erred in permitting any part of the testimony taken down to be read over to the jury in the absence of the accused, and that it was sufficient cause for setting aside the verdict. State *v.* Sheppard, 49 W. Va. 612, 39 S. E. 676.

Delivery of Indictment, etc., to Jury.—The indictment and written instructions of the court or other writings proper to be given into the hands of the jury should be delivered to them in the presence of the defendant and his counsel, that objection, if any, may be made at the time. Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

Sending Jury to Their Room.—It is not error wherefor a verdict of guilty will be set aside, that in the absence of the prisoner, on the morning of the second day of the trial, the jury is called and sent to their room to consider their verdict, the jury afterwards returning into court, and in the presence of the prisoner, rendering their verdict. Lawrence's Case, 30 Gratt. 845; Jones *v.* Com., 79 Va. 213. See the title JURY.

At Return of Verdict.—A verdict on an indictment for felony must be rendered by the jury in open court, in the presence of the prisoner, and be received and recorded by the court. These facts must appear from the record, and no presumption that all things were rightly done by the trial court will supply the omission of any one of these facts. They sufficiently appear, however, from a record which shows the presence of the prisoner, and declares that the jury "retired to their room to consult of their verdict, as follows, to wit: * * * Whereupon the prisoner, by his counsel, moved the court not to proceed to judgment upon the verdict aforesaid" but to set it aside as contrary to the law and the evidence. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962. See post, "In General," V, J, 2, b, (3), (b), cc, (aa); "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c).

Motion for New Trial.—In State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876, it was held, that the prisoner being tried for felony must be present when action is had on a motion for a new trial.

See post, "In General," V, J, 2, b, (3), (b), cc, (aa).

Where in the absence of the prisoner, who was being tried for felony, a motion for a new trial was made and overruled, and afterwards during the same term, in his presence, the overruling was rescinded, and he was invited to renew the motion, but refused; it was held, the irregularity was thereby cured. Bond *v.* Com., 83 Va. 581, 3 S. E. 149, citing Boswell *v.* Com., 20 Gratt. 865. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c). See the title NEW TRIALS.

Judgment by Default.—"In criminal proceedings, under common-law practice, there can be no judgment by default. Whart. Cr. Pl. & Prac. § 540; 1 Bish. Cr. Proc., § 267. But the statute changes this rule to some extent, at least." State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c).

In prosecutions for felony there can be no judgment by default. State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; Pifer *v.* Com., 14 Gratt. 710; Com. *v.* Crump, 1 Va. Cas. 172.

"In Crump's Case, 1 Va. Cas. 172, it was held, 'That in no case whatever, except where some statute hath otherwise directed, must judgment of imprisonment, or unusual corporal punishment, be rendered, unless the defendant be present in court.'" State *v.* Sheppard, 49 W. Va. 582, 612, 39 S. E. 676. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c). See the title JUDGMENTS AND DECREES.

Unless expressly authorized by statute, no court can give judgment of imprisonment, or other corporal punishment, unless the defendant is present in court. Com. *v.* Crump, 1 Va. Cas. 172.

Pronouncing Sentence.—"In 21 Am. & Eng. Ency. Law 1071, it is stated that: 'Although the presence of the defendant in court at the time of pronouncing sentence, and the inquiry as to whether he has anything to say why sentence should not be pronounced, may be necessary to the validity of the sentence, an omission of these formalities, like a defect in the style of the sentence itself, will not be ground for a new trial, or the discharge of the prisoner, but the appellate court will remand the case, with instructions to render judgment according to law.'" State *v.* Allen, 45 W. Va. 65, 30 S. E. 209. See post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c). See the title SENTENCE AND PUNISHMENT.

Proceedings on Writ of Error.—"The law allows proceedings on writs of error without requiring the actual presence of the criminal in court." State *v.* Conners, 20 W. Va. 1.

Statements of Counsel after Trial.—As the trial of a criminal case begins at the arraignment of the prisoner and ends with the sentence pronounced upon him by the court, after judgment, it is not error to hear the statement of counsel for the prisoner in his absence that he has no bills of exceptions to offer. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962.

Signing the orders is no step in the prosecution of a criminal, and no part of the trial, but is simply the authentication of what has been done, and where the record shows that the accused was present when the proceedings were had, he need not be present when the orders are signed. Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349.

Entries Nunc Pro Tunc.—When made in proper cases, to further the ends of justice, courts may make entries of judgments and orders nunc pro tunc in criminal cases, and the time within which this may be done is not limited. If the entry is one which the judge may be compelled, by mandamus, to make, he may make it of his own motion, and it is not essen-

tial that the accused be present. Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349.

bb. Appearing by Attorney.

See post, "Record Showing Appearance by Attorney," V, J, 2, b, (3), (b), cc, (bb).

The rule is well established that a person on trial for a felony can not appear by attorney. Sperry *v.* Com., 9 Leigh 623; Hooker *v.* Com., 13 Gratt. 763; Lawrence *v.* Com., 30 Gratt. 845; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Snodgrass *v.* Com., 89 Va. 619, 17 S. E. 238; Shelton *v.* Com., 89 Va. 453, 16 S. E. 355; Jackson *v.* Com., 19 Gratt. 665; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Allen, 45 W. Va. 65, 30 S. E. 211; State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Sutfin, 22 W. Va. 771; State *v.* Greer, 22 W. Va. 800; State *v.* Conners, 20 W. Va. 1; State *v.* Conkle, 16 W. Va. 736; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579. See also, Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Kibler *v.* Com., 94 Va. 804; 26 S. E. 858; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; Anderson *v.* Com., 84 Va. 77, 3 S. E. 803; Jones *v.* Com., 79 Va. 213; Cluverius *v.* Com., 81 Va. 848; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Com *v.* Crump, 1 Va. Cas. 172.

In felony cases there is no equivalent to the technical appearance by attorney of defendant in civil cases except the being in actual or constructive custody. "When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be enforced against him; and courts will not give their time to proceedings, which for effectiveness must depend upon the consent of the person charged with crime." State *v.* Conners, 20 W. Va. 1.

"At pages 81, 82 and 83 (People *v.* Genet, 59 N. Y.), Judge Johnson, who delivered the unanimous opinion of the court, says: 'The whole theory of criminal proceedings is based upon the idea of the defendant being in the power and under the control of the court in his person. While the constitution and the statute provide him with counsel, and the statutes give the right of appearance by attorney in civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney." State *v.* Conners, 20 W. Va. 1. See ante, "Entry by Attorney," V, I, 6, c, (7), (b); post, "Presence at Trial for Misdemeanor," V, J, 2, b, (3), (c).

cc. Must Be Shown by the Record.

(aa) In General.

The record must show that a person indicted for felony was personally present during the trial therefor. It must show that he was arraigned in person, pleaded in person and was personally present whenever anything is done in his case in any way affecting his interest. The record can alone be looked to for the evidence to prove such presence at every stage of the trial. Va. Code, 1904, § 4017; W. Va. Code, ch. 159, § 2; Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Bowles *v.* Com., 103 Va. 816, 48 S. E. 527; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Shelton *v.* Com., 89 Va. 450, 16 S. E. 355; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Bond *v.* Com., 83 Va. 581, 13 S. E. 149; Cluverius *v.* Com., 81 Va. 848; Lawrence *v.* Com., 30 Gratt. 845; Boswell *v.* Com., 20 Gratt. 860; Jackson *v.* Com., 19 Gratt. 656; Hooker *v.* Com., 13 Gratt. 763; Pifer *v.* Com., 14 Gratt. 710; Sperry *v.* Com., 9 Leigh 623; Com. *v.* Crump, 1 Va. Cas. 172; State *v.* Tucker, 52 W. Va. 420, 44 S. E.

427; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527; State *v.* Sutfin, 22 W. Va. 771; State *v.* Conners, 20 W. Va. 1; State *v.* Conkle, 16 W. Va. 736; State *v.* Strauder, 8 W. Va. 686; Younger *v.* State, 2 W. Va. 579. See also, Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Weatherman *v.* Com., 91 Va. 796, 22 S. E. 349; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Campbell, 42 W. Va. 251, 24 S. E. 875; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Greer, 22 W. Va. 800; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Jones *v.* Com., 87 Va. 63, 12 S. E. 226. See ante, "In General," V, J, 2, b, (3), (b), aa.

"In looking into the English forms of entries, it will be found that the appearance of the accused is carefully stated upon the record to have been in his proper person." Bond *v.* Com., 83 Va. 581, 3 S. E. 149.

Presence Inferred from Record.—The whole record is to be looked to, and if anything appears in the record from which this presence must be necessarily inferred, it is all that the law requires. Benton *v.* Com., 91 Va. 782, 21 S. E. 495, citing Lawrence *v.* Com., 30 Gratt. 851; Sperry *v.* Com., 9 Leigh 623, and Cluverius *v.* Com., 81 Va. 787; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

Although it is necessary that the prisoner shall be present in person when assigned and during his trial, if it be inferred from the record that he was present, that is sufficient, though it is not formally stated that he was present. Lawrence *v.* Com., 30 Gratt. 845.

No presumption that all things were rightly done by the trial court will supply the omission. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962; Lawrence *v.* Com., 30 Gratt. 845; Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Cluverius *v.* Com., 81 Va. 848; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527; Sperry *v.* Com., 9 Leigh 623.

If the record shows that a prisoner was present in court when a motion for a new trial was made, the presumption is that he remained until the court adjourned for the day, unless the contrary is made to appear either directly or by necessary implication. When once shown to have been present, it is not necessary to show that he was remanded to jail at the conclusion of the proceedings for the day, though it usually so appears. Williams *v.* Com., 93 Va. 769, 25 S. E. 659.

Motion for New Trial.—The presence of the defendant must be shown by the record when a motion for a new trial is made and overruled. Bond *v.* Com., 83 Va. 581, 3 S. E. 149, citing Hooker *v.* Com., 13 Gratt. 763. See ante, "In General," V, J, 2, b, (3), (b), aa.

Presence Sufficiently Shown.—Where at the end of the record of the proceedings of the court on the day of the conviction, it is stated: "And thereupon the accused was remanded to jail," is conclusive that he had been personally present during all the proceedings had that day. Cluverius *v.* Com., 81 Va. 788; Lawrence *v.* Com., 30 Gratt. 851.

The presence of the accused at a trial for felony sufficiently appears from a record which shows the presence of the prisoner, and declares that the jury "retired to their room to consult of their verdict, as follows, to wit: * * * Whereupon the prisoner, by his counsel, moved the court not to proceed to judgment upon the verdict aforesaid," but to set it aside as contrary to the law and the evidence. Gilligan *v.* Com., 99 Va. 816, 37 S. E. 962. See the title VERDICT.

Where the record shows that at the beginning of the trial in any day's proceedings the prisoner was sent to the bar in the custody of the sheriff, it will be presumed that he was pres-

ent during the proceedings in the case the whole day, although it does not show at the close of the day's proceedings that the prisoner was remanded to jail. State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

In this case (being an indictment for murder), this entry appears upon the record of the circuit court, viz: "And at another day, to wit; at a circuit court continued and held for the county of Ohio, at the courthouse thereof, on the 6th day of June, 1872,

"The State of West Virginia,

v.

Taylor Strauder

"Upon an indictment for murder.

"On motion of the defendant, and for reasons appearing to the court, this cause is continued until the first day of the next term. Held, that it sufficiently appears, by the record, that Taylor Strauder was personally present in court when the motion was made, and the case was continued." It is required that the record shall show that on his motion the cause was, by the court, contined. State *v.* Strauder, 8 W. Va. 686.

Sufficiency of record as showing that defendant entered his plea of not guilty in person. See ante, "Modern Practice," V, I, 6, c, (7), (g), bb.

Presence Not Shown.—The defendant was convicted of murder in the first degree. In the record on appeal there was nothing to indicate that the prisoner was present in person or by attorney when the case, after the arraignment, was continued by the court. It was held, that said record was fatally defective. Coleman *v.* Com., 90 Va. 635, 19 S. E. 161.

An entry upon the record, "This case was continued for the defendant," does not show that he was personally present, as it is a settled principle that the presumption that a court of general jurisdiction acts rightly can not supply an essential part of the record. Shelton *v.* Com., 89 Va. 450, 16 S. E. 355. See the titles CONTINUANCES, vol. 3, p. 270; RECORDS.

(bb) Record Showing Appearance by Attorney.

See ante, "Entry by Attorney," V, I, 6, c, (7), (b); "Appearing by Attorney," V, J, 2, b, (3), (b), bb.

"An appearance by attorney can not imply that the prisoner was personally present in court." Lawrence *v.* Com., 30 Gratt. 845; Coleman *v.* Com., 90 Va. 635, 19 S. E. 161; Sperry *v.* Com., 9 Leigh 623; Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Hooker *v.* Com., 13 Gratt. 766; State *v.* Sutfin, 22 W. Va. 771.

The fact that a person charged with felony appears by attorney, does not show that he was not then personally present in court, and if it otherwise appears from the record that he was then personally present it will be sufficient. Benton *v.* Com., 91 Va. 782, 21 S. E. 495; Lawrence *v.* Com., 30 Gratt. 851, citing Sperry *v.* Com., 9 Leigh 623; Cluverius *v.* Com., 81 Va. 787.

Where the record only shows an appearance by attorney it is deficient in what the law regards as essential to be stated in such a case. Lawrence *v.* Com., 30 Gratt. 845; State *v.* Sutfin, 22 W. Va. 771.

And upon a recital in the record that the defendant appeared by attorney, it will not be presumed that he was personally present. Sperry *v.* Com., 9 Leigh 623.

The only statement in the record of a felony case in regard to the appearance of the prisoner on that day in question is that he appeared by his attorney, without any circumstances stated from which it can necessarily be inferred that he was personally present. It was held, the record is deficient in what the law regards as essential to be stated in such a case. Sperry *v.* Com., 9 Leigh 623; State *v.* Strauder, 8 W. Va. 686.

A verdict having been found against a prisoner, he moves the court to set it

aside as contrary to evidence, which motion is on another day overruled. On the day when the motion is made and also when it is overruled, the record states that the prisoner appeared by attorney; and there is nothing in the record to show that he was present. This is error. Hooker *v.* Com., 13 Gratt. 763; State *v.* Strauder, 8 W. Va. 686. See the title NEW TRIALS.

As to record showing entry of plea of "not guilty in felony cases by attorney, see ante, "Entry by Attorney," V, I, 6, c, (7), (b); "Modern Practice," V, I, 6, c, (7), (g), bb.

(c) Presence at Trial for Misdemeanor.

"In misdemeanors the personal presence of the defendant is not necessary at the trial; a verdict and judgment for the fine may be found and rendered in his absence; and after the term he can neither move for a new trial nor in arrest of judgment. But until final judgment he may so move. In England, in cases of misdemeanor the jury merely passed upon the fact of guilt; the amount of the fine against him was fixed by judgment of the court." State *v.* Conkle, 16 W. Va. 746, quoting Pifer *v.* Com., 14 Gratt. 710. See ante, "Presence at Trial for Felony," V, J, 2, b, (3), (b).

Persons charged with misdemeanor may be tried in their absence. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; Pifer *v.* Com., 14 Gratt. 710.

When the defendants indicted jointly for a misdemeanor, have been duly summoned they may be tried in their absence although the court has not awarded a capias for their arrest. Such trial and sentence of such defendants in their absence, held, not violative of the constitutional guaranty that "the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him." Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838; § 4012, Va. Code, 1904.

The defendants to a charge for misdemeanor have the opportunity, to appear and defend. Their choice not to appear, but to make default, is a waiver of the constitutional provision: "That the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him," etc. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Appearance by Counsel.—A defendant may appear by counsel in any misdemeanor case, though it be punishable by imprisonment. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. See ante, "Rule as to Proceedings against Infants," V, G; "Presence at Trial for Felony," V, J, 2, b, (3), (b).

In prosecution for misdemeanors the personal appearance of the defendant is not necessary, and appearance may be by attorney. "It is true that we find the books saying that personal presence is necessary in all cases where corporal punishment is assigned—which would cover misdemeanors, where the punishment is bodily. Whart. Cr. Pl. & Prac., § 540; 1 Bish. C. Prac., § 270. Some hold that where bodily punishment must (not may) be imposed, like petit larceny in this State, the appearance must be personal, and that it is only where it definitely appears that no bodily punishment will be inflicted that his presence at the trial can be dispensed with. 1 Bish. Cr. Prac., § 268, note 2; note to Warren *v.* State, 68 Am. Dec. 220. But I think the rule is that in all misdemeanor cases the defendant may appear by attorney, and the trial be had in absence of defendant. Opinion in Pifer's Case, 14 Gratt. 713; Cooley, Const. Lim. 319; Warren *v.* State, 68 Am. Dec. 214, and note 220, 221; 1 Chit. Cr. Law, 411, 412." State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

Right of Infant to Appear in Person or by Counsel.—Upon a presentment against an infant for a misdemeanor, the infant has a right to appear and defend himself in person or by attor-

ney, and it is error to assign him a guardian and to try the case on a plea pleaded for him by the guardian. Word *v.* Com., 3 Leigh 743. See also, the title INFANTS.

Rendering Verdict.—In Virginia the verdict of guilty upon an indictment for a misdemeanor may be rendered in the absence of the accused, even though the penalty is imprisonment. Price *v.* Com., 33 Gratt. 819, 36 Am. Rep. 797; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838. See ante, "Presence at Trial for Felony," V, J, 2, b, (3), (b). See the title VERDICT.

Judgment by Default.—Under § 20, ch. 158, of W. Va. Code, where a summons to answer an indictment for a misdemeanor under chs. 32, 151, or any statutory misdemeanor, has been returned served, there may be a judgment for a fine by default. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875.

If it is proposed to impose imprisonment, there can be no judgment for it by default. A capias to bring in the defendant must issue, and if returned "not found" a plea of "not guilty" may be entered, a trial had by jury and a verdict of guilty rendered, not by taking the indictment as confessed but, by the state's proving her case. If a verdict of guilty be rendered, before a judgment of imprisonment, the defendant must be brought in by capias ad audiendum, and the verdict should stand until his presence is procured. There can not be a judgment for a fine at one time, and of imprisonment at another. State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875. See ante, "Presence at Trial for Felony," V, J, 2, b, (3), (b). See the title JUDGMENTS AND DECREES.

Pronouncing Judgment.—"In Pifer's Case, 14 Gratt. 713, Judge Allen properly stated the rule to be that a judgment for a mere fine could be pronounced in the defendant's absence, 'but where a man is to receive any corporal punishment, judgment can not be given in his absence; and the reason given is that there is a capias pro fine, but no process to take a man and put him in the pillory.' Where there is a fine only, you need not have the defendant present, as you can collect it by a capias pro fine; but if you are going to imprison, how can you do it without the court has its hands on him? There is no writ after judgment to take him and put him in jail, or in the pillory. 1 Bish. Cr. Prac., § 275." State *v.* Campbell, 42 W. Va. 246, 24 S. E. 875; State *v.* Allen, 45 W. Va. 65, 30 S. E. 209; Com. *v.* Crump, 1 Va. Cas. 172. See ante, "Presence at Trial for Felony," V, J, 2, b, (3), (b).

Amending Judgment.—The court may amend the judgment, during the same term in which it was rendered, in the absence of the accused. Price *v.* Com., 33 Gratt. 819.

Upon the trial of P. for murder, the jury found him not guilty of the murder, but guilty of involuntary manslaughter, and assessed upon him a fine of $500. And the court thereupon entered a judgment discharging him. At the same term of the court, in the absence of P. the court set aside the judgment, and entered a judgment, against him, for the fine of $500, and six months' imprisonment, and directed him to be arrested and committed to prison. Held, during the same term of the court the matter was under the control of the court; and it was competent for the court to set aside the first and render the second judgment. It was not necessary that P. should be present in court when the second judgment was entered. Price *v.* Com., 33 Gratt. 819.

(d) Presence and Benefit of Counsel.

See ante, "Assignment of Counsel to Indigent Persons," V, I, 3.

A defendant in a criminal prosecution is entitled under the fundamental law of the state to the benefit of counsel. Hill *v.* Com., 88 Va. 633, 14 S. E. 330; Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

The prisoner's counsel must be personally present during the trial. State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Right to Have Counsel—Silence of Record—Presumption.—Every person accused of crime has a right to have counsel to aid him in his defense, but no one is compelled to employ counsel. If the record fails to show whether the accused had counsel or not, or even if it shows that he did not have counsel, it is not ground for reversal, unless it further appears that the right to have counsel was denied. It is not to be presumed that the right was denied. Barnes *v.* Com., 92 Va. 794, 23 S. E. 784.

Right to Be Heard by Counsel.—"It was held (Words' Case, 3 Leigh 744) that 'the accused has the right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached, and conclusive the evidence in its opinion may be.'" State *v.* Shores, 31 W. Va. 491, 7 S. E. 414. See the title ARGUMENTS OF COUNSEL, vol 1, p. 714.

"It is the right of every party accused to be heard by counsel on his whole case." Word *v.* Com., 3 Leigh 743.

But the court undoubtedly has a superintending control over the course of the argument to prevent the abuse of that or any other right. It is a power, however, to be exercised with discretion, and with reference to the particular circumstances of each case, subject to review by an appellate court. Jones *v.* Com., 87 Va. 63, 12 S. E. 226, citing Word *v.* Com., 3 Leigh 743; State *v.* Shores, 31 W. Va. 500, 7 S. E. 418. See also, Barnes *v.* Com., 92 Va. 794, 23 S. E. 784. See the title ARGUMENTS OF COUNSEL, vol. 1, p. 714.

c. Waiver of Rights.

General Rule.—"That which the law makes essential in proceeding involving the deprivation of life or liberty can not be dispensed with or affected by the conduct of the accused, much less by his mere failure, when on trial or in custody, to object to unauthorized methods." Jones *v.* Com., 100 Va. 842, 41 S. E. 951; Hall *v.* Com., 80 Va. 556; Spurgeon *v.* Com., 86 Va. 655, 10 S E. 979.

The right of a defendant in a criminal prosecution to affect by consent the conduct of a case is much more limited than in civil actions. When issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. Neither the public officer, prosecuting for the people, nor the defendant has authority to consent to such a change. State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428, opinion of Johnson P., quoting Cancemi *v.* The People, 18 N. Y. 128.

"A prisoner on trial, under our laws, has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law, by furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist upon his rights, he waives them." McCue *v.* Com., 103 Va. 870, 49 S. E. 623.

"A party who stands by without objection and sees proper evidence excluded, or improper evidence admitted, without objecting, will not be heard to make the objection after verdict. And so with instructions. In other words, litigants are not permitted to play fast and loose with the court. If they are silent when it is their duty to speak, they are not permitted to speak when it is their duty to be silent." McCue *v.* Com., 103 Va. 870, 49 S. E. 623. See also, Briggs *v.* Com., 82 Va. 554; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434.

Reason for Rule.—The doctrine of

waiver does not extend to those matters that are made essential, and the reason is, that a strict compliance with all essentials in a felony case is necessary to constitute a proceeding by "due process of law." Spurgeon *v.* Com., 86 Va. 655, 10 S. E. 979. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

Presumption as to Waiver by Accused.—"In Jackson's case, 19 Gratt. 656, it was held, that the prisoner 'is to be considered as standing upon all his legal rights, waiving none of them.'" Bond *v.* Com., 83 Va. 581, 3 S. E. 149; Hall *v.* Com., 80 Va. 555.

Waiver by Accused Leaving Errors Apparent on the Record.—"Where a waiver by the accused leaves the record destitute of an essential part, he may afterwards take advantage of the defect, notwithstanding the waiver, as where he waives the right to be present throughout the trial, or consents to go to trial without arraignment or plea. 1 Bish. Crim. Prac. (3d Ed.), § 125; Dougherty *v.* Com., 69 Pa. St. 286; Spurgeon's Case, 86 Va. 652, 10 S. E. 979; Hopt *v.* Utah, 110 U. S. 574. Lawrence's Case, 30 Gratt. 845, to this extent is consequently overruled." Jones *v.* Com., 87 Va. 63, 12 S. E. 226.

Waiver by Counsel.—"There are rights which the prisoner can not waive, and which, of course, counsel can not waive for him, but there are mere irregularities as to which counsel may bind him either by express waiver or by conduct, as when he remains silent when it was his duty to speak." Jones *v.* Com., 100 Va. 842, 41 S. E. 951; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858.

Waiver of Mere Incidents to the Trial.—"There are rights which the prisoner can waive neither by counsel nor in person. It is unnecessary to enumerate them. There are other rights which the prisoner may waive either in person or by counsel. They are the mere incidents connected with the conduct of his trial; the prisoner having the right to be represented by counsel, that right carries with it the authority of counsel to represent the prisoner and to bind him by his acts with respect to the incidents arising in the conduct and trial of the cause." Kibler *v.* Com., 94 Va. 804, 26 S. E. 858.

"It is sometimes difficult to determine what is, and what is not essential, for the authorities are not altogether harmonious, and lay down no absolute rule, on the subject. There is no doubt that independently of the act last mentioned (January 18, 1888, acts, 1887-88, p. 15) objection to the competency of a juror can not be made after he is sworn upon the jury, unless by leave of the court. Poindexter's Case, 33 Gratt. 766. So, also, where the accused is given the right by statute or otherwise to have a copy of the indictment, or a list of the jurors or witnesses, before trial, he may waive the right either directly or indirectly." Spurgeon *v.* Com., 86 Va. 655, 10 S. E. 979.

As Effecting Necessity for Presence at Trial.—"Bishop on Criminal Procedure, § 682, says: 'It is a principle pervading the entire law of procedure in criminal causes that, after indictment found, nothing shall be done in the cause in the absence of the prisoner (citing the note to Hooker's case, 13 Gratt. 763). Yet the doctrine of waiver of rights, discussed in a previous chapter, may to some extent modify this principle so as to allow of proceedings in the absence of the defendant, when he does not choose to be present, and especially when his convenience is consulted by having the steps taken while he is absent. Yet the right of waiver seems not to be carried very far here.'" Bond *v.* Com., 83 Va. 581, 3 S. E. 149. See ante, "Presence of Accused and Counsel," V, J, 2, b, (3).

As to Waiver by Voluntary Absence from Trial.—See ante, "Presence at Trial for Felony," V, J, 2, b, (3), (b);

"Presence at Trial for Misdemeanor," V, I, 2, b, (3), (c).

Waiver of Dilatory Pleas by Pleading General Issue.—As to waiver of the right to interpose a plea in abatement by pleading the general issue alone, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 25.

Objections to Indictment.—As to waiver of right to make objections to the indictment by failing to demur, or moving to quash or moving in arrest of judgment, see the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Objections to Discharge of Jury.—As to waiver of objections to discharge of the jury for failure to agree or for other causes, see the title JURY.

Objections to Writ of Venire Facias.—As to waiver of objections to a writ of venire facias, see the title JURY.

Waiver of Jury Trial.—Generally, as to waiver of jury, see the title JURY.

"By consent of parties in a misdemeanor case a jury may be waived and the facts may be submitted to the court. State *v.* Cottrill, 31 W. Va. 162, 6 S. E. 428; State *v.* Griggs, 34 W. Va. 78, 11 S. E. 740; State *v.* Denoon, 34 W. Va. 139, 11 S. E. 1003; State *v.* Flanagan, 48 W. Va. 115, 35 S. E. 862." State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350; § 4048, Va. Code, 1904.

Preliminary Examination.—As to waiver of preliminary examination, see the title COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 1.

Admissibility of Evidence and Instructions.—"It was never the law that a prisoner could not waive questions relating to the admissibility of testimony and instructions, or even an erroneous conviction, for if he does not proceed in the appellate court to be relieved from it he must suffer its consequences." State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; McCue *v.* Com., 103 Va. 870, 49 S. E. 623. See the titles EVIDENCE; INSTRUCTIONS.

3. Misconduct during Trial.

a. Remarks or Actions of the Court.

(1) Expression of Opinion.

In the trial of criminal cases, especially, the court should leave to the jury, exclusively, the consideration of the facts and no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it. Dejarnette *v.* Com., 75 Va. 867; State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

It is error for a court in the trial of a criminal cause, to make a remark to, or in the presence of the jury, in reference to matters of fact, which might in any degree influence them in their verdict. State *v.* Hurst, 11 W. Va. 54; State *v.* Thompson, 21 W. Va. 741.

"The trial judge should exercise great care not to intimate in any manner his opinion upon any fact at issue. He can not do so directly or indirectly, neither explicitly nor by innuendo." State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

"In this state, all expressions of opinion, or comments, or remarks upon the evidence, which have a tendency to intimate the basis of the court with respect to the character or weight of the testimony, particularly in criminal cases, are watched with extreme jealousy, and generally considered as invasions of the province of the jury." Dejarnette *v.* Com., 75 Va. 867.

Illustrations.—In State *v.* Hurst, 11 W. Va. 54, the court made this remark to the jury when it was reported to him that one of them said they could not agree: "I see no reason why the jury can not agree upon a verdict in this cause," and directed the jury to return. They found the prisoner guilty, and the appellate court deemed this a sufficient reason to set aside the judgment and verdict, and grant a new trial. State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Thompson, 21 W. Va. 741.

"Whilst a medical witness for the

accused was explaining to the jury the difference between moral and intellectual insanity, and giving the opinion of writers thereon, the presiding judge stopped the witness, and in the presence of the jury, said to the commonwealth's attorney: 'Is it possible, sir, that you sit there and permit such testimony as that without objection?' To which the commonwealth's attorney replied: 'Yes, sir; I am willing to hear it all.' When the court replied: 'I will not stop it unless you object.' To which question and interference of the court, and the manner in which it was done, the accused excepted. In view of the fact that a new trial is to be had on other grounds, and inasmuch as the same matter is not at all likely to arise again, it is not deemed necessary now to decide whether or not the interference and remark of the presiding judge constitutes error sufficient for the reversal of the judgment, more especially as a decision of that point involves the necessity of passing upon the relevancy of the testimony of the witness. But to prevent any possible misapprehension in the future, it is proper to say that in the administration of justice, it is of great importance that the court should leave to the jury exclusively the consideration of the facts." Dejarnette *v.* Com., 75 Va. 867.

It is not improper for the trial court, in overruling a motion to exclude certain evidence, on the ground of inadmissibility, to remark, in the presence of the jury: "I don't think I ought to give my reasons for this decision. I don't want to give any intimation how I regard it. I simply say I overrule the motion to exclude the testimony." State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

In a case tried on an indictment containing two counts, after the jury had returned a general verdict of guilty, the court upon being asked by the defendant to have the jury polled as to whether the verdict applied to both counts, stated to the jury: "I suppose you meant to find the prisoner guilty on both counts," and then directed the poll to be taken. It was held, that this was not error, which could have prejudiced the defendant in this particular case, and is no ground for reversing the judgment. (p. 504.) State *v.* Halida, 28 W. Va. 499.

Summing Up the Case.—"In England and many of the American states, * * * the judge 'sums up' the case, as it is said; that is, delivers a charge, in which he covers the whole ground of the case, giving his opinion on law and fact; and this charge is necessary, and must be full in its exposition of the law of the case. 1 Bish. Cr. Proc., §§ 976, 979, 980; Whart. Cr. Pl. §§ 709, 711. This charge is a material part of the trial. But in the Virginias this 'summing up' or charge is unknown. Our practice is widely different. Under our practice the judge must not state the evidence, or discuss or give or intimate his opinion upon it. If anything drops from him, even casually or inadvertently, in giving instructions or otherwise, indicating an opinion on the weight or effect of the evidence or the credibility of a witness, it is generally ground for reversal. Dejarnette's Case, 75 Va. 867; Whitelaw *v.* Whitelaw, 83 Va. 40, 1 S. E. 407; State *v.* Hurst, 11 W. Va. 54; State *v.* Thompson, 21 W. Va. 741; State *v.* Greer, 22 W. Va. 800; State *v.* Sutfin, 22 W. Va. 771." State *v.* Cobbs, 40 W. Va. 718, 22 S. E. 310; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

Instructions Conveying Opinion of Court as to Guilt of Accused.—Instructions given by the trial court, on its motion, in a felony case, which may convey to the jury the opinion of the court as to the guilt of the accused, are improper. State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

"When the jury was about to be sent to its room, 'the court, on its own motion, taking the indictment in his hand, instructed the jury in the following words, to-wit: "Gentlemen of

the Jury: I think it would be proper for me to say to you that, if you should find the defendant guilty of murder in the first degree, you could further determine the mode of punishment, and say whether it should be by death, or confinement in the penitentiary for life. If you should determine that he ought to be confined in the penitentiary, you will make that a part of your finding and of your verdict. You can, under the indictment, find the defendant guilty of murder in the second degree." Thereupon, the jury being about to retire, the counsel for the defendant suggested to the court that he ought also to say to the jury that the jury could find the defendant not guilty; and thereupon the court said to the jury: "Of course, gentlemen, you could find the prisoner not guilty at all, if you thought the evidence justified such a finding; but in all your findings you must be governed by the evidence.'" To these remarks of the court the prisoner objected. These words might be very harmless, or they might be disasterous to the prisoner, according to the accent and manner of the court in using them. They might very easily be made to convey the sense that the court was fully convinced of the guilt of the prisoner, and for the jury to find otherwise they must disregard the evidence. Manner and accent can not be made part of the record, and such language, uttered at the time it was, could be made very suggestive to the jury—at least, from which they could draw their own inferences as to the opinion entertained by the court. Hence the rule that, if such instructions or remarks may have prejudiced the prisoner, they are sufficient grounds of error to justify the granting of a new trial. State *v.* Staley, 45 W. Va. 792, 32 S. E. 198; Neill *v.* Produce Co., 38 W. Va. 228, 18 S. E. 563; State *v.* Cobbs, 40 W. Va. 721, 22 S. E. 310; State *v.* Greer, 22 W. Va. 80; State *v.* Hurst, 11 W. Va. 54; McDowell *v.* Crawford, 11 Gratt. 405." State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

"It was proper for the court to say that, if the jury believed the prisoner not guilty, they had the right to so find; but to intimate to them in any manner, by words, conduct or accent, that such finding on their part was not justified by the evidence by which they must be governed, was improper, and prejudicial to the prisoner's guarantied right of a fair trial." State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734.

Generally, as to prejudicial instruction, see the title INSTRUCTIONS.

(2) Comments on Character of Witnesses.

Remarks made by the trial judge in the presence of the jury (referring to a witness who had testified for the state), as follows: "Suppose Dr. Burgess, whose integrity is not to be questioned, when placed by a party upon the witness stand to testify as to matters coming within his professional conduct or employment, and having so testified, the opposite party was to bring in two or three witnesses from another county, say, from Huntington, who were entire strangers to the people of Wayne county, and who, upon the witness stand, were to testify to their having heard Dr. Burgess, in Huntington, make statements directly contradicting those made by him on the witness stand; would it not be a reasonable and logical rule that would permit the party so calling him to introduce, upon rebuttal, witnesses acquainted with his general reputation, to testify as to his good character for truth?"—the "two or three witnesses" referred to being summoned as experts on behalf of the defendant, and so testified in the case touching the matter of the evidence of said witness Burgess, held, to be error, which might prejudice the defendant. State *v.* Staley, 45 W. Va. 792, 32 S. E. 198.

b. Misconduct of Jury.

As to misconduct of jury as a ground

of setting aside the verdict, see generally, the titles JURY; NEW TRIALS.

In cases of misconduct or irregularity by the jury during the trial, if the verdict is against the prisoner, the presumption is that such misconduct or irregularity has been prejudicial to him and the burden of proof is upon the state to show beyond a reasonable doubt that the prisoner has suffered no injury thereby. State *v.* Harrison, 36 W. Va. 729, 15 S. E. 982. See also, the titles APPEAL AND ERROR, vol. 1, p. 558; PRESUMPTIONS AND BURDEN OF PROOF; REASONABLE DOUBT.

c. Misconduct of Counsel.

Replies to Adverse Criticism.—The fact that an attorney associated with a public prosecutor to assist in the prosecution, in response to adverse criticism by counsel for the prisoner, replied that he had "refused a large fee in this case to prosecute," is not good cause of exception or objection on the part of the prisoner. McCue *v.* Com., 103 Va. 870, 49 S. E. 623.

Remarks to Jury.—Unless the court in a felony trial permits counsel for the state to so far transgress the rule of propriety as clearly to prejudice the prisoner, the judgment will not be reversed because of improper remarks of counsel made to the jury. State *v.* Shores, 31 W. Va. 491, 7 S. E. 414; State *v.* Shawen, 40 W. Va. 1, 20 S. E. 875.

Where a criminal trial is in other repects fair, a verdict of conviction will not be set aside by this court for improper remarks of counsel, where it is plainly warranted by the evidence in the case under the law, and no other verdict could have been found without misconduct by the jury. State *v.* Shawen, 40 W. Va. 1, 20 S. E. 783.

In this case the prosecuting attorney said: "If you sentence him to the penitentiary for life, it won't be five years till he will be let out on some excuse or pretext, and return home, to enter upon a new cause of crime." He further said: "This [meaning the homicide for which prisoner was on trial] is the grand culmination of an epidemic of crimes that have been committed in this county." He further said, referring to the prisoner: "He is so steeped in crime that he has no friend to sit beside him during the trial." This was held, to be no ground for a new trial. State *v.* Shawen, 40 W. Va. 1, 20 S. E. 873.

Generally, as to arguments of counsel, control by court, effect of improper argument, etc., see the title ARGUMENTS OF COUNSEL, vol. 1, p. 713.

Comments on Failure of Accused to Testify.—As to comments on failure of the accused to testify by the prosecuting attorney, see the title ARGUMENTS OF COUNSEL, vol. 1, p. 717; WITNESSES.

d. Misconduct of Sheriff.

"It is also assigned as error, that the court refused to set aside the verdict on the ground that the sheriff, who had charge of the jury, made a bet, while the jury were considering the case, that the verdict would be against the defendant. Speaking for myself I have no hesitation in saying, that, if this were a felony case, and the sheriff, who had charge of the jury, had made a bet with any one, while he had the jury so in his charge, that the jury would find the prisoner guilty, this fact would raise a presumption that the prisoner was prejudiced thereby, and the burden would be thrown upon the state of showing that the prisoner could not have been prejudiced by such conduct of the officer having the jury in charge. I think this would be the logical result of the principles this court has already laid down in Cartright's Case, 20 W. Va. 32, and Greer's Case, 22 W. Va. 800. But this is not a felony but a misdemeanor case. The indictment, we have seen, did not

charge felony, but was good as an indictment for a misdemeanor. The jury was, therefore, not properly in the charge of the sheriff during the trial, and under these circumstances the betting of the sheriff on the result of the trial would be no more than the betting of any one else on the verdict. At the time the bet was made, the jury had been already selected and sworn, and therefore the sheriff after the bet had nothing to do with the selection. What effect such betting would have had on the verdict, if made before the jury were sworn, and if the sheriff had anything to do with the selection of the jury, does not arise in this case." State *v.* Howes, 26 W. Va. 110.

e. Misconduct of Witnesses.

See the titles NEW TRIALS; WITNESSES.

f. Misconduct of Spectators.

See the title NEW TRIALS.

Much must be left to the judgment and discretion of the trial court in the preservation of order in the courtroom and in the exclusion of extraneous influences on the trial of a criminal case. Applause in the courtroom and other manifestations of approval or dislike should be promptly suppressed, and if the trial court fails to exercise its discretion with becoming vigor, or the public becomes so violently excited as to overawe the jury, and ground is afforded for the belief that justice has not been done, the appellate court should set aside the verdict and award a new trial. In the case at bar, the trial judge promptly rebuked applause while a witness for the commonwealth was testifying, and threatened to clear the courtroom. When the offense was repeated the judge again threatened to clear the courtroom, and placed policemen in the rear of the courtroom to prevent its recurrence and to detect offenders. The offense not being again repeated, this was deemed sufficient. Doyle *v.* Com., 100 Va. 808, 40 S. E. 925.

In a prosecution for homicide applause by a large crowd in the courthouse following remarks of the prosecuting attorney to the jury is not cause for reversal where the court promptly rebuked the misconduct of the spectators in a manner sufficient to prevent its recurrence. Bowles *v.* Com., 103 Va. 816, 48 S. E. 527.

4. Province of Court and Jury.

a. Powers and Duties of Court.

See generally, the titles JUDGES; TRIAL.

(1) Control of Trial.

Discretion of Court.—"The conduct of the trial must necessarily be left largely to the discretion of the presiding judge—a discretion which can not, in its very nature, be made a subject of review by this court, except in a clear case of abuse of that discretion." State *v.* Shawen, 40 W. Va. 1, 20 S. E. 875.

Holding Night Session.—The court has a wide discretion in holding night sessions, so far limited, however, as that it shall not impair the party's right to a fair trial according to law. State *v.* Belknap, 39 W. Va. 427, 19 S. E. 508.

Postponement during Progress of Trial.—"In the progress of the trial, the prisoner was taken apparently with a fit, and fell or jumped from his seat to the floor, where he laid until carried to a private room. The court thereupon suspended the trial and summoned two physicians, who, after making an examination of the prisoner, testified that, in their opinion, he was sane and 'shamming' although evidently laboring under great mental excitement. After the examination by the doctors, the prisoner, escorted by two deputy sheriffs, walked out of the courtroom into the courthouse yard, and soon afterwards returned to the prisoner's box, where he remained during the further progress of the trial. Under these circumstances the * * * circuit court, upon the return of the prisoner, rightly resumed and pro-

ceeded with the trial." Curtis *v.* Com., 87 Va. 589, 13 S. E. 73.

It is not error for the court to refuse to stop the trial to enable the counsel for prisoner to prepare a bill of exceptions, as the same might be prepared after verdict. Jones *v.* Com., 87 Va. 63, 12 S. E. 226. See the title EXCEPTIONS, BILL OF.

Questioning Witnesses.—As to the power of the court to interrogate witnesses, see the title WITNESSES.

Control of Argument.—As to the control of argument of counsel, see the title ARGUMENTS OF COUNSEL, vol. 1, p. 714.

(2) As to Admissibility of Evidence.

It is the province of the court to decide on the admissibility of testimony and not for the jury even under the instruction of the court. Vass *v.* Com., 3 Leigh 786; Hill *v.* Com., 2 Gratt. 594; Bull *v.* Com., 14 Gratt. 613.

Confessions.—As to admissibility of confessions a question for the court, see the title CONFESSIONS, vol. 3, p. 79.

(3) Determination and Instructions as to Law.

See post, "Duty to Receive the Law as Determined by the Court," V, J, 4, b, (2).

It is the office of the judge to respond as to the law. Brown *v.* Com., 86 Va. 466, 10 S. E. 745; State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of the trial. State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

It is the right and the duty of a judge sitting in a criminal trial, to instruct the jury as to the law, if he think it proper to do so; and no law prescribes any particular time at which the instruction shall be given. Gwatkin *v.* Com., 9 Leigh 678. See the title INSTRUCTIONS.

b. Province of Jury.

(1) As to Questions of Fact.

(a) In General.

It is the province of the jury to pass upon the evidence and determine all contested questions of fact. State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; State *v.* Thompson, 21 W. Va. 741.

All issues of fact outside of the record are for the jury. Day *v.* Com., 2 Gratt. 562.

"It is a fundamental principle that all competent evidence both for and against the prisoner shall go to the jury, whose duty and province it is to ascertain the facts." State *v.* Prater, 52 W. Va. 132, 43 S. E. 230.

Invasion of Province of Jury.—The doctrine is established, "that when the evidence is parol, any opinion as to the weight, effect or sufficiency of the evidence submitted to the jury, any assumption of a fact as found, or even an intimation that written evidence states matters, which it does not state, will be an invasion of the province of the jury." State *v.* Thompson, 21 W. Va. 741, quoting McDowell *v.* Crawford, 11 Gratt. 405; State *v.* Hurst, 11 W. Va. 54; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813. See post, "Weight and Sufficiency of Evidence," V, J, 4, b, (1), (c).

An instruction which assumes an important and material fact as true which is not conceded in the case is an invasion of the province of the jury. State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695. See also, State *v.* Robinson, 20 W. Va. 714.

Corpus Delicti.—See post, "Corpus Delicti," V, J, 5, a, (2), (b).

Plea in Abatement.—Upon an indictment for a felony, the prisoner pleads in abatement, and the attorney for the commonwealth takes issue upon the plea. The issue should be tried by a jury. Day *v.* Com., 2 Gratt. 562; McCue *v.* Com., 103 Va. 870, 49 S. E. 623. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 24, et seq.

Question of Identity.—The question of the identity of an accused person with the perpetrator of an offense is for the jury. Hopper *v.* Com., 6 Gratt. 686. See the title IDENTITY.

Grade of Offense.—It is the province of the jury to ascertain the grade of offense. Hawley *v.* Com., 75 Va. 847.

(b) As to Credibility of Witnesses.

See post, "Weight and Sufficiency of Evidence," V, J, 4, b, (1), (b); "Weight and Sufficiency," V, J, 5, c.

"The credibility of witnesses is a question exclusively for the jury." Horton *v.* Com., 99 Va. 848, 38 S. E. 184; McCue *v.* Com., 103 Va. 870, 49 S. E. 623; Doyle *v.* Com., 100 Va. 808, 40 S. E. 925; Lyles *v.* Com., 88 Va. 396, 13 S. E. 802; Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351; State *v.* Sutfin, 22 W. Va. 771; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Thompson, 21 W. Va. 741.

Generally, as to credibility of witnesses, see the title WITNESSES.

"The jury came into court and propounded the following question: 'Has a juror a right to disbelieve a witness, whose character for truth had not been impeached by other witnesses?' and the court replied: 'The jury is the sole judge of the evidence, of its weight and credibility, and in determining the weight or credit to be given to any witness may consider his demeanor on the witness stand, contradictory statements and the probabilities of his story. The jury or juror may disbelieve any witness, but of course it would be a virtual disregard of a juror's duty to arbitrarily disregard the evidence of a witness.' To the giving of which instruction the prisoner excepted. * * * This instruction states the law correctly, and the prisoner could not have been prejudiced thereby." State *v.* Sutfin, 22 W. Va. 771.

It is error in the court to instruct the jury that, if they were of the opinion that any witness had willfully and corruptly testified to what was false, they were at liberty to reject all of his testimony that was not corroborated by other testimony, for the reason that said instruction was calculated to mislead the jury, and was equivalent to telling them that, where a witness had sworn falsely in one thing, the remainder of his testimony should have no weight with them unless corroborated, when they had a right to believe any portion of the testimony, whether corroborated or not, and the instruction invades the province of the jury. Thompson's Case, 21 W. Va. 741; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813.

"In this state the court would err in advising the jury not to convict on the uncorroborated evidence of an accomplice, though this is the common practice in England and in some of the states. But it is utterly opposed to the practice in this state or in Virginia. * * * page 740, 741, 11 W. Va. R." State *v.* Thompson, 21 W. Va. 741. See the title WITNESSES.

(c) Weight and Sufficiency of Evidence.

See post, "Weight and Sufficiency," V, J, 5, c. See the titles EVIDENCE.

It is the province of the jury to pass upon the weight and value of evidence. Wadley *v.* Com., 98 Va. 803, 35 S. E. 452; Dejarnette *v.* Com., 75 Va. 867; Kibler *v.* Com., 94 Va. 804, 26 S. E. 858; Vass *v.* Com., 3 Leigh 786; Hill *v.* Com., 2 Gratt. 594; State *v.* Sullivan, 55 W. Va. 597, 47 S. E. 267; State *v.* Tucker, 52 W. Va. 420, 44 S. E. 427; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Kerns, 47 W. Va. 266, 34 S. E. 734; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Kinney, 26 W. Va. 141; State *v.* Smith, 24 W. Va. 814; State *v.* Greer, 22 W. Va. 800; State *v.* Thompson, 21 W. Va. 741; State *v.* Hurst, 11 W. Va. 54, quoting McDowell *v.* Crawford, 11 Gratt. 405.

The credibility of the evidence is a

question upon which the jury alone is competent to decide. Vass *v.* Com., 3 Leigh 786.

"Where there is evidence tending to criminate, the jury is almost uncontrollably the judge of its force and weight, and of the proper inferences from the facts proven." State *v.* Bowyer, 43 W. Va. 180, 27 S. E. 301; State *v.* Hurst, 11 W. Va. 54, citing Ross *v.* Gill, 1 Wash. 88; State *v.* Thompson, 21 W. Va. 741, citing McDowell *v.* Crawford, 11 Gratt. 405; State *v.* Musgrave, 43 W. Va. 672, 28 S. E. 813; State *v.* Sullivan, 55 W. Va. 597, 47 S. E. 267.

"It is for the jury in a criminal case to determine whether evidence introduced upon a given point amounts to proof of the fact sought to be proved." State *v.* Allen, 45 W. Va. 65, 30 S. E. 209.

Whether a witness be impeached or not, or whether he is contradicted as to material facts or not, the jury are the exclusive judges of the weight to be attached to his evidence. The court would err in influencing them in any way in determining this weight, either by instruction as to the proper manner of ascertaining such weight, or otherwise. State *v.* Thompson, 21 W. Va. 741. See ante, "Expression of Opinion," V, J, 3, a, (1).

Effect of Directly Opposing Testimony.—"Where a number of witnesses testify opposite to each other the jury is not bound to regard the weight of the evidence as equally balanced." Horton *v.* Com., 99 Va. 848, 38 S. E. 184. See instructions in McCue *v.* Com., 103 Va. 870, 49 S. E. 623.

Jury May Consider Appearance and Manner of Testifying.—"The jury have the right to determine from the appearance of the witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence, or lack of intelligence and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly." Horton *v.* Com., 99 Va. 848, 38 S. E. 184.

Bias of Witnesses.—The jury in making up their judgment as to the weight to be attached to the evidence of a witness are authorized to consider the temper, feeling, or bias of such witnesses. Wadley *v.* Com., 98 Va. 803, 35 S. E. 452; Horton *v.* Com., 99 Va. 848, 38 S. E. 184. See also, instruction given in McCue *v.* Com., 103 Va. 870, 49 S. E. 623. See the title WITNESSES.

Character.—As to weight of evidence as to character of accused a question for the jury, see post, "Evidence as to Character," V, J, 5, c, (2).

Confession and Admission.—As to weight and sufficiency of confessions and admission a question for the jury, see the titles CONFESSIONS, vol. 3, p. 79; DECLARATIONS AND ADMISSIONS.

(d) Question of Intent.

The presence of criminal intent or purpose is a question of fact, to be determined by the jury from all the circumstances proven. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996. See ante, "Guilty Knowledge or Intent," IV, B; post, "Intent," V, J, 5, a, (2), (c).

(e) Question of Guilty Knowledge.

The question of guilty knowledge rests exclusively with the jury; and they must decide truly according to their own convictions upon a consideration of all the evidence before them whether guilty knowledge actually exists. Wash *v.* Com., 16 Gratt. 540. See ante, "Guilty Knowledge or Intent," IV, B; post, "Guilty Knowledge," V, J, 5, a, (2), (d).

(f) Question of Alibi.

See post, "Alibi as a Defense," V, J, 5, a, (4).

When it is attempted to set up an alibi as a defense to a criminal prosecution, it is for the jury to decide whether the evidence introduced is sufficient to prove the defense. Cunning-

ham *v.* Com., 88 Va. 37, 13 S. E. 309; Dean *v.* Com., 32 Gratt. 912.

(g) Question as to Capacity.

As to capacity to commit crime a question for the jury, see ante, "A Question of Fact," IV, F, 1, c.

(2) Duty to Receive the Law as Determined by the Court.

It is the duty of the jury to take the law from the court and apply it to the facts of the case. State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; Brown *v.* Com., 86 Va. 467, 10 S. E. 745, citing Honesty *v.* Com., 81 Va. 283; Muscoe *v.* Com., 86 Va. 443, 10 S. E. 534; Davenport *v.* Com., 1 Leigh 588, overruling Com. *v.* Garth, 3 Leigh 761; Doss *v.* Com., 1 Gratt. 557. See ante, "Determination and Instructions as to Law," V, J, 4, a, (3).

Jury Are Not Judges of the Law.—"The Virginia court of appeals has explicitly declared that, 'In criminal cases the jury are not the judges of the law.' Brown *v.* Com., 86 Va. 466, 10 S. E. 745." State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695.

"Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it or choose, from wantonness or ignorance or accidental mistake, to interpret it." State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695, overruling State *v.* Hurst, 11 W. Va. 77 and State *v.* Betsall, 11 W. Va. 740.

"In criminal cases, the power of the jury is not above the law nor the court. They are the judge of the facts and not of the law. State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695. They must take the law from the court and the court, in giving the law, is bound by its limitations. The law stands above both court and jury. By disregarding the law and their oaths the jury, by their physical power, may acquit a guilty man and their verdict is final and conclusive, but it is not because they had the legal right to do so. It is only because the constitution says a party so acquitted can not be retried." State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Dickey, 48 W. Va. 325, 37 S. E. 695; Brown *v.* Com., 86 Va. 466, 10 S. E. 745.

(3) As to Mixed Questions of Law and Fact.

Mixed questions of law and fact must be determined by the jury upon the facts of the particular case, under suitable instructions from the court as to the law. Davis *v.* Russell, 5 Bing. 354 (15 Eng. C. L. 463). Muscoe *v.* Com., 86 Va. 448, 10 S. E. 534. See also, Hill *v.* Com., 2 Gratt. 594.

5. Evidence.

a. Presumptions and Burden of Proof.

(1) In General.

See post, "Proof of Guilt," V, J, 5, c, (1).

Presumption of Innocence.—"'The prisoner is presumed to be innocent until his guilt is established, and he is not to be prejudiced by the inability of the commonwealth to point out any other criminal agent, nor is he called upon to vindicate his own innocence by naming the guilty man. He rests secure in that presumption of innocence until proof is adduced which establishes his guilt beyond a reasonable doubt, and whether the proof be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the prisoner.' McBride's Case, 95 Va. 826, 30 S. E. 454." Jones' Case, 103 Va. 1012, 49 S. E. 663; McCue *v.* Com., 103 Va. 870, 49 S. E. 623; Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Anderson *v.* Com., 83 Va. 326, 2 S. E. 281; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Davis *v.* Com., 99 Va. 838, 38 S. E. 191; Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Davis *v.* Com., 99 Va. 868, 39 S. E. 585; Shipp *v.* Com., 86 Va. 746, 10 S. E. 1065; Prather *v.* Com., 85 Va. 122, 7 S. E. 178; Vaughan *v.* Com., 85 Va. 671, 8 S. E. 584; Pruner *v.* Com., 82 Va. 115; Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298;

Thompson *v.* Com.; 88 Va. 45, 13 S. E. 304; Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Tilley *v.* Com., 90 Va. 99, 17 S. E. 895; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812; Wadley *v.* Com., 98 Va. 803, 35 S. E. 452; Bundick *v.* Com., 97 Va. 783, 34 S. E. 454; Bundick *v.* Com., 97 Va. 787, 34 S. E. 455; Brown *v.* Com., 97 Va. 791, 34 S. E. 882; Hairston *v.* Com., 97 Va. 754, 32 S. E. 797; Barker *v.* Com., 90 Va. 820, 20 S. E. 776; Taliaferro *v.* Com., 77 Va. 411; Burch *v.* Com., 1 Va. Dec. 861; Dean *v.* Com., 32 Gratt. 912; Pryor *v.* Com., 27 Gratt. 1009; State *v.* Davis, 50 W. Va. 100, 40 S. E. 331; State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; State *v.* Sheppard, 49 W. Va. 582, 607, 39 S. E. 676; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; State *v.* Ralphsnyder, 34 W. Va. 352, 12 S. E. 721; State *v.* Flanagan, 26 W. Va. 116; State *v.* Betsall, 11 W. Va. 703; State *v.* Abbott, 8 W. Va. 741.

In a criminal prosecution the burden is on the commonwealth to prove not only that the crime charged in the indictment has been committed, but also that it was committed by the accused, and the evidence must exclude every reasonable doubt of the guilt of the accused. Goldman *v.* Com., 100 Va. 865, 42 S. E. 923. See the title PRESUMPTIONS AND BURDEN OF PROOF.

An instruction that the prisoner comes to trial presumed to be innocent, and this presumption extends to the end of the trial, and the jury should endeavor to reconcile all the evidence with this presumption, was properly refused as misleading. Barker *v.* Com., 90 Va. 820, 20 S. E. 776.

(2) Proof of Material Elements of Offense.

See post, "Proof of Guilt," V, J, 5, c, (1).

(a) General Rule.

"The commonwealth must prove everything essential to the establishment of the charge in the indictment to the exclusion of a reasonable doubt." Thompson *v.* Com., 88 Va. 47, 13 S. E. 304; Jones *v.* Com., 79 Va. 213; Brown *v.* Com., 87 Va. 215, 12 S. E. 472; Chahoon *v.* Com., 20 Gratt. 733; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298; Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665.

The burden of proof rests upon the prosecution to make out and prove to the satisfaction of the jury beyond a reasonable doubt, every material allegation in the indictment. Unless that has been done the jury should find the defendant not guilty. State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298; Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Longley *v.* Com., 99 Va. 807, 37 S E. 339.

Any fact which is a necessary ingredient of the offense charged in the indictment, must be proved on a trial for such offense, by the evidence in the cause, or by fair inference therefrom. Chahoon *v.* Com., 20 Gratt. 733.

Criminal Agency of Accused.—In a criminal prosecution it is incumbent on the commonwealth to prove the commission of the offense by the accused. Davis *v.* Com., 99 Va. 868, 39 S. E. 585; Brown *v.* Com., 87 Va. 215, 12 S. E. 472.

In order to warrant a conviction the evidence must connect the accused with the crime. Grayson *v.* Com., 6 Gratt. 712; McBride *v.* Com., 95 Va. 818, 30 S. E. 454.

The agency of the accused in the criminal act, must be proved before the jury beyond a reasonable doubt. State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; Jones *v.* Com., 103 Va. 1012, 49 S. E. 663; Jones *v.* Com., 79 Va. 213.

To convict one of crime it must be conclusively established that a crime

has been committed, and that the accused is the guilty party. Jones *v.* Com., 103 Va. 1012, 49 S. E. 663; Jones *v.* Com., 79 Va. 213. See post, "Corpus Delicti," V, J, 5, a, (2), (b); "Proof of Guilt," V, J, 5, c, (1).

(b) Corpus Delicti.

Meaning of Term.—The corpus delicti, is, the fact that the crime charged has been actually perpetrated. Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Jones *v.* Com., 103 Va. 1012, 49 S. E. 663; State *v.* Flanagan, 26 W. Va. 116; State *v.* Parsons, 39 W. Va. 464, 19 S. E 876. See ante, "Effect as Putting in Issue Material Facts," V, I, 6, c, (7), (h).

The phrase "corpus delicti," as used in criminal law means the body or substance of the crime. State *v.* Flanagan, 26 W. Va. 116; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Smith *v.* Com., 21 Gratt. 809.

Thus in murder the corpus delicti has two components—death as the result, and the criminal agency of another as the means, but not the defendant's criminal agency. Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Smith *v.* Com., 21 Gratt. 809; State *v.* Flanagan, 26 W. Va. 116.

It was, however, said in State *v.* Hall, 31 W. Va. 505, 7 S. E. 422, that: "(Whart. Crim. Ev., § 633) says: 'It should be remembered that the corpus delicti consists not merely of an objective crime, but of the defendant's agency in the crime;' citing Johnson *v.* Com., 29 Gratt. 811, and two Texas cases. [Merritt *v.* State, 2 Tex. App. 177; Davis *v.* State, Id. 588.]"

Necessity for Proving and Burden of Proof.—In every prosecution for crime it devolves upon the commonwealth to prove the corpus delicti as a material element of the offense. Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Davis *v.* Com., 99 Va. 868, 39 S. E. 585; Jones *v.* Com., 79 Va. 213.

The corpus delicti, the fact that a crime has been committed, must be established, as the first and indispensable fact as if there is no crime there can not possibly be a criminal. State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876.

The corpus delicti, like every other fact material to establish the guilt of the accused must be proven beyond a reasonable doubt. Brown *v.* Com., 87 Va. 215, 12 S. E. 472; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; State *v.* Flanagan, 26 W. Va. 116.

There should be no conviction where the corpus delicti is not proved with particular clearness and certainty. Brown *v.* Com., 89 Va. 379, 16 S. E. 250. See also, Brown *v.* Com., 86 Va. 935, 11 S. E. 799; Brown *v.* Com., 87 Va. 215, 12 S. E. 472.

"The rule in criminal cases is that the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be first established. So long as the least doubt exists as to the act there can be no certainty as to the criminal agent." 1 Starkie on Ev., 510." Jones' Case, 103 Va. 1012, 49 S. E. 663.

It is a fundamental and inflexible rule of legal procedure, of universal obligation, that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the corpus delicti either by direct evidence or by cogent and irresistible grounds of presumption. State *v.* Flanagan, 26 W. Va. 117; Anderson *v.* Com., 83 Va. 329, 2 S. E. 281; Nicholas *v.* Com., 91 Va. 750, 21 S. E. 364; Smith *v.* Com., 21 Gratt. 809; Johnson *v.* Com., 29 Gratt. 820.

If the corpus delicti is not proved, then however strong and numerous may be the coincidences of circumstances to indicate guilt, they will avail nothing; for so long as the least reasonable doubt exists, as to the criminal act, there can be no certainty as to the criminal agent. 1 Stark Ev.; Com *v.*

Webster, 5 Cush 295. State *v.* Flanagan, 26 W. Va. 116.

"The coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, amounts to nothing unless the corpus delicti, the fact that the crime has been actually perpetrated, be established by full proof, for so long as the least reasonable doubt exists as to the act, there can be no certainty as to the agent." State *v.* Flanagan, 26 W. Va. 116.

To establish the corpus delicti, in a prosecution for murder, it is necessary to prove not only that the parties alleged to have been murdered were dead, but that such death was caused by the criminal agency of another. Nicholas *v.* Com., 91 Va. 745, 21 S. E. 364.

"Where there is no sufficient legal proof of crime, there can be no legal criminality. Rex *v.* Burdett, 4 B. & Ald. 123; Wills' Cir. Ev., ch. 7, § 1. This principle requires that upon a charge of homicide even when the body has been found, and although indications of a violent death be manifest, it shall still be fully and satisfactorily proved, that the death was neither occasioned by natural causes, by accident, nor by the act of the deceased himself. 1 Stark Ev., 513." State *v.* Flanagan, 26 W. Va. 116; State *v.* Parsons, 39 W. Va. 464, 19 S. E. 876; Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364; Smith *v.* Com., 21 Gratt. 809. See the title HOMICIDE.

Admissions of the prisoner are competent evidence to prove the corpus delicti. "We know of no decisions anywhere that hold the admissions of the defendant are not competent evidence tending to prove the corpus delicti. Such admissions may not be sufficient proof of the corpus delicti, but they certainly are competent evidence tending to prove that the crime charged has been committed." State *v.* Hall, 31 W. Va. 505, 7 S. E. 422.

Confessions.—As to the weight and sufficiency of confessions as proof of the corpus delicti, see the title CONFESSIONS, vol. 3, p. 79.

Manner of Proving.—As to the proof of the corpus delicti in particular instances, see the specific titles.

(c) Intent.

See ante, "Guilty Knowledge or Intent," IV, B; "Question of Intent," V, J, 4, b, (1), (d).

The burden of proving criminal intent is upon the commonwealth. If from the whole evidence the jury have a reasonable doubt as to whether criminal intent existed, they should acquit. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

It is the duty of the state to allege and prove criminal intent, and if from the whole evidence the jury have a reasonable doubt as to whether such intent existed, they should acquit the prisoner. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; State *v.* Poindexter, 23 W. Va. 805.

Where a specific intent to accomplish a particular purpose is an essential element of a crime, it is necessary to prove such specific intent. State *v.* Shores, 31 W. Va. 491, 7 S. E. 413.

The defense of accidental killing is a denial of criminal intent, and throws upon the state the burden of proving such intent beyond a reasonable doubt, and the accused is not required to sustain such defense by a preponderance of testimony. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996. See the title HOMICIDE.

"When acts, which are not mala in se, are made mala prohibita from motives of public policy, and not because of their normal turpitude, or the criminal intent with which they are committed," it is not necessary to prove criminal intent upon the prosecution. State *v.* Cain, 9 W. Va. 559; State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918. See ante, "Ignorance or Honest Mistake," IV, F, 3.

Upon a prosecution for the violation of a revenue law, where the intent of the defendant is not made by the statute one of the ingredients of the offense, criminal intent need not be proved. White *v.* Com., 78 Va. 484.

"The question how far a jury is bound to presume guilt or a guilty intent from any state of facts, is involved in very great doubt by the authorities. The various decisions on the subject are reviewed and commented on by Bishop on Criminal Law, §§ 248, 249 and 513; 2 Starkey's Ev., pt. 2, 928, note p; 3 Arch. Crim. Prac. 550; and Best on Presumptions, ch. 1, 2, 3. By one elementary writer it is said that where the policy of the law and ends of justice require that a presumption should be made, the jury should be told they ought to make the presumption, unless some evidence be given to the contrary; it should not be put to them as a matter of discretion. Larceny for example, it is said, is inferred from the recent possession of stolen property. Best on Presumption, ch. 3, § 40. Starkey, ubi supra, says that though the fact of a connection between the recent possession of stolen property by the accused, with the fact that he stole it, are usually combined, experience shows that this connection, although unusual, is not necessary. No artificial weight can be attached to it, and juries do not convict unless fully satisfied of the actual guilt of the prisoner." Wash *v.* Com., 16 Gratt. 530.

Quære.—If there be a presumption of law of a guilty intention in any prosecution for a criminal offense, except in the case of a prosecution for murder. Wash *v.* Com., 16 Gratt. 530.

(d) Guilty Knowledge.

The question of guilty knowledge is of a different character from that of presumed intention from a given state of facts. The guilty knowledge is itself a fact constituting an essential ingredient of the offense charged. The actual existence of the fact must be proved either directly or by such other facts and circumstances, as when fairly investigated by the proper tribunal for the ascertainment of facts, can leave no reasonable doubt that the fact does exist. The court can not assume in supposed adherence to any artificial rule of law, that other facts being proved to exist, there is in all cases a legal and necessary connection between such facts and the other fact to be presumed. The determination rests exclusively with the jury; and they must decide truly according to their own convictions upon a consideration of all the evidence before them. Wash *v.* Com., 16 Gratt. 530. See ante, "Guilty Knowledge or Intent," IV, B; "Question of Guilty Knowledge," V, J, 4, b, (1), (e).

Where guilty knowledge is a necessary ingredient of the offense charged in the indictment the burden is on the prosecution to prove such knowledge by the evidence in the cause, or by fair inference therefrom. "To say that such guilty knowledge must be proved as a 'substantive fact,' seems to imply that stronger or other evidence is required of this fact than of other material facts of a case." It is not error to refuse such instruction. Chahoon *v.* Com., 20 Gratt. 733.

When acts, which are not mala in se are made mala prohibita from motives of public policy, and not because of their moral turpitude, or the criminal intent with which they are committed, it is not necessary to prove guilty knowledge upon the prosecution. State *v.* Cain, 9 W. Va. 559; State *v.* Baer, 37 W. Va. 1, 16 S. E. 368; State *v.* Pennington, 41 W. Va. 599, 23 S. E. 918. See ante, "Ignorance or Honest Mistake," IV, F, 3.

In a prosecution for uttering counterfeit coin, the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved, and there can be no presumption of law, from the existence of other facts, of this guilty knowledge; though there may

be a presumption of fact. Wash *v.* Com., 16 Gratt. 530. See also, State *v.* Poindexter, 23 W. Va. 805.

As to proof of guilty knowledge in particular offenses, see the specific titles, as for instance in cases of forgery, see the title FORGERY AND COUNTERFEITING.

Conspiracies.—As to proof of guilty knowledge in cases of prosecution for conspiracy, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74.

(e) Malice.

As to the presumption of malice in cases where it is an essential element, see the titles PRESUMPTIONS AND BURDEN OF PROOF, and specific titles, as for instance, ASSAULT AND BATTERY, vol. 1, p. 729; HOMICIDE.

(f) Presence of Accused.

See post, "Alibi as a Defense," V, J, 5, a, (4).

Where the presence of the accused is necessary to the commission of the offense the burden of proving presence is first upon the state; and if the state fail to prove the presence of the accused, or if the evidence, as a whole, leaves the question of his presence in a condition of reasonable doubt in the minds of the jury, it must acquit him. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

(g) Territorial Jurisdiction.

See the titles JURISDICTION; VENUE.

An indictment can not be sustained without proof that the offense was committed in the county where the venue is laid. The burden on the commonwealth to prove that the offense was committed within the jurisdiction of the trial court is just as great as it is to prove commission of the offense itself. The failure to prove either entitles the accused to an acquittal. Fitch *v.* Com., 92 Va. 824, 24 S. E. 272. See ante, "Effect as Putting in Issue Material Facts," V, I, 6, c, (7), (h). See the title PRESUMPTIONS AND BURDEN OF PROOF.

The courts will not take judicial notice of the fact that a particular locality or unincorporated hamlet is in a particular county. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865; Fitch *v.* Com., 92 Va. 824, 24 S. E. 272; Butler *v.* Com., 81 Va. 159; Richardson *v.* Com., 80 Va. 124; Savage *v.* Com., 84 Va. 585, 5 S. E. 563; Hoover *v.* State, 1 W. Va. 335; State *v.* Mills, 33 W. Va. 455, 10 S. E. 808; State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380. See ante, "Territorial Limitation of Operation of Criminal Laws," V, A, 4. See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDICIAL NOTICE; JURISDICTION; VENUE.

"That the alleged crime was committed within the jurisdiction of the court was a material fact, in order to convict, and should have been proved as charged. See Hoover *v.* State, 1 W. Va. 336." State *v.* Mills, 33 W. Va. 455, 10 S. E. 808. See the title VENUE.

It is error for the circuit court to refuse to set aside a verdict and grant a new trial, in a felony case, when the state fails to prove at the trial that the alleged offense was committed within the jurisdiction of the court. State *v.* Mills, 33 W. Va. 455, 10 S. E. 808.

(3) Incapacity as a Defense.

Generally, as to presumption of capacity, see the title PRESUMPTIONS AND BURDEN OF PROOF, and specific titles.

As to the burden of proof where insanity is relied on as a defense, see the title INSANITY. See also, ante, "Want of Capacity," IV, F, 1.

Generally, as to presumptions of capacity of infants to form the criminal intent, see the title INFANTS.

As to burden of proof of capacity of an infant to commit rape, see the titles INFANTS; RAPE.

(4) Alibi as a Defense.

See ante, "Presence of Accused," V, J 5, a, (2), (f).

Nature When Set Up.—Alibi is strictly a defense. The defense of alibi is always set up in opposition to the affirmative proof of the presence of the accused. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561. See also, Dean *v.* Com., 32 Gratt. 912; Cunningham *v.* Com., 88 Va. 37, 13 S. E. 309; Taylor *v.* Com., 77 Va. 692; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

Burden of Proof.—"Where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him." Thompson *v.* Com., 88 Va. 45, 13 S. E. 304; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Saying that the burden is on the prisoner to establish such alibi is only to assert that he must produce sufficient proof to overcome the evidence of his presence already in, and thus raise a reasonable doubt in the minds of the jury as to the commission of the offense by him. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

In criminal prosecutions, while the burden of proving an alibi is on the accused, on account of its affirmative nature, yet this does not dispense with the necessity of the state's proving the actual presence of the accused at the place where, at the time when, the crime was committed, when personal presence is essential to the commission of crime; and if, from the evidence, the jury have a reasonable doubt of the presence of the accused at the place where, at the time when the offense was committed, they should acquit him. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

Where the jury were instructed on behalf of the accused that the burden of proving everything essential to the charge is on the commonwealth; it was held, not to be error to add, "but the burden of proving an alibi is on the accused." Thompson *v.* Com., 88 Va. 45, 13 S. E. 304. See the titles INSTRUCTIONS; PRESUMPTIONS AND BURDEN OF PROOF.

Rebutting Proof of Alibi.—"The accused had made a strong effort to establish an alibi, and in this condition of the case it was eminently proper for the commonwealth to introduce these witnesses to prove that the accused was, during the whole of the third and fourth days of August, 1882, the days on which the horse was stolen and sold, at places widely separated from those at which he claimed to be during these days, and so rebut the evidence produced to prove the alibi." Taylor *v.* Com., 77 Va. 692. See the title ADJOURNMENT, vol. 1, p. 180.

Failure to Assert Alibi When First Accused.—In Dean *v.* Com., 32 Gratt. 925, the sole defense was an alibi which the defendant for the first time offered to prove on the trial in the county court. The court said: "Now, the failure, unexplained, to assert the defense of an alibi when it could first be made, and, if true, would be conclusive, is always regarded by the best writers on circumstantial evidence as a most suspicious circumstance. The credibility of an alibi is always strengthened, if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. Wherever pertinent and material evidence by which an alibi might, if true, have been supported, is withheld, or is the result of afterthought or contrivance, the attempt to set it up recoils with fatal effect upon the party who asserts it. Now, in this case, the defense of an alibi was not offered till the trial at the county court. It was then attempted to be proved by his two sons. It was manifestly an afterthought. If it had been true, how natural that it would have been asserted at the moment of the first charge and arrest and trial before the justice. If he had informed his counsel then, it is

inconceivable that such a fact should have been withheld and the prisoner have been permitted to be sent to jail without defense. But waiving all these considerations, the question of whether an alibi was proved was a question of fact for the jury. It is manifest the jury did not believe the evidence of the two boys, the sons of the prisoner. It was for the jury, not this court, to judge of their credibility." See post, "Failure of Accused to Produce Evidence in His Own Behalf," V, J, 5, a, (6).

The prisoner at his trial before a justice made no defense and was committed to jail. At the trial on indictment for murder before the county court, he for the first time offered proof of an alibi; and this was his whole defense. It was then attempted to be proven by his two sons. It was manifestly an afterthought. If it had been true, how natural that it would have been asserted at the moment of the first charge and arrest and trial before the justice. If he had informed his counsel then, it is inconceivable that such a fact should have been withheld and the prisoner have been permitted to be sent to jail without defense. Dean *v.* Com., 23 Gratt. 912.

Question for the Jury.—See ante, "Question of Alibi," V, J, 4, b, (1), (f).

(5) Failure of the Accused to Testify.

See the titles PRESUMPTIONS AND BURDEN OF PROOF; WITNESSES.

The failure of the accused to testify creates no presumption against him, and in considering his guilt or innocence, his failure to testify is not a circumstance which the jury is entitled to consider. Sawyers *v.* Com., 88 Va. 356, 13 S. E. 708.

(6) Failure of Accused to Produce Evidence in His Own Behalf.

If the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject matter of the charge against him, then his failure or neglect to produce such evidence may be considered by the jury, in connection with the other facts proved in the case. Chahoon *v.* Com., 20 Gratt. 735. See the titles CONSTITUTIONAL LAW, vol. 3, p. 140; WITNESSES.

In Goodman *v.* Richmond, etc., R. Co., 81 Va. 584, the court said: "Moncure, P., in Chahoon's Case, 20 Gratt. 797, says: 'The conduct of a party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his knowledge, frequently affords occasions for strong presumptions against him, since it raises a strong suspicion, that such evidence, if adduced, would operate to his prejudice.'"

The neglect or failure of the accused to call as witnesses persons who can testify of their own knowledge as to the whereabouts of the accused on the day upon which the crime was committed, is grounds from which the jury may draw inferences in determining his guilt. Taylor *v.* Com., 90 Va. 109, 17 S. E. 812. See ante, "Alibi as a Defense," V, J, 5, a, (4).

b. Admissibility.

(1) Relevancy.

As to the necessity that the evidence upon the trial of a criminal case shall be relevant to the issue in the case, see the title EVIDENCE.

(2) Hearsay.

As to the admissibility of hearsay evidence, see the title HEARSAY EVIDENCE.

(3) Expert and Opinion Evidence.

As to the admission and effect of such evidence, see the title EXPERT AND OPINION EVIDENCE.

(4) Declarations and Admissions.

As to the admissibility and effect of declarations and admissions, see the title DECLARATIONS AND ADMISSIONS.

(5) Dying Declarations.

See the title DYING DECLARATIONS.

(6) Confessions.

As to the admissibility and effect of confessions, see the title CONFESSIONS, vol. 3, p. 79.

(7) Proof of Other Crimes.

As to the admissibility of proof of other crimes, see the title EVIDENCE.

(8) Res Gestæ.

See the title RES GESTÆ.

(9) Circumstantial Evidence.

See the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817.

(10) Secondary Evidence.

As to the admissibility of secondary evidence, see the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

(11) Parol Evidence.

See the titles AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 192; PAROL EVIDENCE.

(12) Judicial Notice.

See the title JUDICIAL NOTICE.

(13) Incriminating Evidence.

The constitution provides, in protection of the rights and liberty of the citizen, that no man can be compelled to give evidence against himself in a criminal prosecution. Va. Const., 1902, art. 1, § 8; Kendrick *v.* Com., 78 Va. 490; McCue *v.* Com., 103 Va. 870, 49 S. E. 823; Temple *v.* Com., 75 Va. 892; Sprouse *v.* Com., 81 Va. 374; Cullen *v.* Com., 24 Gratt. 624; Murphy *v.* Com., 23 Gratt. 960; West Virginia Const., art. 3, § 5; State *v.* Prater, 52 W. Va. 132, 43 S. E. 230; State *v.* Beatty, 51 W. Va. 232, 41 S. E. 434; State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

By the eighth section of the bill of rights of Virginia a person is not only secured against giving evidence against himself on his own trial, but he can not be required on the trial of another, to testify, if his evidence will tend to criminate himself. Cullen *v.* Com., 24 Gratt. 624.

Abridgment of Privilege—Indemnity against Prosecution.—This constitutional privilege of silence can not be taken away by statute, unless absolute indemnity is provided, and nothing short of complete amnesty to the witness, an absolute wiping out of the offenses as to him so that he can no longer be prosecuted therefor, will furnish that indemnity. But if he is thus fully protected by statute, he may be compelled to answer, though his testimony may show that he has committed a crime. The indemnity, however, must be positively guaranteed to him by statute, and an offer of indemnity by the court or prosecuting attorney is not sufficient. Kendrick *v.* Com., 78 Va. 490; Temple *v.* Com., 75 Va. 892; Cullen *v.* Com., 24 Gratt. 624; Murphy *v.* Com., 23 Gratt. 960.

"The privilege accorded to every citizen to refuse to answer a question which may tend to criminate himself, is one guaranteed by the constitution. It is a right of which neither legislatures nor courts can deprive him." Temple *v.* Com., 75 Va. 892.

"No implied suggestion by the court nor any implied or positive promise by the commonwealth's attorney could operate as an indemnity to the witness that he would not be further prosecuted. He had a right to stand upon his constitutional privilege, and not to trust to the chances of a further prosecution. The court, of course, could offer him no such indemnity. Nor could the commonwealth's attorney, for he might die, or be removed, or resign, and his successor might see fit to institute a prosecution against him. Or whether he did or not, a grand jury, without the advice or consent of the commonwealth's attorney, might institute such prosecution." Temple *v.* Com., 75 Va. 892.

Discretion as to What Is Incriminating.—"Wherever a party on oath declares that the answer to the question

propounded to him will criminate himself, the court must accept that answer as true, and as making a prima facie case in which the witness must be excused, unless there is something in the circumstances of the particular case which makes it appear either that the witness contumaciously refuses to answer, or where it appears that from all the circumstances he is clearly mistaken as to any possibility of his future prosecution. The witness ought not in any case be compelled to answer after declaring on oath that such answer may criminate himself, especially after he has taken the advice of counsel, unless it clearly appears to the court that he is mistaken." Temple *v.* Com., 75 Va. 892.

"In the famous Burr trial Chief Justice Marshall said: 'It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact, which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say, on oath, that he can not answer without accusing himself, he can not be compelled to answer." Temple *v.* Com., 75 Va. 892.

Acts Not Amounting to a Waiver of Privilege.—The fact that the witness has testified before the coroner, and stated the facts, does not deprive him of his privilege; and that having been done without being advised of his privilege, it is not a waiver of it by him. Cullen *v.* Com., 24 Gratt. 624.

The fact that the witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not deprive him of his privilege to decline to testify on the trial of the party indicted. Temple *v.* Com., 75 Va. 892. See also, Cullen *v.* Com., 24 Gratt. 624; Brown *v.* Epps, 91 Va. 726, 21 S. E. 119.

Cross-Examination as to Motives and Intentions.—A prisoner, when examined in his own behalf, may be asked, on cross-examination, as to his own motives and intentions, when these are material. This is especially so when he neither claims his exemption nor suggests that his answer would tend to criminate him. Litton *v.* Com., 101 Va. 833, 44 S. E. 923. See also, Jackson *v.* Com., 96 Va. 107, 30 S. E. 452.

Statements by Prosecuting Witness.—On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defense. The answer to the question may tend to criminate himself, and the testimony is inadmissible. Murphy *v.* Com., 23 Gratt. 960.

Prisoner's Writing Name Forged to Check.—Where prisoner was charged with forging a check payable to Gibson, and forging Gibson's name on it, the mayor asked him to write the name "Gibson." Prisoner reluctantly, but without threat or promise, wrote and misspelt it with a p instead of a b, just as it was misspelt in the forged writing. This was not compelling him to furnish evidence against himself. Sprouse *v.* Com., 81 Va. 374.

Examination of Prisoner's Garments.—A sheriff, having a prisoner in his jail charged with murder, requests him to deliver his pantaloons to him, not informing him of the purpose for which he desired them. The prisoner, without any protest or objection, delivers him the pantaloons, taking them off for that purpose. The pantaloons are subjected to investigation by experts, to discover the presence or absence of blood spots on the pantaloons. The state, upon the trial, against the prisoner's objection, by leave of the court, introduces the pantaloons, together with the evidence tending to

show that such investigation revealed blood spots on the pantaloons. There is no error in allowing the pantaloons and such evidence to go before the jury. State *v.* Baker, 33 W. Va. 319, 10 S. E. 639.

Personal Search of Prisoner for Incriminating Evidence.—"Those arresting a person are bound to take from his person any articles which may be of use as proof in the trial of the offense." State *v.* Baker, 33 W. Va. 319, 10 S. E. 639, citing Frederick *v.* State, 3 W. Va. 695; State *v.* Douglass, 20 W. Va. 770; State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

"There is such a thing as unreasonable search which the law will not permit, but where a man stands charged with crime and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the state and may be taken from him and used for the purpose. If it were otherwise, the pistol with which a murderer shoots down his victim or the dagger with which he stabs him, inseparably connected with the corpus delicti, and, therefore, competent and legitimate evidence, could not be taken from the pocket of the murdered and used as evidence against him, for the reason that they belong to him and are found upon his person. It is well settled that a person in custody on a criminal charge may be subjected to a personal search and examination against his will in order to discover upon him evidence of his criminality. 55 Am. St. Rep., note 228, citing Rusher *v.* State, 94 Ga. 363; Ex parte Hurn, 92 Ala. 102; Closson *v.* Morrison, 47 N. H. 482." State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

The seizure of instruments or tokens used by the defendant in the perpetration of the crime with which he is charged and with which he stood charged at the time they were taken from his person is not illegal. Such instruments and tokens are admissible in evidence against the defendant and do not come within the rule that no one shall be compelled to furnish evidence against himself in a criminal prosecution. State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

Capacity to Commit Rape.—In Foster *v.* Com., 96 Va. 306, 31 S. E. 503, it is said that it is questionable whether the commonwealth has the right by the compulsory exposure of his person, to obtain evidence of the puberity of a boy under the age of fourteen years and of his capacity to commit the crime of rape. See the titles INFANTS; RAPE.

Extorted Confessions Disclosing Other Incriminating Evidence.—"If a confession be extorted unlawfully from a prisoner, and in it he indicates where a corpse or stolen property, or other thing connected with the crime, may be found, and they are found where he stated, some authorities hold that both the whole confession and the fact that the corpse or articles were found where the prisoner in his confession indicated are admissible; but all agree that it may be proven that the corpse or articles were found, and found at a certain place. Fredrick's Case, 3 W. Va. 695; and opinion in Douglass' Case, 20 W. Va. 770; Whart. Crim. Ev., § 678; 1 Greenl. Ev. § 231." State *v.* Baker, 33 W. Va. 319, 10. S. E. 639. See the title CONFESSIONS, vol. 3, p. 79.

Dueling Acts.—As to acts relating to the testimony of persons aiding and abetting a duel, see the title DUELING.

Unlawful Gaming Acts.—As to acts providing that a witness giving evidence in a prosecution for unlawful gaming shall never be proceeded against for any offense of unlawful gaming committed by him at the time and place indicated in such prosecution, see Temple *v.* Com., 75 Va. 892. See also, title GAMING.

(14) Flight of Accused.

Evidence of an attempt to escape may be considered by the jury along with other facts and circumstances tending to establish the guilt of an accused. The nearer the attempt is to the time of the commission of the offense the more weight it will be entitled to, but the circumstance should be cautiously considered as it may be attributed to a number of other reasons than consciousness of guilt. Anderson *v.* Com., 100 Va. 860, 42 S. E. 865.

The flight of the accused is evidence against him. It is a circumstance for the prosecution. State *v.* Sheppard, 49 W. Va. 582, 602, 39 S. E. 676. See the title CIRCUMSTANTIAL EVIDENCE, vol. 2, p. 817.

Evidence that after the homicide prisoner evaded arrest, and after arrest broke jail and resisted rearrest, is competent. Williams *v.* Com., 85 Va. 607, 8 S. E. 470.

It seems that it is always competent for the state, in criminal cases, to prove that the defendant fled from the place where the crime was committed soon after its commission or its discovery, and to prove conduct or statements of the accused which he would not probably have made if innocent, and which, therefore, have a tendency to give rise to the presumption that he has a guilty connection therewith. Such evidence is somewhat in the nature of admission or confession of the party accused and, therefore, on his trial is relevant evidence. In Dean *v.* Com., 32 Gratt. 912, the accused, when arrested by the party having the warrant of arrest, expressed a desire not to be taken to the house of the man whom he was charged to have murdered. the officer asked him if it would suit him to go to another place nearby; prisoner said it would, and he was taken there and a guard placed over him. While there under guard he made his escape at night, fleeing to the mountains without coat or vest or hat or pants, and leaving beside his garments, twenty dollars in money. Dean *v.* Com., 32 Gratt. 912. See the title DECLARATIONS AND ADMISSIONS.

Attempts to Escape—Possession of Tools for That Purpose.—Evidence that the accused, while in jail upon a criminal charge, had concealed in a crack in his cell a saw for cutting iron, and that one of the bars of the cell window was half cut by the use of some saw such as was discovered in the spot where the prisoner said the same was concealed, is admissible. When asked by the jailer where the saw was, the prisoner said he could not get it for him; that he told the jailer he would get it for him that evening if he could, but that he couldn't get it; but, upon the jailer threatening to take him up stairs and chain him to the floor, the prisoner told him he could not get the saw, but he would show him where it was. The prisoner then got up and pointed out a certain crack, and told the jailer, "There is where the saw is." A plank was raised and the saw was found where he said it was. This evidence, although exceedingly weak, was admissible under the well-established rule of evidence that where a party charged with or in custody for a crime which he is alleged to have committed, attempts to escape, or to evade the threatened prosecution, it becomes one of a series of circumstances from which guilt may be inferred, and the court did not err in allowing this evidence to be given to the jury. Whart. Crim. Ev., § 750. State *v.* Koontz, 31 W. Va. 127, 5 S. E. 328.

Attempt to Bribe Officer to Permit Escape.—The offer of the prisoner to bribe the person who has him in custody, to permit him to escape, and his attempts to escape, may be given in evidence against him; though the offer and the attempts were made when the prisoner had been committed for a different offense from that for which he was tried; both offenses being founded on the same fact. Dean *v.* Com., 4 Gratt. 541.

(15) Character of Accused.

See post, "Evidence as to Character," V, J, 5, c, (2).

(a) Right to Introduce.

aa. By Defendant.

"The prisoner may, if he chooses, introduce evidence of his good character in his defense." Price *v.* Com., 21 Gratt. 846; Parrish *v.* Com., 81 Va. 1; Hey *v.* Com., 32 Gratt. 946; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Madison, 49 Va. 96, 38 S. E. 492; State *v.* Lane, 44 W. Va. 730, 29 S. E. 1020; State *v.* Donohoo, 22 W. Va. 761.

"General character is always in issue in a criminal case; and evidence thereof is always admissible. Roscoe's Crim. Ev. 100; Phillips on Ev. 762." Parrish *v.* Com., 81 Va. 1; Hey *v.* Com., 32 Gratt. 946.

The good character of an accused party in respect of the trait involved in the act imputed to him, where intent is essential to its criminality, is admissible, whether the guilt of the accused be doubtful or not. State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

"The prevalent rule now is that evidence of good character in respect to the trait involved in the act, where criminal intent is essential, is always admissible. Whart. Crim Ev., §§ 57, 60, 66; 1 Greenl. Ev., §§ 14b (16 Ed.); 3 Greenl. Ev., § 25; Lincecum *v.* State, 25 Am. St. R. 727; Hopp *v.* People, 83 Am. Dec. 231." State *v.* Madison, 49 W. Va. 96, 38 S. E. 492. See post, "For What Purposes Admissible," V, J, 5, b, (15), (b).

bb. By Prosecution.

Until the character of the accused is put in issue by him it can not be attacked. State *v.* Sheppard, 49 W. Va. 582, 599, 39 S. E. 676; State *v.* Lane, 44 W. Va. 730, 29 S. E. 1020; State *v.* Donohoo, 22 W. Va. 761.

"Unless the defendant puts his character in issue, the prosecution can not call witnesses to impeach it. (Whar. Cr. Ev., § 64 and cases cited.)" State *v.* Donohoo, 22 W. Va. 761.

It was not error to refuse to instruct the jury, that evidence of good character can not be received in behalf of the prisoner, until his character has been assailed. State *v.* Donohoo, 22 W. Va. 761.

The commonwealth can not introduce evidence of the accused's bad character to help make out the charge against him; and, a fortiori, she can not rely on any inference of his bad character from his failure to introduce evidence to prove his good character. Price *v.* Com., 21 Gratt. 846. See post, "Rebuttal by Prosecution," V, J, 5, b, (15), (d); "For What Purposes Admissible," V, J, 5, b, (15), (b).

Where the accused does not introduce evidence of his good character, the law gives him credit for good character, or, rather, protects him from the imputation of a bad character. "It requires the case to be decided according to the evidence, and without any reference at all to the character of the prisoner. 2 Russell on Crimes, 784-786; 1 Wharton's American Criminal Law, § 637, and cases referred to in the notes; and especially, the People *v.* White, 24 Wend. R. 520, and The Same *v* Bodine, 1 Denio R. 281." Price *v.* Com., 21 Gratt. 846.

"The twenty-sixth assignment is to the action of the court in permitting Mrs. Flora Ayers to testify, in rebuttal, over the objection of the defendant, that Mrs. Sheppard, the prisoner's mother, had told her, on the evening of August the 22d, that the defendant did not like children, and that she had told Allie not to let Lee fondle over him or bother him, Mrs. Sheppard in her cross examination having denied that she had made such a statement. The court erred in admitting this statement, which relates to the character of the defendant. He had not put his good character in this respect in issue. Until he puts his character in issue it can not be attacked. It is true that

there is evidence on the side of the defense that the prisoner's relations with his wife and her child were pleasant and agreeable, but that testimony does not relate to his general character or disposition toward children. The state might have shown, if it could, that his relations with his wife and her child were otherwise, but it could not base upon that testimony, an attack upon his general character, either in the evidence in chief or in rebuttal. 3 Greenleaf on Evidence, §§ 25, 26; 3 Am. and Eng. Ency. Law, 110 and 111; 9 Am. and Eng. Ency. Law, 699. If such evidence had been proper and material, and the witness might have been contradicted upon it, the evidence complained of would still have been improper, for the reason that the mother of the prisoner had not testified to his good character in this respect, but only that his relations with the members of his family were pleasant and agreeable, and that might have been true without regard to his general disposition or character." State *v.* Sheppard, 49 W. Va. 582, 601, 39 S. E. 676.

(b) For What Purposes Admissible.

"Evidence of the good character of the prisoner is always admissible in such cases to disprove guilt, and of his pacific character, to aid the jury in ascertaining the probable grade of the offense." State *v.* Morrison, 49 W. Va. 211, 38 S. E. 481.

It is always admissible for the defendant to put his character in evidence for the purpose of showing that it was unlikely, that he would have perpetrated the act charged upon him. (Wharton's Cr. Ev., § 57.) State *v.* Donohoo, 22 W. Va. 761.

"Upon the trial of a person charged with the crime of murder, evidence of his good character may always be received as tending to disprove his guilt." State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481.

In Wolverton *v.* Com., 75 Va. 909, evidence to show the defendant's character for honesty was admitted to rebut a charge of larceny on which he was being prosecuted. See the title LARCENY.

Upon the question whether the accused bought the goods knowing them to have been stolen, the evidence being circumstantial, evidence of the good character of the accused is competent, and deserves consideration in determining the question of guilt of innocence. Hey *v.* Com., 32 Gratt. 947.

Character for Industry and Veracity—Prosecution for Seduction.—In a prosecution for felonious seduction, evidence of good character for industry and veracity is not relevant to the issue as it throws no light upon the intercourse of a man with women. Flick *v.* Com., 97 Va. 766, 34 S. E. 39. See post, "Evidence as to Character," V, J, 5, c, (2).

(c) Manner of Proving.

Evidence as to the reputation of the accused need not necessarily be confined to his reputation in the vicinity of his residence, but may be given with reference to the localities in which he is in the habit of dealing. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

Inadmissible Conversations as to Character of Accused.—When a prisoner introduces evidence in support of his general good character, and the commonwealth endeavors to impeach it, the witness who impeaches, must not give in evidence, conversations held with others subsequent to the commencement of the prosecution. Carter *v.* Com., 2 Va. Cas. 167.

Witnesses.—One who is well acquainted with those of a community who best know another is competent to give evidence as to his general reputation for honesty; and such evidence is not confined to the immediate vicinity of him whose reputation is the subject of inquiry. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 226. See the title WITNESSES.

Examination of Witnesses as to Character.—See the title WITNESSES.

(d) Rebuttal by Prosecution.

If the accused introduces evidence of his good character, the commonwealth may then introduce countervailing evidence of character. Price *v.* Com., 21 Gratt. 846; State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; State *v.* Lane, 44 W. Va. 730, 29 S. E. 1020; State *v.* Donohoo, 22 W. Va. 761. See ante, "By Prosecution," V, J, 5, b, (15), (a), bb; "Rebuttal by Prosecution," V, J, 5, b, (15), (d).

(16) Statements on Legal Examinations.

(a) Statutory Rules.

Rule in Virginia.—In a criminal prosecution, other than for perjury, or in an action on a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, unless such statement was made when examined as a witness in his own behalf. (1877-78, p. 315.) Va. Code, 1904, § 3901. Section 22, ch. 195, Code, 1873, contained the same provision except the clause, "unless such statement was made when examined as a witness in his own behalf," does not occur therein. The section as found in the Code of 1873 was construed and applied in Kirby *v.* Com., 77 Va. 681, 46 Am. Rep. 747.

Rule in West Virginia.—"Section 20, ch. 152 (of the Code) * * * reads as follows: 'In a criminal prosecution, other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon legal examination.'" State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527. See the title PERJURY.

(b) Statements on Preliminary Examinations.

Statements by the Accused.—No statement by one accused of crime, while a witness testifying on his own behalf before a justice, on his preliminary examination, can be used against him on his trial. W. Va. Code, ch. 152, § 20; State *v.* Hall, 31 W. Va. 505, 7 S. E. 422; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

A statement made by a person accused of crime upon the occasion of the preliminary examination before a justice, when he was not sworn or examined as a witness, is not inadmissible by reason of § 20, ch. 152, W. Va. Code, 1891. State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

"It is also assigned as error that the court permitted the prosecuting attorney to prove the statement made by the prisoner when he was before the justice on his preliminary examination. This was error. Code, ch. 152, § 20, provides that 'in a criminal prosecution other than for perjury, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.' The proving of such statement made against the prisoner of what he said while a witness on his preliminary examination was against the provisions of the statute." State *v.* Hall, 31 W. Va. 505, 7 S. E. 423.

Of Witnesses Other than the Accused.—Virginia Code, 1873, ch. 195, § 22, provides that "in a criminal prosecution, other than for perjury, or an action in a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination." Therefore, evidence that the statements of witnesses for the accused conflict with the testimony of the accused as delivered on his examination as a witness at a former trial, is inadmissible. Kirby *v.* Com., 77 Va. 681.

If the prosecutor for the commonwealth, on the examination of the prisoner in the examining court, give in evidence the confession of the prisoner,

but on the trial before the superior court, he does not give that confession in evidence, it is not competent for the prisoner to prove what the commonwealth had proved in the other court, touching the said confession. Mendum *v.* Com., 6 Rand. 704. See the titles CONFESSIONS, vol. 3, p. 79; DECLARATIONS AND ADMISSIONS.

If the commonwealth introduce a witness on the trial, who gives his evidence, it is not competent for the prisoner to prove what another witness of the commonwealth swore to in the examining court, that other witness not being a witness in this case, nor summoned, though living in the adjoining county. Mendum *v.* Com., 6 Rand. 704. See the title HEARSAY EVIDENCE.

(c) Statement at Coroner's Inquest.

No statement made by one accused of murder, while a witness testifying at the coroner's inquest, can be used against him on his trial; but anything said by him before such examination as a witness is competent, if relevant. State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380; State *v.* Cross, 44 W. Va. 315, 29 N. E. 527.

c. Weight and Sufficiency.

(1) Proof of Guilt.

See ante, "In General," V, J, 5, a, (1); "General Rule," V, J, 5, a, (2), (a).

See the title REASONABLE DOUBT.

Proof beyond Reasonable Doubt.—The legal presumption of innocence can be overcome only by full proof, such as will exclude all reasonable doubt of the guilt of the accused. McCue *v.* Com., 103 Va. 870, 49 S. E. 623; Jones *v.* Com., 103 Va. 1012, 49 S. E. 663; Goldman *v.* Com., 100 Va. 865, 42 S. E. 923; Anderson *v.* Com., 83 Va. 326, 2 S. E. 281; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; Davis *v.* Com., 99 Va. 838, 38 S. E. 191; Horton *v.* Com., 99 Va. 848, 38 S. E. 184; Davis *v.* Com., 99 Va. 868, 39 S. E. 585; Wadley *v.* Com., 98 Va. 803, 35 S. E. 452; Hairston *v.* Com., 97 Va. 754, 32 S. E. 797; Bundick *v.* Com., 97 Va. 783, 34 S. E. 454; Bundick *v.* Com., 97 Va. 787, 34 S. E. 455; Taliaferro *v.* Com., 77 Va. 411; McBride *v.* Com., 95 Va. 818, 30 S. E. 454; Burch *v.* Com., 1 Va. Dec. 861; Shipp *v.* Com., 86 Va. 746, 10 S. E. 1065; Prather *v.* Com., 85 Va. 122, 7 S. E. 178; Vaughan *v.* Com., 85 Va. 671, 8 S. E. 584; Pruner *v.* Com., 82 Va. 115; Hall *v.* Com., 89 Va. 171, 15 S. E. 517; Tucker *v.* Com., 88 Va. 20, 13 S. E. 298; Thompson *v.* Com., 88 Va. 45, 13 S. E. 304; Porterfield *v.* Com., 91 Va. 801, 22 S. E. 352; Tilley *v.* Com., 90 Va. 99, 17 S. E. 895; Taylor *v.* Com., 90 Va. 109, 17 S. E. 812; Barker *v.* Com., 90 Va. 820, 20 S. E. 776; Doss *v.* Com., 1 Gratt. 557; Dean *v.* Com., 32 Gratt. 912; Pryor *v.* Com., 27 Gratt. 1009; State *v.* Alderton, 50 W. Va. 102, 40 S. E. 350; State *v.* Davis, 50 W. Va. 100, 40 S. E. 331; State *v.* Roberts, 50 W. Va. 422, 40 S. E. 484; State *v.* Sheppard, 49 W. Va. 582, 607, 39 S. E. 676; State *v.* Manns, 48 W. Va. 480, 37 S. E. 613; State *v.* Staley, 45 W. Va. 792, 32 S. E. 198; State *v.* Cross, 42 W. Va. 253, 24 S. E. 996; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; State *v.* Ralphsnyder, 34 W. Va. 352, 12 S. E. 721; State *v.* Flanagan, 26 W. Va. 116; State *v.* Betsall, 11 W. Va. 703; State *v.* Abbott, 8 W. Va. 741.

If, after having heard all of the evidence in the case, the jury have a reasonable doubt of the guilt of the accused upon the whole case, or as to any fact essential to prove the charge made against him in the indictment, it is their duty to give the prisoner the benefit of the doubt, and find him not guilty. Longley *v.* Com., 99 Va. 807, 37 S. E. 339; McCue *v.* Com., 103 Va. 914, 49 S. E. 623.

To warrant the conviction of the prisoner every fact necessary to establish his guilt must be proved beyond a reasonable doubt. Longley *v.* Com., 99 Va. 807, 37 N. E. 339; Goldman *v.* Com,. 100 Va. 865, 42 S. E. 923.

Guilt Must Be Proved, Not Inferred.—The guilt of a person accused of crime is not to be inferred because the facts are consistent with his guilt. They must be inconsistent with his innocence. In the case at bar the evidence establishes a mere suspicion of guilt. Brown *v.* Com., 97 Va. 791, 34 S. E. 882; Hairston *v.* Com., 97 Va. 754, 32 S. E. 797; Bundick *v.* Com., 97 Va. 783, 34 S. E. 454; Bundick *v.* Com., 97 Va. 787, 34 S. E. 455; State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665.

Before the jury can convict they must be satisfied, not only that the circumstances are consistent with the prisoner's having committed the crime charged, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that he is guilty. "To doubt," it has been said, "is to acquit." Tucker *v.* Com., 88 Va. 20, 13 S. E. 298.

"It is not sufficient, therefore, that the evidence creates a suspicion of guilt. The accused is entitled to an acquittal, unless the fact of guilt is proven to the actual conclusion of every reasonable hypothesis of his innocence. Prather's Case, 85 Va. 125, 126, 7 S. E. 178; Taliaferro's Case, 77 Va. 411; and Pryor's Case, 27 Gratt. 1009." Bundick *v.* Com., 97 Va. 783, 34 S. E. 454; Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

"In Johnson's Case, 29 Gratt. 796, Judge Moncure, after laying down the rule, observed further that 'where the evidence leaves it indifferent which of several hypotheses is true or establishes only some finite probability in favor of one hypothesis, such evidence can not amount to proof, however great the probability may be.' This proposition, he said, was literally taken from 1 Starkie on Evidence 572, and correctly expounds the law. See also, Grayson's Case, 6 Gratt. 712; 7 Gratt. 613; Smith's Case, 21 Gratt. 809; Dean's Case, 32 Gratt. 912; Taliaferro's Case, 77 Va. 411; Pruner *v.* Com., 82 Va. 115." Anderson *v.* Com., 83 Va. 326, 2 S. E. 281.

The guilt of a party is not to be inferred because the facts proved are consistent with his guilt, but they must be inconsistent with his innocence. Johnson's Case, 29 Gratt. 796; McBride's Case, 95 Va. 826, 30 S. E. 454; Brown's Case, 97 Va. 791, 34 S. E. 882; Davis *v.* Com., 99 Va. 838, 38 S. E. 191.

"Where the evidence establishes only some finite probability in favor of the hypothesis of guilt, such evidence cannot amount to proof, however great the probability may be. See also, Jones *v.* Com., 17 Gratt. 563; Pryor *v.* Com., 27 Gratt. 1009; Taliaferro *v.* Com., 77 Va. 411." Prather *v.* Com., 85 Va. 127, 7 S. E. 178.

A conviction of felony should be set aside when the evidence makes a case only of suspicion or probability of guilt. Burch *v.* Com., 1 Va. Dec. 861.

Mere Preponderance of Evidence Insufficient.—"A distinction is to be noted between civil and criminal cases, in respect to the degree or quantity of evidence necessary to justify the jury in finding their verdict for the government. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor the evidence preponderates, although it be not free from reasonable doubt." Criminal cases are not to be decided in accordance with the weight or mere preponderance of evidence. "'In criminal trials the party accused is entitled to the presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor. It is, therefore, a rule of criminal law that the guilt of the accused must be fully proved.' 3 Greenleaf's Evidence, § 29." Jones *v.* Com., 79 Va. 213. See also, opinion of Keith, J., in Goldman *v.* Com., 100 Va. 865, 42 S. E. 923.

"'Neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose unless it generate full belief of the fact to the exclusion of any reasonable doubt.' 1 Stark. Ev. 478; 3

Greenl. Ev., § 29." State *v.* Flanagan, 26 W. Va. 117.

In a criminal prosecution the mere preponderance of evidence will not warrant the jury in finding the defendant guilty. Before the jury can convict the defendants, they must be satisfied of their guilt beyond all reasonable doubt, and unless so satisfied, the jury should find the defendants not guilty. In criminal cases even when the evidence is so strong that it demonstrates the probability of the guilt of the parties accused, still if it fails to establish beyond reasonable doubt the guilt of the defendants or one or more of them in manner and form as charged in the indictment, then it is the duty of the jury to acquit the defendant or defendants as to whose guilt they entertain such reasonable doubt. State *v.* Johnson, 49 W. Va. 684, 39 S. E. 665.

Judicial Certainty as to Guilt.—The jury can found their belief upon nothing but the evidence. "'For the purposes of public justice, it is essential to maintain with rigor the distinction between judicial and moral truth. I may have, for instance, as a juror, a moral conviction of the guilt of the defendant on trial. He may have confessed his guilt to me; or I may have learned from persons, not called as witnesses, facts inconsistent with his innocence. This, however, is not to be permitted to have the slightest effect on my judicial reasoning; for, to punish even a guilty man without judicial certainty of his guilt would be recognizing a principle fatal to public justice.' Whar. Cr. Ev., § 4." State *v.* Sheppard, 49 W. Va. 582, 607, 39 S. E. 676.

More Evidence Required in Some Crimes than Others.—As to cases requiring the testimony of two witnesses or of one witness and corroborating circumstances in order to convict, see, for instance, the titles PERJURY; SEDUCTION; TREASON. See also, the titles EVIDENCE; WITNESSES.

Confession.—As to the weight and sufficiency of confession as evidence, see the title CONFESSIONS, vol. 3, p. 79.

(2) Evidence as to Character.

See ante, "Character of Accused," V, J, 5, b, (15).

It is the duty of the jury to take into consideration the good character of the defendant in a criminal prosecution as developed from the evidence in the case, and if from such evidence, as well as from all other evidence, facts, and circumstances in the case, they have a reasonable doubt as to the guilt of the defendant, they must find him not guilty. State *v.* Staley, 45 W. Va. 792, 32 S. E. 198. See the title REASONABLE DOUBT.

The character of a prisoner, when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of the prisoner is a matter for the determination of the jury in connection with other facts proven in the case. Crump *v.* Com., 98 Va. 833, 23 S. E. 760. See also, Briggs *v.* Com., 82 Va. 554.

The character of the accused, good or bad, when proved, may always be received and weighed by the jury in favor of or against him as the case may be. Briggs *v.* Com., 82 Va. 554. But see Crump *v.* Com., 98 Va. 833, 23 S. E. 760.

Upon a prosecution for felonious seduction the jury are not entitled to acquit the accused if they believe the evidence as to his good character for industry and veracity is sufficient to raise a reasonable doubt as to his guilt. Flick *v.* Com., 97 Va. 766, 34 S. E. 39.

In a prosecution for felonious seduction evidence of good character for industry and veracity, will not support an instruction that the jury have the right, in their discretion, to acquit the prisoner if they believe the evidence of his good character is sufficient to raise a reasonable doubt as to his guilt. Flick *v.* Com., 97 Va. 766, 34 S. E. 39.

See ante, "For What Purposes Admissible," V, J, 5, b, (15), (b).

Instructions.—In a criminal prosecution it is not error to refuse to instruct the jury "that the character of the accused, if good or bad, when proved, may always be received and weighed by them in favor of or against him, as the case may be," and, in lieu thereof, to instruct "that the character of a prisoner, when proven, whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of the prisoner is a matter for the determination of the jury in connection with other facts proven in the case." Crump *v.* Com., 98 Va. 833, 23 S. E. 760.

The court said: "We do not mean to say the instructions as asked for was not correct. It was in the words of the instructions as asked in Brigg's case, 82 Va. 554, and approved by the court; but the amended instruction given by the court in this case wholly covered it, and was so expressed as to prevent the jury from being misled, which was possible in the form in which it was asked."

It is not error to refuse to instruct the jury that "if accused be proved of good character as a man of peace, the law says that such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character;" and in lieu thereof, to instruct them that "the character of the accused, good or bad, when proved, may always be received and weighed by them in favor of or against him, as the case may be." Briggs *v.* Com., 82 Va. 554.

Such an instruction is misleading, as a man may have been of previous good character and yet be guilty of crime. Briggs *v.* Com., 82 Va. 554.

6. Witnesses.

a. Privilege.

As to the constitutional privilege that a witness shall not be compelled to answer incriminating questions, see the title CONSTITUTIONAL LAW, vol. 3, p. 140.

b. Competency, Examination, Impeachment, etc.

As to the competency of witnesses, putting them under rule, examination, impeachment and corroboration, see the title WITNESSES.

7. Order of Argument.

See the titles ARGUMENTS OF COUNSEL, vol. 1, p. 713; OPEN AND CLOSE.

8. Nolle Prosequi.

Generally, as to nolle prosequi, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

As to a nolle prosequi as a ground for a plea of former jeopardy, see the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 187.

9. Retraxit.

See also, the title RETRAXIT.

A retraxit is believed to be unknown to the criminal law, at least as far as it regards a prosecution at the suit of the commonwealth. It is used in England in cases of appeal, which is a prosecution carried on at the suit of an individual. As well observed at the bar, this power of a retraxit is a dispensing power, and the law has not entrusted it to a prosecuting attorney. Wortham *v.* Com., 5 Rand. 669.

A dismission of a presentment is not a retraxit. Wortham *v.* Com., 5 Rand. 669.

10. Instructions.

As to the charge of the court, requests therefor, form and requests, see the title INSTRUCTIONS.

11. Verdict.

See the title VERDICT.

12. Sentence.

As to the imposition of sentences, manner, requisites, etc., see the title SENTENCE AND PUNISHMENT.

13. Mistrial.

See the title JURY.

14. New Trials.

See the title NEW TRIALS.

15. Punishment.

See the title SENTENCE AND PUNISHMENT.

16. Cumulative Sentence for Habitual Criminals.

As to the imposition of additional punishment for second offenses, see the title SENTENCE AND PUNISHMENT.

Criminal Libel.

See the title LIBEL AND SLANDER.

Criminal Procedure.

See the title CRIMINAL LAW, ante, p. 1, and references given.

Crimination.

As to privilege of accused to refuse to criminate himself, see the title CONSTITUTIONAL LAW, vol. 3, p. 198. As to privilege of witness to refuse to criminate himself, see the title WITNESSES.

Criticism.

See the titles CONTEMPT, vol. 3, p. 236; LIBEL AND SLANDER.

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CROSS REFERENCES.

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I. Growing Crops Considered Realty.

A growing crop of wheat is realty, and under the statute of frauds can be sold only by a contract in writing. Kerr *v.* Hill, 27 W. Va. 577.

Hubbs *v.* Swabacker, 51 W. Va. 441, 41 S. E. 164, quoting Baunstoss *v.* Stahler, 33 Pa. St. 251, 75 Am. Dec. 592, says: "Growing crops of grain and vegetables are goods and chattels and not real estate and may be conveyed by verbal contract or taken and sold under execution. This is the common law." See also, the title FRAUDS, STATUTE OF.

II. Rights as to Crops.

A. GROWING CROPS GO WITH LAND ON SALE OR DEVISE.

1. General Rule.

By the common law the growing crop is a part of the freehold and goes with the land on sale or devise of the latter. There are exceptions, however, in favor of husbandry and relate to emblements; but the exceptions cease with the reason and policy on which they are founded, and the general rule is unquestionable. Engle *v.* Engle, 3 W. Va. 257; Hilleary *v.* Thompson, 11 W. Va. 117.

B. UNDER SALE OF LAND.

1. All Crops, Not Severed or Not Reserved, Pass to Purchaser.

There can be no doubt, that if one sell his land without any reserve, all crops, not severed, will pass to the purchaser. They are a part of the subject, and enter into the price. Crews *v.* Pendleton, 1 Leigh 305; Kerr *v.* Hill, 27 W. Va. 605.

Judicial Sale.—Where a trustee under an ordinary deed of trust to secure a debt sells land at a public sale, a crop of wheat growing upon it sowed by the owner of the land passes to the purchaser of the land, unless it was reserved. Kerr *v.* Hill, 27 W. Va. 576.

An agreement was entered into according to the following terms: "I convey you my land, slaves, etc., as a security for the debts I owe you; I bind myself to pay you those debts by a given time, and if I fail, you may proceed, and get a decree for a sale of the subject; meantime, I remain in possession, use the slaves, and take the profits of the land; but, whenever you get a decree, you may immediately sell everything." It was held, under this agreement, that if the mortgagor goes on and makes preparation for a crop, he does it with full knowledge that the land with the crop is subject to be sold, if the decree can be obtained before he severs it. Nor does he lose anything by this; for the crop on the land enhances the price; if by this increase, the debt be overpaid, he gets the overplus; if not, still the full value of his labor goes (as he had agreed it should go) to the payment of the debts secured by the mortgage. Crews *v.* Pendleton, 1 Leigh 305.

The chancellor, in May 1822, decrees foreclosure, of a mortgage upon land, slaves, and stock, and directs his marshal, unless the debt be paid within six months, to sell the subject to satisfy the debt; the mortgagor is al-

lowed to retain possession and sow crop in spring of 1823; the marshal sells the subject in June, 1823, and mortgagee purchases it, and completes the crop; afterwards, and before marshal's sale was reported and confirmed, creditors of the mortgagor levied a fi. fa. on the crop of 1823, then gathered. It was held, that the vendee at the marshal's sale was entitled to the then growing crop. The chancellor ought in such case to protect the vendee's property in the crop by enjoining the mortgagor's creditors from proceeding under the execution. Crews *v.* Pendleton, 1 Leigh 297. See the title MORTGAGES.

A purchaser at a trustee's sale who gets the whole amount of property that he understood he was bidding for, can not sustain a valid legal claim to a portion of the property covered by the trust deed, which was a crop, and which he understood at the time of the sale, was excluded therefrom. Hubbs *v.* Swabacker, 51 W. Va. 439, 41 S. E. 164.

Error to Confirm Sale on Condition That Purchaser Surrender Claim to Crop.—If the confirmation of a sale of land on which was a growing crop was made conditional upon the purchaser surrendering any claim to the landlord's share of the growing crop, and the sale had been in all other respects fair, this would be an error, of which just complaint could have been made by the purchaser. It would not be an error to the prejudice of the debtor, as it would make the land bring more money. Hilleary *v.* Thompson, 11 W. Va. 119.

C. UNDER DEVISE OF LAND.

1. When Crops Will Pass.

By a devise of a tract of land in fee simple, together with all the crops thereon, whether gathered or growing at the time of the testator's death, not only the crops made the year the testator died, but those of the preceding year remaining on the land, and those brought thither, from other plantations, to be stored, will pass. Carnagy *v.* Woodcock, 2 Munf. 234. See the title WILLS.

Where a devise of land includes the personal property thereon, crops growing on it at the time of the testator's death pass with the land to the devisee. Dunford *v.* Jackson, 2 Va. Dec. 196. See the title WILLS.

By a devise of the residue, the emblements, growing on lands specifically devised to another, will pass. Fleming *v.* Bolling, 3 Call 75, distinguishing from Shelton *v.* Shelton, 1 Wash. 53. See the title WILLS.

2. Death of Testator at Certain Time Prevents Passing of Crops.

The crops growing at the time of testator's death (he having died in September), do not pass under the word appurtenances to the devisees of the respective plantations, but go into the surplus. Shelton *v.* Shelton, 1 Wash. 53. See the title WILLS.

By the common law of England, emblements upon lands devised, go with the lands, but our act of assembly, passed in 1748, ch. 3, § 30, has controlled that common law, by declaring that when a testator dies, at the season of the year in which the present testator died (August), the growing crops shall not pass. Fleming *v.* Bolling, 3 Call 82.

3. Rights of Widow under Devise.

Entitled to One-Third Severed Crop under Dower.—E. devised his lands, subject to the dower of his wife, and prior to his death a crop of wheat had been sown thereon, which was harvested by the executor before a decree was had assigning dower. It was held, that as the widow was entitled at the death of the husband to be endowed of one-third of the land with the crop growing on it, so if the crop be severed before the assignment of dower she is entitled to be endowered of the land in like manner, and of one-third of the crop thus severed, for by the severance the estate had been diminished in value to the amount of the

crop. Engle *v.* Engle, 3 W. Va. 246. See the titles DOWER; WILLS.

Entitled to Growing Crops under Life Estate.—A husband devised his farm to his wife for life, the remainder to his sons in fee, together with all "personal property" thereon at his death. It was held, that crops growing on the land at the testator's death, together with all other personal property thereon passed to the wife for life with remainder to the sons, while those on other land not devised, together with all moneys, bonds, and choses in action, passed to the executors. Dunford *v.* Jackson, 2 Va. Dec. 196. See the title WILLS.

D. UNDER RELATIONSHIP OF LANDLORD AND TENANT.

1. In General.

At the common law where land is leased for a certain number of years, and the period of its termination is fixed and certain, and the lease is silent as to who shall be entitled to the growing crops on the land at the end of the term, the offgoing tenant is not entitled to the waygoing crop; but where the lease recognizes the right to sow in the last year of the term, and the tenant is restricted to the cultivation of certain portions of the land and pays an equal annual rental sum for its use, he has a right to reap the waygoing crop, where the lease is silent as to who is entitled thereto. Kelley *v.* Todd, 1 W. Va. 197, citing Mason *v.* Moyers, 2 Rob. 606, distinguishing Harris *v.* Carson, 7 Leigh 632. See the title LANDLORD AND TENANT.

2. Rights of Tenants.

Entitled to Deduction in Rent When Threats of Purchasers Prevented Sowing.—While a suit was pending by creditors of a deceased person to subject land to the payment of their debts, it was rented by the owners for three years with the agreement that if it should be sold during the term then the lease should terminate on April 1, following the sale. In June of the last year of the term it was sold, and in consequence of the threats of the purchasers, one of whom was one of the lessors, to reap any crops that might be sowed, the lessee did not sow any fall crops. It was held, that he was entitled to a deduction from his rent on that account. Mason *v.* Moyers, 2 Rob. 606. See the title LANDLORD AND TENANT.

When One Tenant May Recover of Another.—A lease for a term of years stipulated that the land should be sown with wheat and timothy the last autumn of the term, which terminated in the spring. At the end of the term the lessee vacated, and they were leased again to another lessee, who harvested the wheat. It was held, that the first lessee was entitled to recover of the second lessee the value of the wheat. Kelley *v.* Todd, 1 W. Va. 197. See the title LANDLORD AND TENANT.

The plaintiff in this suit lived upon land belonging to his father and by the consent of whom he let the land by written agreement under seal to A for one year with the privilege of keeping it for another year. The further stipulations of the agreement were that the plaintiff should find the tools for working the land, the seed sown upon it, and the feed for the horse worked upon it, while A should board himself and family at his own expense, do all the work in the crop, and when the crop was gathered should give to plaintiff one-half of all that was made on the farm; A, after entry, assigned his lease to a second party who bound himself under seal to execute A's part. This second party transferred the lease to still a third party who made a contract with the plaintiff to occupy the premises under like provisions entered into by plaintiff and A. This last party accordingly raised a crop. Subsequent to this entry the father of plaintiff conveyed the land in fee to the last mentioned occupant who in turn conveyed

it to the defendant with notice of the lease. Defendant gathered the crop and appropriated some to his use. Whilst the crop was being gathered plaintiff demanded his share but defendant refused. This was held, not to be a lease, rendering rent in kind, as the reservation of the one-half crop was not incident to the reversion, and consequently gave no right of distress, but the contract constitutes plaintiff and defendant joint tenants and as such the plaintiff may recover his one-half share of the crop. Lowe *v.* Miller, 3 Gratt. 206, 207, 212, 213.

What Emblements Pass to Executors of Tenant for Life.—The common law gives to the executors of the tenant for life, such emblements, and such only, as were seeded in his lifetime. As to such crops as are put in after his death, the executors (in a case where the common-law rule governs), should be charged a reasonable rent for the land, to be paid to the persons entitled in reversion or remainder, according to their several rights. Thompson *v.* Thompson, 6 Munf. 514.

3. When Cropper Is Not Tenant.

Where a land owner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant, but a mere employee, and the ownership of the entire crop is in the land owner. Parrish *v.* Com., 81 Va. 1.

4. Landlord May Sue for Damage to Crop.

The owner of land, who has leased it to a tenant for a share of the crop, may sue for a tort of a wrongdoer damaging the growing crop. Neal *v.* Ohio River Co., 47 W. Va. 216, 34 S. E. 914.

E. UNDER RELATIONSHIP OF GUARDIAN AND WARD.

1. Right of Husband of Ward.

After marriage of a female ward, the guardian continues in possession of her land as agent, and reaps the crop of wheat; the ward then dies, and the guardian sells and delivers the wheat as the husband's property, and takes receipts for it in the name of the husband, who, with the guardian's consent agrees on the price with the purchaser; it was held, that the wheat was the property of the husband, and the purchaser is liable to him, and not to the guardian, for the price. Guerrant *v.* Hocker, 7 Leigh 366. See the title GUARDIAN AND WARD.

F. UNDER RELATIONSHIP OF TRUST AND TRUSTEE.

1. Where Injunction Lies.

If a trustee claims a growing crop of wheat, which in his absence another trustee takes possession of and commences cutting, the cestui que trust in the first deed may file a bill that the second trustee be enjoined from selling the wheat, which he has cut, and for the appointment of a receiver and other appropriate relief; for in such a case a court of law could furnish no adequate relief for the wrong complained of, and a court of equity had jurisdiction. Kerr *v.* Hill, 27 W. Va. 576.

III. Code Provisions as to Growing Crops Not Severed.

A. NO DISTRESS OR LEVY—INDIAN CORN EXCEPTED.

By W. Va. Code, 1899, ch. 41, § 18, it is provided that no growing crop, not severed, shall be liable to distress or levy, except Indian corn, which may be taken at any time after October 15, in any year. Hubbs *v.* Swabacker, 51 W. Va. 441, 41 S. E. 164. See also, Va. Code, 1904, tit. 16, ch. 39, § 904.

IV. Offenses Created by Illegal Taking of Crop.

If a cropper forcibly, or against the consent of a landowner, take the crop from the possession of the latter, the taking is larceny, robbery, or other offense, according to the circumstances of the case. Parrish *v.* Com., 81 Va. 1.

V. Evidence.

A. ADMISSIBILITY IN GENERAL.

A crop of grass growing in a meadow, and partly matured, affords a basis for measure of damages for the wrongful destruction of the crop by fire as for the value of the crop matured into hay. Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489. See the title FIRES.

And in an action for the destruction of a crop of grass by fire, evidence of the value of the usual crop of hay is admissible, and not to be rejected as proving profits mere conjectural or speculative. Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489. See the title FIRES.

B. PAROL EVIDENCE.

1. When Admissible.

To Explain Intention of Parties Conveying Crop.—There was no error in permitting parol evidence of the intention of the parties to a deed that the purchaser should have the growing crop, that being in harmony and not inconsistent with the deed. Robinson *v.* Pitzer, 3 W. Va. 370. See the title PAROL EVIDENCE.

To Prove Understanding as to Condition of Sale.—Where there is an understanding before a public sale of land that the purchaser does not get the growing crop of wheat, this understanding need not be evidenced by any writing, but may be proven by parol evidence. Kerr *v.* Hill, 27 W. Va. 577. See the title PAROL EVIDENCE.

2. When Not.

Parol Evidence of Usage as to Waygoing Crops Can Not Explain Written Contract.—Parol evidence of a usage for the offgoing tenant to have the waygoing crop, is not admissible to explain a written contract of lease for a fixed and certain period. Harris *v.* Carson, 7 Leigh 632. See the title PAROL EVIDENCE.

VII. What Deeds of Trust Conveying Crops Not Fraudulent.

A deed of trust which among other things conveys growing crops of wheat, rye, and oats, and which is not to be enforced for two years from its date, is not necessarily fraudulent as to creditors. Cochran *v.* Paris, 11 Gratt. 348. See the titles DEEDS OF TRUST; FRAUDULENT AND VOLUNTARY CONVEYANCES.

A deed of trust given in 1870 to secure a bona fide debt of $10,000, evidenced by four notes payable in one, two, three, and four years and conveying a tract of land with the crops then upon or thereafter grown upon the land until the said notes are fully paid, and other property, is not fraudulent per se on its face. Brockenbrough *v.* Brockenbrough, 31 Gratt. 580. See the titles DEEDS OF TRUST; FRAUDULENT AND VOLUNTARY CONVEYANCES.

A deed of trust to secure bona fide creditors, conveying land, slaves, and crops cut and growing, not to be enforced for two years, reserving the profits in the meantime to the grantor, and directing the surplus proceeds of sale, after payment of the debts secured, to be paid to the grantor, is not fraudulent per se, though made without the knowledge of creditors. Dance *v.* Seaman, 11 Gratt. 778. See the titles DEEDS OF TRUST; FRAUDULENT AND VOLUNTARY CONVEYANCES.

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CROSS REFERENCES.

See the titles ACTIONS, vol. 1, p. 122; ANSWERS, vol. 1, p. 389; SET-OFF, RECOUPMENT AND COUNTERCLAIM. And see references given in body of title.

As to cross bills for divorce, see the title DIVORCE.

I. Definition.

"In Daniel's Chancery Practice, 1st American edition, at pages 1742 and 1743, chapter 31, it is said: 'A cross bill is a bill brought by a defendant against a plaintiff or other parties in a former bill depending, touching the matter in question in that bill.'" West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

"A cross bill is a proceeding to procure a complete determination of a matter in litigation. It is a mode of defense to the original subject of litigation." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416. See post, "In General, IV, A.

"A cross bill, ex vi terminorum, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill." Higginbotham *v.* May, 90 Va. 234, 17 S. E. 941; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

II. Answer as Cross Bill.

See generally, the title ANSWERS, vol. 1, p. 389.

A. IN GENERAL.

1. Independant of Statute in Virginia.

See post, "Object in Allowing," II, C.

An answer containing new matter calling for affirmative relief may be treated as a cross bill. Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609; Adkins *v.*

Edwards, 83 Va. 300, 2 S. E. 435; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595; Wayland *v.* Crank, 79 Va. 602; Cralle *v.* Cralle, 79 Va. 182; Gregg *v.* Sloane, 76 Va. 502; Kendrick *v.* Whitney, 28 Gratt. 646; Rhea *v.* Jordan, 28 Gratt. 678; Tate *v.* Vance, 27 Gratt. 571; Sayers *v.* Wall, 26 Gratt. 354; Mettert *v.* Hagan, 18 Gratt. 231; Taylor *v.* Beale, 4 Gratt. 97; Kyle *v.* Kyle, 1 Gratt. 526. See also, Sands *v.* Lynham, 27 Gratt. 291.

In Cunningham *v.* Hedrick, 23 W. Va. 579, it is said that such is the practice in Virginia where no statute requiring or permitting it exists, and cites Taylor *v.* Beale, 4 Gratt. 93.

2. Under Statute in West Virginia.

Under the 35th section of ch. 125, W. Va. Code, an answer containing such matter as calls for affirmative relief in favor of the party filing it is made the basis of relief between all parties, thus treating it as a cross bill. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199, citing Riggs *v.* Armstrong, 23 W. Va. 760; Skaggs *v.* Mann, 46 W. Va. 209, 33 S. E. 110; Cleavenger *v.* Felton, 46 W. Va. 249, 33 S. E. 117; Livey *v* Winton, 30 W. Va. 562, 4 S. E. 451; Martin *v.* Smith, 25 W. Va. 579; Sturm *v.* Fleming, 22 W. Va. 404; Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 240, citing Gallatin Land, Coal, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747; Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Farmers' Bank *v.* Watson, 39 W. Va. 344, 19 S. E. 413; Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462; McMullen *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237; Morgan *v.* Blatchley, 33 W. Va. 156, 10 S. E. 282; Grobe *v.* Roup, 46 W. Va. 488, 33 S. E. 261; Casto *v.* Greer, 44 W. Va. 332, 30 S. E. 100; Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568; Leonard *v.* Smith, 34 W. Va. 442, 12 S. E. 479; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Radcliff *v.* Corrothers, 33 W. Va. 682, 11 S. E. 228; Clark *v.* Figgins, 31 W. Va. 156, 5 S. E. 643; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483; Enoch *v.* Mining, etc., Co., 23 W. Va. 314; Cunningham *v.* Hedrick, 23 W. Va. 579; McMullen *v.* Eagan, 21 W. Va. 233; Reid *v.* Stuart, 20 W. Va. 382, citing Laidley *v.* Merrifield, 7 Leigh 346; Kyle *v.* Kyle, 1 Gratt. 526; Middleton *v.* Selby, 19 W. Va. 168; Rust *v.* Rust, 17 W. Va. 904; Burlew *v.* Quarrier, 16 W. Va. 108; Hickman *v.* Painter, 11 W. Va. 386; Moore *v.* Wheeler, 10 W. Va. 35; Vanbibber *v.* Beirne, 6 W. Va. 168. See also, Burner *v.* Hevener, 34 W. Va. 774, 12 S. E. 861.

Effect on Right to Prefer Cross Bill.—It seems from the holding in Leonard *v.* Smith, 34 W. Va. 442, 12 S. E. 479, that the right to file a cross bill still exists in this state; that § 35, ch. 125, W. Va. Code, which allows an answer to be treated as a cross bill, does not take away the right of the defendant to file a cross bill if he prefers it.

B. WHEN ALLOWED—GENERAL RULES.

As to when a cross bill is proper, see post, "Object and Necessity," IV.

In McMullen *v.* Eagan, 21 W. Va. 233, it is said that an answer may be treated as a cross bill only when a cross bill could have been properly filed.

Where Relief Not Given on Answer.—An answer will be treated as a cross bill under the statute calling for affirmative relief only where a cross bill must be filed according to the chancery practice to get the relief sought in the answer, and not in cases where it can be given on the answer. Paxton

v. Paxton, 38 W. Va. 616, 18 S. E. 765; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

The answer of the administrator should not be considered in the light of a statutory cross bill, filed under §§ 35, 36, ch. 125, W. Va. Code, since the cross relief sought is only incidental to the main relief prayed for in the bill, and covered also by the general prayer. Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21.

Error—Ordering Answer Filed as Cross Bill.—See Alleman *v.* Knight, 19 W. Va. 201, a case in which it was error in the court below to order an answer of one of the defendants to a bill of injunction to be filed as a cross bill.

C. OBJECT IN ALLOWING.

Not to Change Pleadings in Equity.—An answer alleging new matter constituting a claim to affirmative relief in the suit, within the purview and meaning of § 35, ch. 125, W. Va. Code, was simply intended to be allowed in lieu of a cross bill in the cause as to such matter, and not to make any other change in the practice as to the pleading in courts of equity. Moore *v.* Wheeler, 10 W. Va. 35; Vanbibber *v.* Beirne, 6 W. Va. 168. See also, Pethtel *v* McCullough, 49 W. Va. 520, 39 S. E. 199; Armstrong *v.* Wilson, 19 W. Va. 114; Middleton *v.* Selby, 19 W. Va. 177; Kendrick *v.* Whitney, 28 Gratt. 646; Cunningham *v.* Hedrick, 23 W. Va. 579. See the title EQUITY.

To Avoid Multiplicity of Suits.—Where the transactions between the parties are numerous and cognate, and have not all been embraced in the bill, but are set up in the answer, the latter may be treated as a cross bill and put them in issue, and relief in respect thereto may be granted by the court, so as to avoid multiplicity of suits. Mettert *v.* Hagan, 18 Gratt. 231; Cralle *v.* Cralle, 79 Va. 182; Kendrick *v.* Whitney, 28 Gratt. 646; Kyle *v.* Kyle, 1 Gratt. 526; Gregg *v.* Sloan, 76 Va. 502; Tate *v.* Vance, 27 Gratt. 571; Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609; Wayland *v.* Crank, 79 Va. 602; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435. See generally, the title MULTIPLICITY OF SUITS.

Enabling Court to Do Justice.—An answer has sometimes been treated as a cross bill, in order to enable the court to do complete justice. Mettert *v.* Hagan, 18 Gratt. 231; Sayers *v.* Wall, 26 Gratt. 354; Piedmont, etc., Ins. Co. *v.* Maury, 75 Va. 514; Preston *v.* Heiskell, 32 Gratt. 61; Cralle *v.* Cralle, 79 Va. 182; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435. See also, Tate *v.* Vance, 27 Gratt. 571; Kraker *v.* Shields, 20 Gratt. 397; Kendrick *v.* Whitney, 28 Gratt. 654; Ragland *v.* Broadnax, 29 Gratt. 422; Wayland *v.* Crank, 79 Va. 604; Sturm *v.* Fleming, 22 W. Va. 404; Cunningham *v.* Hedrick, 23 W. Va. 591; Livey *v.* Winton, 30 W. Va. 562, 4 S. E. 456; Leonard *v.* Smith, 34 W. Va. 447, 12 S. E. 481; Douglass *v.* Laird, 37 W. Va. 703, 17 S. E. 194; Paxton *v.* Paxton, 38 W. Va. 624, 18 S. E. 768; Rhea *v.* Jordan, 28 Gratt. 678; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; Scott *v.* Rowland, 82 Va. 497, 4 S. E. 595; Taylor *v.* Beale, 4 Gratt. 93.

D. FORM AND SUFFICIENCY.

In order that an answer containing new matter calling for affirmative relief may be treated as a cross bill, it must be as definite as a cross bill. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287, citing McMullen *v.* Eagan, 21 W. Va. 233; Middleton *v.* Selby, 19 W. Va. 168; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568.

An answer containing new matter calling for affirmative relief ought to be as definite as a cross bill. It must respond to the matter of the bill, and, having done this, it must, apart from that, state the new matter on which affirmative relief is asked with the same particularity and certainty, under the rules of equity pleading, as if a formal cross bill were filed, and must

state a case for equitable relief touching the matter in question in the original bill, not a case foreign to it. It must contain a prayer for the relief sought from the facts stated, as if a cross bill. McMullen *v.* Eagan, 21 W. Va. 233; Middleton *v.* Selby, 19 W. Va. 168; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568; Purdy *v.* Henslee, 97 Ill. 389; McGuire *v.* Circuit Judge, 69 Mich. 593, 37 N. W. 568; Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 240, citing Gallatin Land, Coal, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747; Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413; Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413; Morgan *v.* Blatchley, 33 W. Va. 156, 10 S. E. 282; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237.

Measured by Same Standard.—An answer, taken and treated as a cross bill, must be measured by the same standard of requirement; and if the answer be defective in this respect, though the objection be not taken by demurrer, the court will, at the hearing, dismiss it if it does not state a case proper for relief. Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

In order that an answer may take the place of a cross bill, it must be in and of itself adequate for such relief as a cross bill. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

As to form and sufficiency of a cross bill, see post, "Form and Sufficiency," VI.

E. PARTIES AND PROCESS.

See post, "Parties," VII; "Process," VIII. And see generally, the title PARTIES.

F. EFFECT.

1. In General.

An answer containing new matter calling for affirmative relief, in effect a cross bill, answers all the ends of a cross bill. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287, citing McMullen *v.* Eagan, 21 W. Va. 233; Middleton *v.* Selby, 19 W. Va. 168; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451, citing Mettert *v.* Hagan, 18 Gratt. 231; Sturm *v.* Fleming, 22 W. Va. 404; Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; Tate *v.* Vance, 27 Gratt. 571. See post, "Object and Necessity," IV.

2. As Bar to Cross Bill.

If such an answer be filed, § 35, ch. 125, W. Va. Code, expressly declares that the respondent shall not file a cross bill for the same purpose. Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.

3. To Give Relief between Codefendants.

As to an answer treated as a cross bill being the basis of relief not only as between that defendant and the plaintiff but as between that defendant and other defendants, see post, "Between Codefendants," IV, B, 2, b.

III. Petition or Bill as Cross Bill.

See generally, as to bill in equity, the title EQUITY.

Petition to Defend.—A bill having been filed by the creditors of S. to subject the land to the payment of their debts, without alluding to the deed from S. to his wife, her children presented their petition to the court setting out the deed and their rights under it, and asked that they might defend their rights under it; they were permitted, without objection by the plaintiffs, to file their answers. Held, if it would have been more proper to assert their rights by a cross bill, their petition may be treated as such. Sayers *v.* Wall, 26 Gratt. 354.

Bill to Enjoin Execution on Interlocutory Decree.—An interlocutory decree is made in a cause, which affects the interest of a person not regularly a party. This person then files his bill against the plaintiff in the first suit, stating his case and asking that the execution of the decree may be enjoined. The plaintiff in the first suit files his answer in the second, but the plaintiff in the second suit, is not made a party in the first, nor does he file an answer, but the pleadings in the two suits present the ground of claim and defense on the part of both, and the two causes come on to be heard together, and a decree is made settling the rights of the parties. On appeal to this court, held, that the bill in the second cause will be considered as serving the double purpose of an answer and cross bill in the first, and the court will proceed to consider and decide the cause upon its merits. Kyle *v.* Kyle, 1 Gratt. 526.

Bill to Enjoin Sale of Land—Former Proceedings.—A bill having been filed against an administrator to surcharge and falsify the ex parte settlement of his administration account; and an order of reference being made therein to a commissioner to take, state and settle said account, but said order remains unexecuted, and the suit was not further prosecuted until nearly nine years thereafter, when said administrator filed a bill to enjoin the sale of certain lands, and involved the same issues and connected it with the original suit by direct allegations of the institution, pendency and nonprosecution thereof, and prayed the settlement of said account before a commissioner under order of the court, and the plaintiffs in the original suit having answered as defendants the bill in the injunction suit, and thus presented anew for the consideration of the court, the pretensions of the parties respectively; held, that even had there been no answer by the administrator to the original bill the filing of the injunction bill by him, under the circumstances, might serve the double purpose of an answer and cross bill in the first suit, and justify the court in proceeding to consider and decide the cause upon its merits, and to recommit, or refer the cause to a commissioner, to state fully the administration account, although the former order remain unexecuted. Campbell *v.* White, 14 W. Va. 122; Kyle *v.* Kyle, 1 Gratt. 526.

A bill filed by trustees to enjoin sale of land (which was sworn to) may be treated as an answer by way of defense to an original bill, and at the same time as a cross bill asserting the claim of the complainants to counter relief in the same cause. "For, so dealing with the proceedings, we find a striking precedent in the somewhat analogous case of Kyle *v.* Kyle, 1 Gratt. 526, wherein the court gave to the bill 'the double function of an answer to the original bill, and a cross bill impeaching the title of the plaintiff and the proceedings in the original suit.' See also, Mettert *v.* Hagan, 18 Gratt. 231, 234; Cralle *v.* Meem, 8 Gratt. 496, 531." Gregg *v.* Sloan, 76 Va. 497.

Bill by Purchasers to Set Aside Sale.—Upon a bill by simple contract creditors to marshal assets, it is competent for the court in its discretion, to decree a sale of the real estate in the hands of the heirs, some of whom are infants, for the payment of the debts. But it is premature to decree a sale before adjudicating the claims of the creditors, and so ascertaining the amount of indebtedness chargeable upon the lands of the decedent, and the application of the purchasers, in such a case, to have the sale set aside, should be by petition in the cause. And if they proceed by bill to enjoin the collection of the purchase money, and have the sale set aside, the bill should be treated as a petition in the cause, and be brought to a hearing with it. Cralle *v.* Meem, 8 Gratt. 496.

IV. Object and Necessity.

A. IN GENERAL.

A cross bill is in general to be considered as a defense to the original bill or a proceeding necessary to the determination of some matter already in litigation. Dickinson *v.* Railroad Co., 7 W. Va. 390; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Alleman *v.* Kight, 19 W. Va. 201; Hansford *v.* Coal Co., 22 W. Va. 70; Radcliff *v.* Corrothers, 33 W. Va. 682, 11 S. E. 228; Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96, citing Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416. See ante, "Definition," I.

It is treated as a mere auxiliary suit, or as a dependency upon the original suit. West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; McMullen *v.* Eagan, 21 W. Va. 233; Alleman *v.* Kight, 19 W. Va. 201, citing Dickinson *v.* Railroad Co., 7 W. Va. 390.

"A cross bill is 'filed by a defendant in a suit against a plaintiff, or some other defendant, or both, in the same suit touching the matter in question in the original bill; and it may be either to obtain a discovery in aid of the defense to the original bill, or to obtain relief for all parties touching the matter of that bill.' 1 Barton's Ch. Pr., p. 300." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. Rep. 416. See post, "Between Codefendants," IV, B, 2, b; "To Obtain Discovery," IV, C.

To Set Up Matter Not Available by Answer.—See the title ANSWERS, vol. 1, pp. 399, 400.

Where in a chancery suit a party has relied in his answer to the bill upon a defense, which, if it could avail him at all, may be pleaded in the answer, a cross bill setting up the same matter is unnecessary. Armstrong *v.* Wilson, 19 W. Va. 108; Tate *v.* Vance, 27 Gratt. 571.

"The doctrine is that a cross bill should never be brought when the party can obtain in the original suit the same relief without it; and where the cross bill seeks no discovery, and sets up no defense which might not have been as well taken by answer, the bill will be dismissed with costs. 1 Bart. Chy. 302." Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595; Chalfants *v.* Martin, 25 W. Va. 394, 396; Enoch *v.* Petroleum Co., 23 W. Va. 314; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21.

When Bill Would Be Mere Formality.—Where a cross bill in a suit would be a mere formality it is unnecessary, and a decree giving the requisite satisfaction is correct. Taylor *v.* Beale, 4 Gratt. 93; Moorman *v.* Smoot, 28 Gratt. 80, cited with approval in Atwood *v.* Shenandoah Valley R. Co., 85 Va. 973, 9 S. E. 748, citing also, French *v.* Townes, 10 Gratt. 513; Faulkner *v.* Davis, 18 Gratt. 651.

"The court will sometimes of its motion direct a cross bill to be filed when it is of opinion it is demanded by the purposes of justice. There is no inflexible rule on the subject. If the court is satisfied that the whole merits of the case have been fully developed on bill and answer, no good can be effected by a cross bill. And there can be no valid reason for putting the parties to the expense and delay of such a proceeding." Tate *v.* Vance, 27 Gratt. 571.

Setting Up Invalidity of Award.—The award upon which the complainant relied in the court below being founded upon evidence received by the arbitrator in the absence and without the knowledge or consent of the defendant, was invalid and furnished no just claim to relief in a court of equity, and the defendant not claiming any relief in the case, but a dissolution of the injunction and dismissal of the bill, may rely upon the invalidity of the award by his answer, and it is unnecessary to file a cross bill for the purpose of avoiding it. Tate *v.* Vance, 27 Gratt. 571. See generally, the title

ARBITRATION AND AWARD, vol. 1, p. 687.

Setting Up Breach of Warranty.—"In Baker *v.* Oil Tract Co., 7 W. Va. 454, it was held, that in a suit of proceeding by foreign attachment, in equity to collect the price of two oil tanks, it is competent for the defendant to plead and rely upon a breach of warranty or to the quality of the material of the oil tanks in reduction or abatement of the price; and when such defense is pleaded and relied on in the answer, it is unnecessary to file a cross bill for that purpose." Armstrong *v.* Wilson, 19 W. Va. 108. See generally, the title WARRANTY.

Cause Which Can Be Settled before Commissioner.—No supplemental answer or cross bill is necessary to raise issues in a cause which, under existing pleadings and decrees, can be settled and reported upon by a master commissioner under a proper order of reference. Ashworth *v.* Tramwell, 102 Va. 852, 47 S. E. 1011. See generally, the title REFERENCE.

B. TO OBTAIN AFFIRMATIVE RELIEF.

1. When Proper.

a. General Principle.

A cross bill is proper whenever the defendants, or either of them, have equities arising out of the subject matter of the original suit, which entitle them to affirmative relief which they can not obtain in that suit. Ragland *v.* Broadnax, 29 Gratt. 420; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637, followed in Fishburne *v.* Ferguson, 85 Va. 321, 7 S. E. 361; Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96; Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

b. Applications of Principle.

(1) Decree of Conveyance.

Defendant in Partition.—"The defendant might in his answer, set up an equitable title in himself against the demand of the plaintiff for partition; but if he desires affirmative relief by a decree for a conveyance of the legal title, then vested in the plaintiff, he must file a cross bill." Tate *v.* Vance, 27 Gratt. 571. See generally, the title PARTITION.

Court is further of opinion, that the said Rhea "is not only entitled, in equity at least, to the said Jordan's interest in the said land, but is also entitled to a conveyance of the legal title to the said interest, and might have obtained a decree for such conveyance on a bill for the specific execution of the said agreement, or on a proper cross bill which was filed in this suit." Rhea *v.* Jordan, 28 Gratt. 678.

(2) Injunction against Sale of Stock.

See generally, the title INJUNCTIONS.

The affirmative relief sought by one of the defendants in the original bill and the sole plaintiff in cross bill, was to enjoin the sale of the stock which he had hypothecated as collateral security with the city of Petersburg, at least, until the character of that stock as "preferred" or "common" stock could be determined by adjudication of the court. This was a proper subject of a cross bill. Ragland *v.* Broadnax, 29 Gratt. 401.

(3) Rescission of Contracts.

See generally, the title RESCISSION, REFORMATION AND CANCELLATION.

Cunningham *v.* Hedrick, 23 W. Va. 579, holds that it is "proper and in accordance with strict rules of pleading when a bill to enforce a vendor's lien was filed, if the defendant wished to rescind the contract because the defendant was of unsound mind, or that it was procured by fraud, to file a cross bill." Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765.

Mettert *v.* Hagan, 18 Gratt. 231, was a bill to recover an interest in an estate, and an answer was filed resisting relief on the ground that the party was incapable, from drink, of making the deed; that it was procured by fraud;

and asking that it be declared null and void. It was held, that strictly a cross bill would have been proper. Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765.

If anything could give the cast to the answer of one calling for affirmative relief, it would be the prayer for rescission. Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765. And see Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016, a case in which a cross bill was filed asking rescission of a contract.

Cancellation.—The cancellation of a contract is proper ground for the filing of a cross bill. McMullen *v.* Eagan, 21 W. Va. 233, 247; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

(4) Confirmation of Contracts.

See Hinchman *v.* Ballard, 7 W. Va. 152, where the personal representatives and heirs of deceased were permitted to file a cross bill for the purpose of having a contract confirmed, for the sale of land, made by the decedent at a time when he was alleged to have been insane.

(5) Inquiry as to Investments by Executors.

Under a decree in a pending cause an executor invests a large amount of assets in confederate bonds. There is an appeal from subsequent decrees in the cause by legatees and next of kin, and the court of appeals settles various questions between legatees and next of kin, and affirms the decrees in all other respects. And on motion of the next of kin it was added that this decree should not prevent the next of kin from asserting by proper proceedings any claim they may be advised to assert against the executor on account of his transactions as such executor. Held, the decree of the court of appeals does not conclude inquiry as to the moneys invested in confederate bonds; but under the reservation in the decree this may be done and in order to make the inquiry the next of kin should file a cross bill, raising the question of the executor's liability for the money so collected and invested by him. Young *v.* Cabell, 27 Gratt. 761. See generally, the titles EXECUTORS AND ADMINISTRATORS; FORMER ADJUDICATION OR RES ADJUDICATA.

(6) To Enforce Lien of Judgment.

A suit to enforce lien of judgment, if found subsisting in suit to cancel satisfaction thereof, may, during pendency of latter suit, be maintained by the owners of the judgment, in the nature of a cross bill. Here the object was to obtain full relief to all parties, especially to the bank of Princeton, by enforcing the lien of the judgment if it should be found to be subsisting. Higginbotham *v.* May, 90 Va. 233, 17 S. E. 941. See generally, the title JUDGMENTS AND DECREES.

(7) To Ascertain Amounts and Priorities of Liens.

"The plaintiff had enjoined the sale of his land until the amount of the defendants' trust lien could be ascertained. The defendants set up as new matter calling for affirmative relief that judgments exist against plaintiff's land prior in right to defendant's trust lien, and, in ascertaining and fixing the amount of the latter, they ask that the former may be determined, so that a proper sale of the land, if any, may be had. If it should turn out, of course, that the defendant's lien was satisfied, then there could be no sale of the land unless the judgment creditors were asking it. If the defendants have a lien, they, having been brought into a court of equity, have the right to have it enforced under the court's supervision, and to properly enforce it the prior liens must be ascertained. The defendants therefore had the right to file an answer in the nature of a cross bill for this purpose." Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238; Martin *v.* Kester, 49 W. Va. 647, 39 S. E. 599. See generally, the title

MARSHALING ASSETS AND SECURITIES.

(8) Attacking Liens as Fraudulent Preferences.

Where a lien creditor has filed a bill to ascertain the property of his debtor and the liens and priorities against the same, a creditor defendant may file in such suit an answer in the nature of a cross bill, attacking any of the liens involved therein as fraudulent preferences. Casto *v.* Greer, 44 W. Va. 332, 30 S. E. 100. See generally, the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

(9) Attacking Deed for Fraud.

Where a deed of personal property giving preference to creditors who should accept its terms was sought to be enforced in a court of equity, by creditors who had accepted its terms, and certain creditors filed answers attacking it for fraud, such answers may be regarded as cross bills. Clark *v.* Figgins, 31 W. Va. 156, 5 S. E. 643. See generally, the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

(10) Order of Restitution from Decree of Commissioner.

By decree of 1888, V. and L. were decreed payment of their liens as second in priority, to be paid out of the proceeds of sale of certain real estate which had been sold under decree, the sale confirmed, and the proceeds directed to be collected and disbursed to the lienors in the order ascertained and fixed by the former decree. Afterwards, in 1889, the order fixing the priorities was changed, remitting V. and L. to the fourth place, and bringing up P. and R. to the second and third places. V. and L. appealed, the decree of 1889 was reversed, and the decree of 1888, as to order of payment, restored, so far as it related to the payment of the liens of V. and L. Before the appeal was taken, but within the time given by statute to appeal, the commissioner who was directed to disburse the proceeds of sale paid to P. and R. the amounts of liens decreed them. Held: (1) That V. and L., with proper pleadings, with notice to, or appearance by or for, the parties, in interest, may have an order or decree of restitution. (2) Such proceeding could be by rule in the nature of a scire facias—by cross bill, in form of amended answer, praying affirmative relief; or by motion. Keck *v.* Allender, 42 W. Va. 420, 26 S. E. 437.

(11) To Set Aside Interlocutory Decree of Sale.

"Mrs. G. had attached property on which the trustees had a prior and paramount incumbrance. She had obtained an interlocutory decree for the sale of it to pay her debt. The trustees surely had the right to intervene for the protection of their interests. Indeed, Mrs. G. should in the first instance have made them parties to her suit, if she knew of their claim. They were necessary parties. Therefore they had the right to come into the cause, not only to resist her claim, but also to assert their own. The proper mode, we apprehend, would have been to file a new or amended petition, with the view to enjoin the execution of the interlocutory decree and to be made parties to the pending suit, and, upon being admitted, to file their answer to the bill by way of defense, and then, upon liberty granted for the purpose, to file a cross bill for relief." Gregg *v.* Sloan, 76 Va. 497. See the titles INTERVENTION; JUDGMENTS AND DECREES. And see ante, "Petition or Bill as Cross Bill," III.

2. Indispensability.

a. In General.

(1) Under Strict Rules of Pleading.

See generally, the title EQUITY.

According to the strict rules of pleading affirmative relief can not be granted except upon a bill or cross bill filed for that purpose. Scott *v.* Rowland, 82 Va. 497, 4 S. E. 595, citing Mettert

v. Hagan, 18 Gratt. 234; Tate *v.* Vance, 27 Gratt. 571. See also, Cralle *v.* Cralle, 79 Va. 182; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Sayers *v.* Wall, 26 Gratt. 354; Taylor *v.* Beale, 4 Gratt. 93; Middleton *v.* Selby, 19 W. Va. 167; Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

It is only when the defendant seeks affirmative relief at the hands of the court that a cross bill is indispensable. The case of German *v.* Mastrin, 2 Paige R. 288, affords an illustration of this principle. It was there held, that the defendant might in his answer, set up an equitable title in himself against the demands of the plaintiff for partition; but if he desire affirmative relief by a decree for a conveyance of the legal title, then vested in the plaintiff, he must file a cross bill. Tate *v.* Vance, 27 Gratt. 571.

"A cross bill is always necessary when the defendant is entitled to some positive relief beyond what the scope of the complainant's suit will afford him." Ragland *v.* Broadnax, 29 Gratt. 401.

(2) Qualifications and Exceptions.

(a) Qualifications.

Answer as Cross Bill.—But the strict rule has been departed from, or does not obtain in Virginia. For here, though, according to the strict rules of pleading, affirmative relief can not be granted except upon a bill or cross bill filed for that purpose, yet, where the answer contains the proper averments, the rule will be relaxed when necessary to effect prompt and complete justice between the parties to the suit. Mettert *v.* Hagan, 18 Gratt. 234; Tate *v.* Vance, 27 Gratt. 571. Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595; Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287, citing Cunningham *v.* Hedrick, 23 W. Va. 579; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Cralle *v.* Cralle, 79 Va. 182; Sayers *v.* Wall, 26 Gratt. 354.

As to answer as cross bill, when allowed, object in allowing, etc., see ante, "Answer as Cross Bill," II; post, "Between Codefendants," IV, B, 2, b.

As to bill as cross bill, see ante, "Petition or Bill as Cross Bill," III.

(b) Suits for an Account.

See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 88.

In suits for an account, in which, if it finally appears that the balance is in favor of the defendant, the court will give him a decree for the sum found to be due even though he file no cross bill. Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

In Payne *v.* Graves, 5 Leigh 569, it is said: "Where a bill is brought for an account and a balance reported in favor of the defendant, the court will decree in favor of the defendant for the balance." Hill *v.* Southerland, 1 Wash. 134; Fitzgerald *v.* Jones, 1 Munf. 150; Todd *v.* Bowyer, 1 Munf. 447.

A court of equity may decree a plaintiff to pay money to a defendant, who had not demanded it by cross bill. Wilson *v.* Rucker, Wythe 296.

(c) Bills for Specific Performance.

See the title SPECIFIC PERFORMANCE.

On bills for specific performance of contracts, if the parties differ as to the terms of the contract, and that question is decided in favor of the defendant, the court will compel the plaintiff to perform the contract thus established. Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 639, citing Pigg *v.* Corder, 12 Leigh 76; Anthony *v.* Leftwich, 3 Rand. 238; Bowles *v.* Woodson, 6 Gratt. 78; Chinn *v.* Heale, 1 Munf. 63; Abbott *v.* L'Hommedieu, 10 W. Va. 677. See also, Rhea *v.* Jordan, 28 Gratt. 678.

Where the contract between parties is different from the contract set up in the bill, and the true contract is proved by the defendant, the court ought generally not to dismiss the bill,

but decree specific performance of the contract as proved, where it will produce neither hardship nor injustice to the parties. McComas *v.* Easley, 21 Gratt. 23.

(d) Reason for Exceptions.

These exceptions proceed distinctly upon the theory that the court only entertains the original bill upon the condition that the plaintiff will consent to the same justice being rendered to the defendant that he asks for himself, and formerly this consent was required to be expressly given in the bill. Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

b. Between Codefendants.

In General.—"A cross bill is also necessary to enable a defendant to have decree against a codefendant." Ragland *v.* Broadnax, 29 Gratt. 401.

Thus in Preston *v.* Heiskell, 32 Gratt. 48, the court reversing and remanding the cause to the circuit court, said: "And there being matters involved in which there may be a conflict of interest between him and some of his codefendants, and in the decision of which he is interested, and to the end that such matters may be decided, it is necessary that he should file a cross bill to put them in issue, he should have been, and be required to file a cross bill for that purpose."

"A cross bill may be filed against a defendant where a question arises between two defendants upon a case made out by evidence arising from pleadings and proofs between the plaintiffs and defendants. 1 Barton's Ch. Pr., page 300, and cases cited." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416. See ante, "In General," I, V, A.

Relief on Answers—In Absence of Statute.—"As to giving relief on an answer, the rule of practice as laid down everywhere, apart from statutory provision, is that an answer can only pray for dismissal of the bill, and not for affirmative relief, and that, if any relief further is asked, it must be done by cross bills. 1 Ency. Pl. & Prac. 871. But this rule has often been departed from in Virginia, as shown in Cunningham *v.* Hedrick (23 W. Va. 579); Bart. Ch. Prac. 304; 4 Minor Inst. 1380; Adkins *v.* Edwards, 83 Va. 300, 2 S. E. 435; Cralle *v.* Cralle, 79 Va. 182; Sayers *v.* Wall, 26 Gratt. 354; Tate *v.* Vance, 27 Gratt. 571; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595. The true rule generally prevalent is that for a defendant to obtain affirmative relief beyond dismissal of the bill, even against the plaintiff, being that he can only do so by cross bill, there is stronger reason to say that one defendant can not have such relief against another defendant without such cross bill; and I hardly think the Virginia cases, relaxing, in some instances, the general rule, would justify relief between defendants without cross bill, unless it is proper as growing out of the pleading and proof between plaintiff and defendant." Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

Prior to the provision of § 35, ch. 125, W. Va. Code, the same rule prevailed in West Virginia as did in Virginia, and relief could be decreed between codefendants only when it is justified or called for by the pleading and proof between the plaintiff and defendant, in the absence of a cross bill. Burlew *v.* Quarrier, 16 W. Va. 108; Roots *v.* Salt Co., 27 W. Va. 483.

Under Statute.—But in West Virginia under § 35, ch. 125, W. Va. Code, an answer containing such matter as calls for affirmative relief in favor of the party filing it is treated as a cross bill and made the basis of relief, not only as between that defendant and the plaintiff, but as between that defendant and other defendants. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287, citing McMullen *v.* Eagan, 21 W. Va. 233; Radcliff *v.* Corrothers, 33 W. Va. 682, 11 S. E. 228; Burlew *v.* Quarrier, 16 W. Va. 108.

Rendering Decree against Codefendant Where Equities Arise Out of Pleadings and Proof.—As to rendering de-

cree in favor of one defendant against a codefendant in the absence of a cross bill but where equities arise out of the pleadings and proof requiring it, see the title JUDGMENTS AND DECREES.

C. TO OBTAIN DISCOVERY.

See generally, the title DISCOVERY.

That a cross bill may be brought to obtain a necessary discovery of facts in aid of the defense to the original bill, see Ragland *v.* Broadnax, 29 Gratt. 401; Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595; Norfolk, etc., Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E 21; Chalfants *v.* Martin, 25 W. Va. 394, 6; McMullen *v.* Eagan, 21 W. Va. 247; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Higginbotham *v.* May, 90 W. Va. 233, 17 S. E. 941; Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96, citing Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416. See ante, "In General," IV, A.

"The answer of Mr. Swann demanded affirmative relief, and was the equivalent of a cross bill, inasmuch as it asked a discovery of the defendants, which is the proper subject of a cross bill. 1 Pom. Eq. Jur., § 198, note 4." Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.

D. TO INTRODUCE NEWLY-ARISING DEFENSES.

See post, "Relevancy to Original Bill," VI, A.

A cross bill lies on behalf of a defendant against the plaintiff in the same suit or against other defendants or against both, in order to take advantage of defenses arising pendente lite, when the matter of defense arises after the cause is at issue. McMullen *v.* Eagan, 21 W. Va. 247; Hansford *v.* Coal Co., 22 W. Va. 70; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; West Virginia Oil, etc., Co. *v* Vinal, 14 W. Va. 637; Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96, citing Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

"In the case of Underhill *v.* Van Gortland, Judge Kent, in 2 vol. Johns. Ch., at pages 354, 355, says: 'It is objected to the cross bill that it ought not to contain new matter, not set up as a defense in the original cause, unless it be new matter subsequently arising, for it is intended only in aid of the defense in the original suit, and can not be more extensive than the original defense. This is undoubtedly the general principle.'" West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

"In 2 Rob., Old Pr., at page 318, it is said: 'The cross bill is intended only in aid of defense to the original suit, and the matter of it can not be more extensive than the original defense. It may perhaps set up additional facts as constituting part of the same defense, relative to the same subject matter. But it ought not to contain new matter not set up as a defense in the original cause, unless it be matter which has arisen subsequently.' For this proposition he cites the opinion of Chancellor Kent in Underhill *v.* Van Cortlandt, 2 Johns. Ch. 355." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

Though additional facts may be added in support of the original defense, yet new and distinct matter not set up as a defense in the original cause, can not be thereby introduced, unless it be matter which has subsequently arisen. Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

V. Time for Filing.

In the case of Hinchman *v.* Ballard, 7 W. Va. 152, a cross bill was properly allowed to be filed after an interlocutory decree. See ante, "To Set Aside Interlocutory Decree of Sale," IV, B, 1, b, (11).

Unreasonable Delay in Filing.—See post, "Stay of Proceedings," XI, B.

It is not error in a circuit court to

refuse to allow a defendant to file a cross bill in a chancery cause, praying a suspension of further proceedings in the original suit, until an account prayed in the cross bill can be taken, when the filing of the cross bill has been unreasonably delayed, and especially where the complainant in the cross bill fails to state any reason for such delay. Baker *v.* Oil Tract Co., 7 W. Va. 454.

It is not error to dissolve an injunction on a cross bill restraining the carrying out of a decree in the cause and to dismiss said bill, where the matters of defense in the cross bill have been set up in an answer, and the cross bill is unreasonably delayed, and especially where the plaintiff in the cross bill fails to state any reason for such delay. Armstrong *v.* Wilson, 19 W. Va. 108.

VI. Form and Sufficiency.

A. RELEVANCY TO ORIGINAL BILL.

Introducing New Matter.—A cross bill should be confined to the matters stated in the original bill, and should not introduce new and distinct matter not embraced therein; and if he does so, no decree can be founded upon those matters; for as to them it is an original bill. West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Radcliff *v.* Corrothers, 33 W. Va. 682, 11 S. E. 228; Hansford *v.* Coal Co., 22 W. Va. 70; Rust *v.* Rust, 17 W. Va. 904; Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96, citing Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

"It must be touching the matters in question in the bill, as where a discovery is necessary, or as when the original bill is brought for a specific performance of a contract which the defendant at the time insists ought to be delivered up and canceled, or when the matter of defense arises after the cause is at issue. McMullen *v.* Eagan, 21 W. Va. 233, 247." Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

What Is New Matter—Deed Inoperative.—If, an injunction to a sale of lands by a trustee be asked in a bill, on the ground that the deed of trust was wholly inoperative to convey the grantor's land because of fatal defects in the deed of trust, the answer can not pray affirmative relief so as to operate as a cross bill, when the prayer for relief is based on the fact, that the deed of trust was given to secure the purchase money of the land, and the deed to the grantor if the deed of trust reserved a vendor's lien, which the answer prays may be enforced. In such case there would be brought into the answer as the basis of the prayer for affirmative relief matters distinct from those stated in the bill, which can not be done. McMullen *v.* Eagan, 21 W. Va. 233.

But if the bill of injunction goes further, and sets out a deed, in which the vendor's lien is reserved, and alleges, that it is fatally defective in not effectually conveying the contingent right of dower of a wife, who signed it, and alleges that more is for this and other reasons claimed to be due under the deed of trust than is really due, and such bill asks general relief, such affirmative relief by the enforcement of the vendor's lien may be asked in the answer; for such relief is confined to matters involved in the original bill. McMullen *v.* Eagan, 21 W. Va. 233.

Setting Up Fraud in Another Transaction.—If a bill be filed for a specific execution of a contract for land, the defendant can not by way of cross bill bring into litigation a fraud practiced on him by the complainant in swapping horses, or a debt due by the complainant unconnected with the contract concerning the land sought to be enforced. The cross bill must relate exclusively to the subject matter of the bill and things connected there-

with, and foreign matter can not be introduced, unless under special circumstances. West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

Additional Fact Constituting Part of Cause.—A cross bill may, perhaps, set up additional facts as constituting part of the same defense relative to the same subject matter. But it must relate exclusively to the subject matter of the original bill and things connected therewith. Foreign matter can not be introduced unless it has arisen after the filing of the original bill. 2 Rob. Pr. (Old Ed.) 313. "But where it departs entirely from the object of the bill and introduced new matter in nowise connected therewith and does not establish a good defense, then such cross bill deserves no other answer than a demurrer." Hansford *v.* Coal Co., 22 W. Va. 70; McMullen *v.* Eagan, 21 W. Va. 247; Rust *v.* Rust, 17 W. Va. 904. That it may set up additional matter, see Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96, citing Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

"Mr. Robinson in the second volume of his Old Practice, at page 313, says: 'The cross bill is intended only in aid of the defense to the original suit, and the matter of it can not be more extensive than the original defense. It may perhaps set up additional facts as constituting part of the same defense, relative to the same subject matter. But it ought not to contain new matter not set up as a defense in the original cause, unless it be matter which has arisen subsequently.'" West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

B. ALLEGATIONS SHOWING EQUITABLE JURISDICTION.

"A cross bill, being generally considered as a defense to the original bill, or as a proceeding, necessary to a complete determination of a matter already in litigation, the complainant is not, at least as against the complainant in the original bill, obliged to show any ground of equity to support the jurisdiction of the court." West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Alleman *v.* Kight, 19 W. Va. 201, citing Dickinson *v.* Railroad Co., 7 W. Va. 390.

"But where a cross bill seeks not only discovery, but relief, care should be taken that the relief prayed by the cross bill should be equitable relief; for to this extent it may be considered as not purely a cross bill, but in the nature of an original bill seeking further aid from the court; and then the relief ought to be such as in point of jurisdiction it is competent for the court to give." West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

"Where a cross bill seeks relief which is of an equitable nature, it is open to demurrer if it does not contain all the proper allegations which confer an equitable title to such relief. 1 Bart. Chy. 302; Story's Eq. Pl., § 360." Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Jones *v.* Fox, 20 W. Va. 370; Rosenberger *v.* Keller, 33 Gratt. 489.

Failure to Allege Grounds Why Deed Should Be Annulled.—In 1878, in suit under Va. Code, 1873, ch. 148, § 1, against S., a nonresident, R. got judgment and an order to sell the attached land. S. and wife got sale enjoined, their bill stating that in 1872, S., then not in debt, bought at judicial sale the land for $4,300, paid $1,500. and becoming unable in 1873 to pay balance, his wife paid it with her own funds on agreement that the purchase should enure pro tanto for her separate benefit; but that the commissioner had conveyed it to him and her and the survivor. She asked that her part be laid off to her. R. answered, denying that she paid anything, and prayed that his answer be treated as a cross bill, the deed be set aside as null, and the land sold to pay his judgment. The

circuit court excluded the depositions of S. and wife, and being of opinion that they had failed to prove their averments, and that the land was liable to the judgment, decreed sale. At same term the court permitted S. and wife to file demurrer and answer to R.'s answer, taken as a cross bill, the same failing to allege any grounds why the deed should be annulled. In 1879 commissioners reported sale. S. and wife excepted to its confirmation, and filed bill of review of the former decree. The circuit court overruled the demurrer and the exception, confirmed the sale, and ordered commissioners to pay the net proceeds to R. On appeal here, held, demurrer to cross bill should have been sustained, as it contained no averment that the deed was voluntary or fraudulent. Scott *v.* Rowland, 82 Va. 484, 4 S. E. 595.

C. CONSISTENCY WITH ANSWER.

"It is settled law, laid down by Lord Hardwicke, and never, I believe, stirred since (2 Ves. 529), that a party shall not question, in his cross bill, what he has admitted in his answer; and upon the strongest reason; for, the answer being upon oath, it could never be endured, that in the same court, in the same proceeding, the same party should set up a claim, in direct conflict with that oath." Hudson *v.* Hudson, 3 Rand. 117, 121; Radcliff *v.* Corrothers, 32 W. Va. 682, 11. S. E. 228.

D. PRAYER FOR RELIEF.

An answer to be treated as a cross bill after responding to the bill and stating the new matter for affirmative relief rule must contain such prayer for relief as a cross bill would in the case. Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 240, citing Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Gallatin, etc., Oil Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747; Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Morgan *v.* Morgan, 42 W. Va. 542, 26 S E. 294; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413; Morgan *v.* Blatchley, 33 W. Va. 156, 10 S. E. 282; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568; Middleton *v.* Selby, 19 W. Va. 167.

"In other words the provisions of the statute only authorize the defendant to combine the cross bill and the answer together. But in doing so it was evidently not the purpose of the statute to dispense with the prayer for the affirmative relief, which by the allegations of the answer it appeared he was entitled to, if it had been prayed for in a cross bill or original bill. The language of the statute is: 'And in such case, if the plaintiff desire to controvert the relief prayed for in the answer, he shall file a reply in writing,' etc. The mere averment of new matter constituting a claim for affirmative relief is not sufficient. It must not only be such matter but it must be alleged in the same manner and with like effect, as if the same had been alleged in a cross bill filed by him therein. There must be a prayer for the relief appropriate to the character of the new matter." Middleton *v.* Selby, 19 W. Va. 167. See, to the same effect, Hickman *v.* Painter, 11 W. Va. 386.

General and Special Relief.—An answer and cross bill which set forth facts entitling the defendant to a diminution of the complainant's demand, and concludes with a prayer for general relief, need not, in specific terms, ask such diminution. Taylor *v.* McDonald, 100 Va. 487, 41 S. E. 946.

VII. Parties.

A. NECESSITY FOR.

In the case of Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238, it is held, that no relief can be granted in equity unless the proper parties are before the court. It is further said, in speaking

of an answer treated as a cross bill: "Such an answer, after responding to the bill * * * must name persons interested in this new matter and make them parties," and cites Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Gallatin Land Coal, etc., Co. *v.* Davis, 44 W. Va. 109, 28 S. E. 747; Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413; Morgan *v.* Blatchley, 33 W. Va. 156, 10 S. E. 282; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237.

B. COMPLAINANT.

"It may be brought by the defendant against the plaintiff in the same suit, or against other defendants, or against both." Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; McMullen *v.* Eagan, 21 W. Va. 233; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

Persons Not Parties Primarily.—See Hinchman *v.* Ballard, 7 W. Va. 152, a case in which the personal representative and heirs who were not parties to the proceeding in the court below were permitted to file a cross bill after appeal and remand of case.

C. DEFENDANT.

A cross bill may be brought against the plaintiff or one or more of the codefendants in the original suit. Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; McMullen *v.* Eagan, 21 W. Va. 233; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637. See also, ante, "Between Codefendants," IV, B, 2, b.

Bill against Defendant.—A cross bill filed against the codefendant in a suit should make the complainant in the original bill a party defendant together with the codefendant. West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

Defendants Necessary to Relief Sought.—When a defendant sought relief against a codefendant as to matters not apparent on the face of the original bill, by a cross bill he must make parties such defendants as are necessary to the relief sought. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

Codefendants Whose Rights Are Affected.—An answer not intended as a mere defense to the bill, but to affect the rights of a codefendant, must make him a party, and call for relief against him upon its facts, as in case of a cross bill. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924, citing Grobe *v.* Roup, 46 W. Va. 488, 33 S. E. 261; Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238; Woods *v.* Douglas, 46 W. Va. 657, 33 S. E. 771; Sturm *v.* McGuffin, 48 W. Va. 595, 37 S. E. 561. See ante, "Necessity for," VII, A.

Prior Lienholders.—A cross bill filed to ascertain amounts and priorities of liens must make parties thereto all the prior lienholders. Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238; Wilson *v.* Carrico, 46 W. Va. 466, 33 S. E. 237.

Creditors Named as Cobeneficiaries.—Plaintiffs in the cross bill who are assignee of a $2,000 note show in their cross bill that the note was assigned to them as collateral for the payment, not only of their respective claims but for the claims of some six or more creditors named in their cross bill wherein the several claims and amounts are set out, and it is alleged in the cross bill that while the note is assigned for the benefit of all the creditors mentioned, the claims of plaintiff are entitled to be preferred and paid in full before the other named creditors can participate in the benefit of the assignment. It was held, that the claims of the plaintiffs in the cross bill being hostile to those of the creditors named as cobeneficiaries, in that, plaintiffs claim priority for themselves and to

be paid in full before any benefit accrue to the other said creditors, hence such creditors are proper parties defendants to the cross bill. Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647.

D. ADDING NEW PARTIES.

A cross bill can not add new parties, except perhaps where it appears from the pleadings and proof in the original suit that the presence of another party is necessary in order that the defense to the complainant's demand may be complete, or a controversy between defendants may be properly adjudicated. Crockett *v.* Woods, 97 Va. 391, 34 S. E. 96; Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

"Briscoe *v.* Ashby, 24 Gratt. 454, is sometimes referred to as sanctioning a different conclusion, but upon investigation of that case it will be found that the new parties were introduced by amended and supplemental bills; that it was to this bill that the cross bill was filed, and that no persons were made parties to it who were not named as such either in the original bills or in the amended and supplemental bills. It is certain that the opinion of the court does not discuss the question now before us." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

"If the plaintiff wishes to make new parties he amends his bill and makes them. If the interest of the defendants require their presence, he takes the objection of nonjoinder, and the plaintiff is forced to amend, or his bill is dismissed. If at the hearing the court finds that the indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross bill to make new parties is not only improper and irregular, but wholly unnecessary." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416, citing Shields *v.* Barrow, 17 How. 145.

Judge Green, delivering the opinion of the supreme court of West Virginia, in McMullen *v.* Eagan, 21 W. Va. 250, states without reservation that no one "'can be made a defendant to a cross bill except persons who are parties to the suit as plaintiffs or as defendants.' See West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va., at page 682." Derbyshire *v.* Jones, 94 Va. 140, 26 S. E. 416.

"The form of this cross bill answer is objected to by the appellees, on the ground that it introduces new parties. The objection is not well taken. The dictum of Judge Green in the case relied upon by appellees (McMullen *v.* Eagan, 21 W. Va. 250) is based upon the case of Shields *v.* Barrow, 17 How. 145. In the other case cited by counsel for appellees (West Virginia, Oil, etc., Co. *v.* Vinal, 14 W. Va. 682), Judge Haymond doubts the propriety of the rule, or rather cites an authority in which a contrary view is expressed. In truth, the later cases draw a very just and proper distinction between a cross bill merely defensive in its character and one which seeks affirmative relief. In the former no new parties can be introduced; in the latter they may, if the ends of justice so require. It seems to be settled, notwithstanding the dictum of Judge Curtis in Shields *v.* Barrow, that new parties may be added by a cross bill which is filed for affirmative relief. Story Eq. Pl. (Ed. 1889), § 399, note a; Briscoe *v.* Ashby, 24 Gratt. 454." Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.

E. WANT OF PROPER PARTIES.

Where a petition filed in a cause prays for relief, and is virtually a cross bill, decrees based on it are of none effect against those who were never summoned to answer it, or who were not properly before the court. Pracht *v.* Lange, 81 Va. 711.

The demurrer to the cross bill should have been sustained, and the bill dismissed, for want of proper parties. Allan *v.* Hoffman, 83 Va. 129, 2 S. E. 602.

In the case of Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647, it is held, that a cross bill is defective in that it

fails to make proper defendants parties, and that it is bad on demurrer.

VIII. Process.

Necessity for as against Plaintiff or Defendant.—"That late invaluable work, Encyclopedia of Pleading & Practice (vol. 5, p. 628), speaking of answers filed under statutes like ours, having the function of cross bills, says: 'The rules governing answers filed as cross bills, it is apprehended, are practically the same as those governing ordinary cross bills,'—and, proceeding to discuss the subject of cross bills, says (what is to the point here): 'In the absence of statute providing otherwise, service of process on the defendants to cross bill, though parties to the original bill, and in court for all the purposes thereof, is necessary to bring them into court on cross bill.' In our case of Rust *v.* Rust, 17 W. Va. 901, such an answer was regarded as open to demurrer, as to its affirmative matter, like a cross bill. Moore *v.* Wheeler, 10 W. Va. 35, holds that the purpose of this statute was only to allow such answer in lieu of a cross bill, and not make any other change in the practice as to pleadings in equity. It may be thence argued fairly that it did not intend to dispense with process upon it as required by the practice upon cross bills. Other cases treat such answer as a cross bill. Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462; McMullen *v.* Eagan, 21 W. Va. 234; Middleton *v.* Selby, 19 W. Va. 168; Harrison *v.* Brewster, 38 W. Va. 294, 18 S. E. 568. So I hold that such an answer can not, on new matter first introduced by it, be the basis of a decree against other defendant without process against them to reply to it." Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287, cited in Woods *v.* Douglass, 46 W. Va. 657, 33 S. E. 771.

"In Shelby *v.* Smith's Heirs, 2 A. K. Marsh, 504, 514, where an answer was framed in the shape of a cross bill, and prayed relief, the court said the codefendants 'were not bound, as a complainant is, to take notice of such interrogations, and no process has been served upon them for that purpose, without which a decree can not be rendered against them.' Our statute regards such an answer as a cross bill, saying that it may allege new matter for affirmative relief 'in the same manner and with like effect as if the same had been alleged in a cross bill,' and therefore we ought to apply to it the rules applicable to cross bills, and surely process to answer a cross bill is indispensable." Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

An answer to be treated as a cross bill, after responding to the bill, must name persons interested in this new matter, and make them parties, by calling for process against them. Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 240, citing Goff *v.* Price, 42 W. Va. 384, 26 S E. 287; Gallatin Land, Coal, etc., Co., *v.* Davis, 44 W. Va. 109, 28 S. E. 747; Graves *v.* Hedrick, 44 W. Va. 550, 29 S. E. 1013; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294; McMillan *v.* Hickman, 35 W. Va. 705, 14 S. E. 227; Farmers' Bank *v.* Watson, 39 W. Va. 342, 19 S. E. 413; Morgan *v.* Blatchley, 33 W. Va. 156, 10 S. E. 282; Holt *v.* Holt, 46 W. Va. 397, 35 S. E. 19; Wilson *v.* Carrico (decided at this term) 46 W. Va. 466, 33 S. E. 237; Pracht *v.* Lange, 81 Va. 711.

An answer in the nature of a cross bill praying affirmative relief, which affects codefendants, and makes such codefendants parties thereto, must have proper process issued thereon before a hearing can be had as to the matters contained in such answer. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924, citing Grobe *v.* Roup, 46 W. Va. 488, 33 S E. 261; Woods *v.* Douglas, 46 W. Va. 657, 33 S. E. 771; Sturm *v.* McGuffin, 48 W. Va. 595, 37 S. E. 561; Goff *v.* Price, 42 W. Va. 365, 26 S. E. 287; Martin *v.* Kester, 46 W. Va. 438, 33 S. E. 238; See post, "Effect of Failure to Reply," IX, C.

IX. Answer, Replication or Demurrer.

A. ANSWER.

Sufficiency.—An answer to a cross bill filed in an action upon a note which concludes as follows: "Respondent is advised that upon said Cochran's (defendant) own statement he has no substantial defense against the note sued on * * *, and now, having fully answered, and here denying, all the allegations in said cross bill, not hereinbefore admitted or denied, respondent prayed to be hence dismissed, with his costs in this behalf expended," etc., is sufficient to put in issue every allegation in the cross bill which it (answer) does not admit to be true. Bunting *v.* Cochran, 99 Va. 558, 39 S. E. 229.

B. NECESSITY FOR SPECIAL REPLICATION.

The 35th section of chapter 125 of the Code of this state provides for the filling of a special replication, in a suit of equity, where defendant in his answer alleges new matter, constituting a claim for affirmative relief. Vanbibber *v.* Beirne, 6 W. Va. 168; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Foutty *v.* Poar, 35 W. Va. 70, 12 S. E. 1096.

"If the plaintiff or defendant against whom such relief is claimed desire to controvert the relief prayed for in the answer, he shall file a special reply in writing denying such allegations of the answer as he does not admit to be true, and stating any facts constituting a defense. See Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287." Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; Chalfants *v.* Martin, 25 W. Va. 394.

When Cross Bill Is Proper.—"Where the answer contains material allegations constituting a claim for affirmative relief, and no reply in writing is filed, but only a general replication, and the cause has been heard on the pleadings thus made and the proofs, if the record shows it is not such a case as would, before the statute, demand a cross bill to give the defendant the relief sought, the decree will not be reversed because no reply in writing was filed." Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765, citing Cunningham *v.* Hendrick, 23 W. Va. 579; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Foutty *v.* Poar, 35 W. Va. 70, 12 S. E. 1096.

Complainant is not required, and it would be bad pleading to reply specially to such new matter, set up by way of answer treated as a cross bill unless there is a prayer for affirmative relief in the answer. Middleton *v.* Selby, 19 W. Va. 167; Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

C. EFFECT OF FAILURE TO REPLY.

If the plaintiff in original bill fail or refuse to file a special reply in writing to such part of the answer thus made a cross bill, the statute imperatively requires the allegations to be taken as true, and that no proof thereof shall be required. Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

Material allegations of new matter in an answer constituting a claim for affirmative relief, not controverted by a special reply in writing, shall for the purposes of the suit be taken as true, and no proof thereof be required. W. Va. Code, ch. 125, § 36. Newlon *v.* Wade, 43 W. Va. 283, 27 S. E. 244.

"The 36th section (ch. 125, W. Va. Code), I understand to mean, that the material allegations of any bill not controverted by an answer are to be taken as true, and no proof thereof shall be required, and for the same reason that the material allegations of a bill shall be taken pro confesso, the allegation of new matter in the answer constituting a claim for affirmative relief, if pleaded in the same manner and with like effect, as if set up in a cross bill, shall likewise be taken as true, and no proof thereof shall be required." Middleton *v.* Selby, 19 W. Va. 167.

Defendant in Original Bill.—See ante, "Process," VIII.

An answer, under § 35, ch. 125, W.

Va. Code, containing new matter constituting a claim for affirmative relief, may be taken for confessed as against the plaintiff, but not against another defendant, without service of process to reply to it. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287; Woods *v.* Douglas, 46 W. Va. 657, 33 S. E. 771.

"The court may either award a rule against the codefendants to reply to such answer—that is, make an order requiring them to be summoned to reply to such answer by a given date or within a given time—or send it to rules with direction to issue process summoning such codefendants to reply to it, and then proceed on it as on a cross bill. Goff *v.* Price, 42 W. Va. 384, 26 S. E. 287.

D. DEMURRER.

1. Grounds.

See ante, "Form and Sufficiency," II, D; "Relevancy to Original Bill," VI, A; "Allegations Showing Equitable Jurisdiction," VI, B; "Want of Proper Parties," VII, E; "Adding New Parties," VII, D.

2. Effect of Overruling Demurrer to Cross Bill.

Although a demurrer may have been overruled to a cross bill asking a rescission of a contract of sale of land set up in the original bill, the court may, if the pleadings and proof justify it, render a personal decree in favor of the complainant in the original bill for the amount of purchase money due him, and, at the same time, refer the cause to a commissioner to ascertain the lines on the land and their respective priorities. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

X. Effect of Dismissal of Original Bill.

The general rule is that when filed purely in defense of the original bill, the dismissal of the original bill dismisses the cross bill; but when in addition the cross bill contains new matter on which it seeks affirmative relief, such dismissal does not dismiss the cross-bill, because as to this new matter it has the elements of an original bill, and the cross bill stands for action. West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637, 698; Ragland *v.* Broadnax, 29 Gratt. 401; Story Eq. Pl. s. 399, note (10 Ed). Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

The relief sought by the cross bill being outside of the original bill, the dismissal of the original bill does not involve the dismissal of the cross bill. Ragland *v.* Broadnax, 29 Gratt. 401, citing Mettert *v.* Hagan, 18 Gratt. 231; Clark *v.* Long, 4 Rand. 452; Rhea *v.* Jordan, 28 Gratt. 678.

In the case of the Piedmont, etc., Life Ins. Co. *v.* Maury, 75 Va. 508, it is said: "It is true that the answer prays that it may be regarded and treated as a cross bill, and that full relief may be given and afforded to the respondent. The only relief it seeks as against the plaintiff is, that the suit be consolidated with the suit, by Blakey, trustee, and that the plaintiff be restrained from further proceeding in his suit alone and independently of the suit by said trustee, and that the objects of the latter suit be carried out. The dismissal of the plaintiff's suit left the Blakey suit pending and gave the respondent substantially all the relief it asked as against the plaintiff, and could not be tried to its prejudice. The dismissal of the bill necessarily carried with it the answer attempted to be set as a cross bill. The respondent's claim to relief, so far as the plaintiff was concerned, was satisfied by the dismissal of the bill; and in this respect the case is unlike that of Ragland *v.* Broadnax, 29 Gratt. 401."

"I think it is competent for the court to dismiss the original bill and afterwards treat and proceed with the cross bill in such case as an original bill for relief. As a means of defense it may be said to have accomplished its object in that respect, when the original bill

is dismissed by the court, but so far as relates to the matters set up therein, as to which it prays affirmative relief as above stated, its legitimate purpose and office has not been attained. I do not think, therefore, that the dismissal of the original bill in this case necessarily disposes of the defendant's cross bill. In Worrel *v.* Wade's Heirs, 17 Iowa R., it was held that 'the dismissal of the plaintiff's bill does not necessarily dispose of the defendant's cross bill.'" West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637.

That a cross bill in all cases does not follow the fate of the original bill, see Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390; West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637; Alleman *v.* Kight, 19 W. Va. 201.

Court Obtains Jurisdiction.—"In 2 Barb, Ch. Pract., p. 129, it is said: 'The connection of the matter of a cross bill, be it per se legal or equitable, with the subject matter of the original bill, gives the court jurisdiction of the cross bill, of which it can not be ousted by a dismission of the original bill.'" Ragland *v.* Broadnax, 29 Gratt. 401.

XI. Hearing.

A. CAUSES HEARD TOGETHER.

See post, "Stay of Proceedings," XI, B.

Where a bill is filed to set aside an interlocutory decree of sale, a proceeding to hear them separately is irregular and improper. The bill ought to be treated by the court as a mere adjunct of the original cause, in the nature of a petition, in the cause brought to hearing therewith. And if so treated, it would have presented to the consideration of the court the inquiry whether the sale made under its decree was advantageous or injurious to the infant heirs. Cralle *v.* Meem, 8 Gratt. 496, 531.

B. STAY OF PROCEEDINGS.

See ante, "Time for Filing," V.

"Upon the filing of such cross bill, it is usually proper to stay proceedings until the same is answered and complete discovery made. * * * " Kanawha Lodge *v.* Swann, 37 W. Va. 176, 16 S. E. 462.

Whether the original cause should be postponed until the cross suit is ready that both may be heard together, is discretionary with the court; such discretion is to be exercised as circumstances may require for the attainment of justice. Affected delay would be a just cause for proceeding to hear the original bill. McConnico *v.* Moseley, 4 Call 360.

"The court will not suspend the hearing of the original cause on account of a cross bill, when that cross bill has been filed at an unreasonable period. Rob. Old Prac. 319, and cases there cited." Baker *v.* Oil Tract Co., 7 W. Va. 454; Armstrong *v.* Wilson, 19 W. Va. 108.

C. EVIDENCE.

Admissibility.—Depositions in original suit may be read under cross bill when so directed. Smith *v.* Proffitt, 82 Va. 832, 1 S. E. 67. See generally, the title DEPOSITIONS.

Effect of Variance.—"The fact that the evidence proved a contract materially variant from that set up in the bill, was not in and of itself sufficient to require the court below to dismiss the cross bill." West Virginia Oil, etc., Co. *v.* Vinal, 14 W. Va. 637. See generally, the title VARIANCE.

D. EFFECT OF DISMISSAL.

Defendant, by its cross bill, admits the validity of certain of bonds, but asks to be relieved from paying same except as against purchasers for value without notice, because of the failure of the conditions of their issuance, and on demurrer the cross bill is dismissed for want of equity; such dismissal is, as between the same parties, res judicata. Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433. The court in this case said: "Nor does it appear that the cross bill was dismissed on any ground not going to the merits,

so that the decree must be held to have been rendered on the merits, and not now to be questioned in a subsequent controversy upon the same subject matter between the same parties." See the title FORMER ADJUDICATION OR RES ADJUDICATA.

E. EXECUTIONS ISSUE SEVERALLY.

It is proper to direct executions to issue severally to a complainant in original bill, and to a complainant in cross bill, for the sums adjudged to them respectively. Stuart *v.* Heiskell, 86 Va. 191, 9 S. E. 984. See the title EXECUTIONS.

XII. Appeal.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

Jurisdiction.—Where the defendant filed his answer in the nature of a cross bill, and praying affirmative relief, and the court failed to take any action thereon, or to adjudicate in the matter of said affirmative relief, in the absence of such action there is nothing of which the appellate court can take jurisdiction. Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288.

Action Where Evidence Appears on Record.—Where the chancery court takes cognizance of a suit, the object whereof is to enforce an alleged mechanic's lien, and a cross bill is filed, and all the evidence appears in the record, this court will review the action of the court below, and decree according to equity and the right of the case. Bailey Construction Co. *v.* Purcell, 88 Va. 300, 13 S. E. 456.

XIII. Leave to Amend after Remand of Cause.

When the cause is remanded to the circuit court, leave will be given to amend the original bill, and set up the matter specifically, with any other credits to which complainant may be entitled; and leave will be given to the defendants also to amend his answer or cross bill to meet any new charges or allegations in the bill. Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; Hinchman *v.* Ballard, 7 W. Va. 152.

Cross Demand.

See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Cross Examination.

See the title WITNESSES.

CROSSINGS.

I. Establishment and Maintenance, 123.
- A. Railroads Crossing Railroads, 123.
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CROSS REFERENCES.

See the titles CORPORATIONS, vol. 3, p. 510; DAMAGES; DEATH BY WRONGFUL ACT; DEEDS; EMINENT DOMAIN; EVIDENCE; NEGLIGENCE; RAILROADS; SPECIFIC PERFORMANCE; STREET RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES.

As to injuries to animals at crossings, see the title ANIMALS, vol. 1, p. 375. As to frightening horses, see the title ANIMALS, vol. 1, p. 378.

I. Establishment and Maintenance.

A. RAILROADS CROSSING RAILROADS.

1. Steam Railroads Crossing Each Other.

Authority to Cross by Act Chartering Company.—The act of the legislature of Virginia to authorize the construction of the Alexandria and Fredericksburg Railway after giving the authority to construct the road, contained a restriction and limitation of its powers in the following words: "Provided, that in the extension of the said railway, it shall in no way interfere with the chartered rights or fran-

chises of any railroad extending between Alexandria and Washington; but this proviso shall not be construed as preventing said Alexandria and Fredericksburg Railway from crossing any such railroad." Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 786.

When Company Crossing Another Becomes Trespasser.—If one railroad company is permitted to cross the track of another at grade on terms of a written covenant between them, the first-mentioned company can not, in an action on the covenant, be considered as a trespasser or wrongdoer in making such crossing; but, if there has been a breach of the covenant and resulting damages, the liability of the defendant company is fixed by the covenant. Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

Failure to Perform Covenants.—If the defendant company has so far failed in the performance of its covenants as not to entitle it to claim the benefits of it, it becomes a licensee or trespasser, as the case may be, and the plaintiff may bring an action on the case for any injury inflicted on it through the negligence of the defendant, and the question will then be, what constituted negligence on the part of the defendant, and what, if any, duty the plaintiff owed it. Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

For What Recovery Will Lie.—Where under the terms of the contract the defendant was responsible for all injuries sustained where its acts of omission or commission, which it covenanted to perform or refrain from, were the proximate cause of the injury inflicted; but where its conduct was not the proximate, but only the remote cause or condition of the accident complained of, and where the acts of the plaintiff, or its omission or ordinary care, constituted the immediate or proximate cause of the injury, then the wrong was self inflicted, and there can be no recovery. Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737.

2. Street Railways Crossing Steam Railroads.

Right to Cross.—A street railway company has the right to cross a railroad at grade without the consent of the railroad company. Richmond, etc., R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670, 32 S. E. 787.

Maintenance of Gate as Consideration.—See post, "Gates," II, B, 2, a.

Power of Court to Prevent Change in Crossings.—The board of public works had, when this case was determined, exclusive jurisdiction to determine whether one railroad in this state should be permitted to cross another, and the terms upon which it might cross, and its adjudication on that subject was final and conclusive, and the courts had no power to interfere with its order by injunction or otherwise; but the grant simply of permission to cross does not carry with it the right to lower the elevation of the road crossed to its detriment, and where it appears that such change in the elevation was not passed on by the board of public works, and no adjudication was invited thereon by either party, courts may, on the application of the injured party, grant an injunction to stay the hand of the party threatening the injury until such time as he shall have the right to change the grade determined by the state corporation commission, which now alone has jurisdiction of the question. Southern R. Co. *v.* Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

From these allegations of the bill and answers, and an examination of the plans and specifications filed therewith, and the affidavits, no doubt is left that the changing of complainant's track by defendant was not passed on by the board of public works, and no adjudication was invited thereon by either party, and that the necessity or

desirability of changing the elevation of the track was only suggested when the defendant installed the crossing frog. If any doubt existed in this respect, it would be removed by an inspection of the notice given by the defendant to complainant on September 30, 1901, in which specific and accurate notice is given complainant of a desire to change complainant's track from two and one-half to one inch elevation. No such intimation as to the desire of defendant to change the elevation of complainant's track is given under the notice dated the 20th of May, 1901, and under which the proceedings were had before the board of public works, and the order entered by it authorizing the crossing. Southern R. Co. *v.* Washington, etc., R. Co., 102 Va. 494, 46 S. E. 784.

3. Street Railways Crossing Each Other.

Jurisdiction of State Corporation Commission.—The state corporation commission was created for the protection of the public by regulating public utilities, and, by the express provision of the constitution, its findings are to be regarded as prima facie just, reasonable, and correct. In the case at bar the order of the commission, permitting one street railway company to cross the tracks of another company at grade, and prescribing in detail the methods by which the companies are to operate their roads at such crossings, is fully sustained and warranted by the evidence. Newport News, etc., R. Co. *v.* Hampton Roads R., etc., Co., 102 Va. 847, 47 S. E. 839.

An objection that the state corporation commission was without jurisdiction to determine a question relating to a grade crossing of two street railways because a part, at least, of the controversy was in litigation between the railway companies in one of the circuit courts of the state will not avail where it appears that the litigated question has been finally determined by a decree of the supreme court not in conflict with the order made by the state corporation commission. Newport News, etc., R. Co. *v.* Hampton Roads R., etc., Co., 102 Va. 847, 47 S. E. 839.

B. RAILROADS CROSSING STREETS AND HIGHWAYS.

Right to Cross.—A railroad company may, under acts, 1874-1875, p. 47 (see Virginia Code, 1904, § 1294b), construct its road across a public highway, but it must do so with as little injury to the highway as is practically possible. It must so restore the highway that its use by the public will not be materially, or at least unnecessarily, interfered with, and so as not to render it less safe and convenient for the passage or transportation of persons or property, along the same, except so far as diminished safety and convenience are inseparable from its use by the railroad. The court said: "To construe the statute literally would defeat the very object which the legislature had in view in pasing it, for, in the very nature of things, it is impossible to construct a railroad across a highway without to some extent impairing its safety or impeding or endangering the passage or transportation of persons or property along the same. The statute must, therefore, receive a reasonable construction, such a one as would enable the railroad company to exercise the power conferred; but it must at the same time be so construed as not to deprive the public of their rights in the highway to any greater extent than is necessarily implied from the power granted." Charlottesville *v.* Southern R. Co., 97 Va. 430, 34 S. E. 98.

Duty to Enlarge Crossing.—The duty of a railroad company, in respect to a highway which it crosses, is a continuing one. If the population of the neighborhood, or the use of the highway, so increases that the crossing, originally adequate, is no longer so, it is the duty of the railroad company to make such alteration in the

crossing as the changed conditions require. The highway, whether under the control of a county or a city, is the property of the state, held in trust for the benefit of the public. The rights of the public have not been waived or released, nor is it in any way estopped from asserting them. Charlottesville *v.* Southern R. Co., 97 Va. 428, 34 S. E. 98.

Duty to Repair Bridge.—The duty of a railway company to keep a bridge in repair arises not from any statutory obligation, but from its duty not to interfere with the public highway. Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

Repair of Bridge over Highway.—A railroad company whose duty it is to maintain a bridge over its track in a public highway may obstruct the highway while necessary repairs are being made on the bridge, but if it attempts to make a temporary roadway for the use of the public, it must exercise reasonable care to make such roadway reasonably safe. Marshall *v.* Valley R. Co., 97 Va. 653, 34 S. E. 455.

C. RAILROADS CROSSING PRIVATE LANDS—FARM CROSSINGS AND CATTLE GUARDS.

See also, the title ANIMALS, vol. 1, p. 378.

Statutory Provisions.—The statute (§ 14, ch. 42, W. Va. Code, 1891), provides that where land is condemned to the use of a railroad, and is cleared and fenced, the company shall construct and ever maintain suitable farm crossings, cattle guards, and fences on both sides of the land taken. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 700.

Cattle Guard Defined.—"A cattle guard is defined to be an appliance to prevent animals from going on land adjoining the right of way, to prevent their passing along a right of way into an improved fenced field. 7 Am. & Eng. Ency. Law 912; Hurd *v.* Railroad Co., 25 Vt. 116; Railroad Co. *v.* Cunnington, 13 Am. & Eng. R. Cas. 529." Quoted in Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 700.

When Cattle Guards Are Unnecessary.—When a railroad company has put in, when building its railroad, a sufficient number of suitable farm crossings and cattle guards, it can not be required afterwards to build others at other places. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

Where the company fences on both sides of its right of way, and puts in a farm crossing, and puts in gates to allow access to the crossing, it need not make cattle guards at the farm crossing, it being a merely private crossing, not a highway. The gates are not expected to remain open, and, when stock is crossing, it is expected to be in charge. The cases requiring such guards at crossings refer to crossings of public highways. The gate is only a means of access to the crossing, and, there being no fence there dividing fields, the mere presence of the crossing does not call for guards. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 700.

Gist of Action for Failure to Construct Guards.—In an action against a railroad company to recover the penalty imposed by § 1262 of the Code of 1904 for failure to construct cattle guards, the gist of the action is whether or not the points within the plaintiff's enclosed lands at which he requested the defendant to construct the cattle guards were necessary and proper places for them to be constructed within the meaning of the statute, and not whether that section applies to private crossings. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

Declaration in Action for Failure to Construct Guards.—An amended declaration is no departure from the original, unless it introduce into the case a new, substantive cause of action different from that declared upon, and different from that which the plaintiff

intended to declare upon. It can not be allowed if it be inconsistent with the nature of the original declaration, or change the cause of action. Allegations may be changed, and others added, but they must relate to the same cause of action. An amended declaration in an action by a landowner against a railroad company for failure to build fences, farm crossings, and cattle guards may charge failures to build them at other points than those specified in original declaration without being in violation of the above rule. Clarke *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696.

II. Accidents at Crossings.

A. MUTUAL RIGHTS AND DUTIES OF RAILROAD AND TRAVELER.

1. Steam Railroads.

Some Degree of Care and Diligence.—The person attempting to cross the railroad track, and the company owning the railroad, have mutual and reciprocal duties and obligations and, though a train has the right of way, the same degree of care and diligence to avoid collision is due from both. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349. See also, Marks *v.* Petersburg, R. Co., 88 Va. 3, 13 S. E. 299; Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 460.

Both parties are equally bound to use ordinary care; that is, such care as a prudent man would usually take under similar circumstances, the one to avoid committing, and the other to avoid receiving, injury. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 533.

Mutual Duty to Look Out for Danger.—The rights and duties, however, of the company and of the public are reciprocal, and hence no greater degree of care is required of the one than of the other. Both the company and the traveler on the highway are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence required is such as a prudent man would exercise under the circumstances of the case in endeavoring to fairly perform his duty. Marks *v.* Petersburg R. Co., 88 Va. 3, 13 S. E. 299.

Rights of Traveler Subordinate.—The rights of a traveler on the highway, at a point where it is crossed on a level by a railroad, are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing, though not in such a sense as to give the company a right to block up the highway; for its right is only given for the purpose of travel, not of storing its cars or goods. Both parties are, however, equally bound to use ordinary care; that is, such care as a prudent man would usually take under similar circumstances, the one to avoid committing, and the other to avoid receiving, injury. Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 460.

Where View of Track Is Obstructed.—If the view of a train approaching a railroad crossing is obstructed by cars left standing on a side track, it is the duty of the railroad company, in the running of its trains, and also of the traveler in approaching the crossing, to use a higher degree of care than if no such obstruction existed. Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 420, 28 S. E 590.

Plaintiff's horse and hearse were injured in a collision with defendant's train, where the road crossed six or seven tracks, with an intervening space of thirty feet. Cars were standing on nearly all the tracks on each side, leaving barely space to pass. The driver brought his team nearly to a stop, and looked and listened, and then drove quickly across; and the collision occurred on the last track, with a backing train whose engine was six hundred feet from the crossing. No one was on the train nearer than the sec-

ond car from the engine, or at the crossing, to give warning, though the conductor knew that an approaching driver could not see or hear the train. It was held, on demurrer to the evidence, that plaintiff could recover. Demaine *v.* Washington, etc., R. Co., 2 Va. Dec. 499.

2. Street Railways.

Rights of Public and Railway Equal.—The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. "The car has a right to cross, and must cross the street; and vehicles and foot passengers have a right to cross, and must cross the railroad track." Richmond R., etc., Co. *v.* Garthright, 92 Va. 634, 24 S. E. 267.

"A street car is not governed by 'the law of the road,' as it is sometimes called, since it can not leave its track and turn aside. But it is settled law that at street crossings it has only the same rights as the traveling public. 'The people of the city,' said Judge Riely, speaking for the court in Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 'have the same right to pass along an intersecting street on foot or in vehicles as a street car has to go across. * * * Neither has a superior right to the other.'" Bass *v.* Norfolk R., etc., Co., 100 Va. 6, 40 S. E. 100.

Right to Run at High Speed.—Street cars have no right at street crossings to run at the same high rate of speed as the ordinary railroad trains. Their running is not attended with the same degree of danger, and they can be much more quickly stopped than the trains of an ordinary railroad. Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 101.

B. DUTY OF RAILROAD COMPANIES AT CROSSINGS.

1. Care Required in Operating Trains or Cars.

a. Degree of Care Required.

(1) In General.

Care Required in Cities.—Company running its trains on city streets, must use greater care than in less frequented localities, and any neglect of precaution proper in such case, constitutes negligence. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

Must Omit Nothing to Prevent Injury to Children.—A railroad company running its cars through a populous street of a city, on which many children live, must omit nothing which can be done by the company and its agents to prevent injury to children on the street. Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455.

What Constitutes Proper Care.—A railroad company is liable for a personal injury inflicted on a passenger at a public crossing, if its agents or servants in charge of a moving train saw him in a position of danger, or by the use of due diligence, might have seen him, and failed to exercise proper care and due diligence to stop the train and prevent it from striking him. But what is proper care and due diligence is to be determined by the facts and circumstances of the particular case. Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406.

Distinction between Traveler and Licensee.—A traveler injured by a railroad train at a public crossing stands on a higher footing than a licensee walking on the track, and, even among licensees, a higher degree of care is required of a person of mature years and in the possession of all his faculties than of an infant of tender years. Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

(2) Crossing Established by User.

Where the public has been in the habit of crossing the railroad track on foot at a certain place for years without objection from the company, it was held, such acquiescence amounts to a license and imposes on the company the duty of taking reasonable care to avoid injuring pedestrians. Norfolk, etc., R. Co. *v.* Wilson, 90 Va. 263, 18 S. E. 35.

Where the direct and usual path to a railroad company's depot lies over a switch on which often stand freight cars with an opening left between two of them, so as to leave the path unobstructed, and this path is habitually used by the patrons and employees of the company with the knowledge and without the disapproval of the officials, it may be assumed that the company invites persons having business at the depot to use that path between the cars to go there; and in using it for that purpose, such persons are not guilty per se of negligence; and if by a sudden, unsignalled act of the company's servants, the cars are run together, thereby crushing such a person, the company is liable in damages for the injury. Nichols *v.* Washington, etc., R. Co., 83 Va. 99, 5 S. E. 171.

The circumstances that the cars were habitually separated at this point, when taken in connection with the location of the steps to the platform of the passenger depot and the constant uninterrupted use of the same by persons getting on and off at this depot, which was never at any time discountenanced by the road or its officials to whom it was known, is susceptible of no other construction than that it was designed as a path by means of which access might be gained to the depot, as well by persons having occasion to visit the depot as by the company's employees. Under these circumstances it can not be imputed to the deceased as negligence, if, in the absence of some warning, he selected this route rather than the other and longer one around by the freight depot. Under such circumstances it seems to us clear that an obligation was imposed upon the company to see that it should not become a source of danger to those to whom it had held it out as a passage or way through which they might safely go, and a duty was imposed upon the company of notifying persons entitled or invited to use it, in some unmistakable way, that it was about to be closed before closing it. Nichols *v.* Washington, etc., R. Co., 83 Va. 103, 104, 5 S. E. 171.

Only Outlet across Track.—In an action by decedent's administrator against railroad company, it was proved that the only outlet from the house whence decedent came was by way of company's tracks, that had long been, with company's acquiescence, the common pathway to the public to and from the house and its vicinity to Lynchburg; that decedent stepped off of side track on to the main track to avoid a material train, and was killed by a yard engine and tender not visible when he came on to the track, being around a bluff, but was backing rapidly within city limits and against its ordinances in the direction decedent was walking; and that the engineer failed to look out, blow the whistle or give any warning. It was held, the defendant's servant's negligence was the proximate cause of the killing, and plaintiff is entitle to recover though decedent may not have been entirely free from fault. Virginia Mid. R. Co. *v.* White, 84 Va. 498, 5 S. E. 573.

(3) Duty to Licensees and Trespassers.

See the title RAILROADS.

b. Duty to Keep Lookout for Travelers.

Steam Railroad.—Where train is backed over crossing or frequented street, the company must keep a look out on the leading car. Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299.

Street Railway.—A street car company owes the duty of foresight to persons and vehicles crossing its tracks in a city, and if the failure to keep a proper lookout was the proximate cause of an injury inflicted upon a person crossing its track, it is liable, notwithstanding the fact that the person injured was guilty of negligence in going upon the track. Richmond Passenger,

etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

c. Duty to Have Train or Cars under Control.

Loss of Control Caused by Overcrowding Street Cars.—The people of a city have the same right to pass along an intersecting street, on foot or in vehicles, as a street car has to go across; and it is gross negligence in a street railway company to overcrowd and load down its cars with passengers, beyond any reasonable or proper limit, as not to be able to stop them readily as they approach intersecting streets, if necessity requires it. If, from such crowding and consequent inability to stop, a collision occurs, resulting in injury to a passenger, the company is liable for such injury. Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267.

d. Right to Assume Travelers Will Exercise Care to Avoid Injury.

A railroad company has the right to assume that a grown person seen on or near its track will get out of the way of an approaching train, and if he fails to do so and is injured, the company is not liable unless it is shown that after the company, by the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury. Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

The engineer on a train, whose duty it is to keep a lookout and to exercise ordinary care to prevent injury to persons or property crossing the track on the public highway, may well presume that the instinct of self-preservation would naturally prompt a person not to venture on the track in front of a rapidly approaching train; especially where the traveler is approaching the track at a slow pace. New York, etc., R. Co. *v.* Kellam, 83 Va. 857, 3 S. E. 703.

e. Starting Train Standing Near Crossing.

A person using a public crossing over a railroad is not bound to assume that the company will negligently, without warning, back a motionless train against her. Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118.

And to excuse a railroad company from suddenly and without warning backing a freight train against a person lawfully using a public crossing, it must be shown in evidence that such person was guilty of some act of legal negligence contributing to her injury, such as a person of ordinary prudence would not be guilty of under the same circumstances. Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118.

f. Injury from Flying Switch.

A person having knowledge of the negligent practice of a railroad company in making "flying switches" over a street crossing, came to the crossing on a starlit, but moonless, night, just as an engine was approaching, and after waiting for it to pass, stepped upon the side track on which the cars following the engine were, and was struck and injured by a box car, so following, without a light or person on it, and without any signal having been given. The person injured and his father, who was with him, testify that, after the passage of the engine and before proceeding, they looked down the track for cars and saw none. As to the extent of the darkness and whether lights in a passenger coach at the rear of the box cars could, or ought to have been seen by them, the evidence was conflicting and uncertain. It was held, that on demurrer to the evidence, judgment was properly rendered for the plaintiff. Vance *v.* Railway Co., 53 W. Va. 339, 44 S. E. 461.

2. Special Precautions at Crossings.

a. Gates.

Judicial Notices That Gates Promote Safety.—It is a matter of common knowledge, of which courts will take judicial notice, that the maintenance of gates and gatekeepers at grade crossings of railroads tends to promote

safety. Courts have the right to take judicial notice of the result of the general experience of society as shown by adjudged cases, and the treatises of text writers. Richmond, etc., R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670, 32 S. E. 787.

Does Not Excuse Negligence of Traveler.—"'Where gates are maintained,' says Elliott on Railroads, vol. 3, § 1157, 'whether required by statute or not, the fact that the gate is open is held to be an invitation to cross, and an assurance that the track can be crossed in safety, but such invitation will not excuse the traveler himself from exercising ordinary care to avoid collision. It is the duty of the company to close the gates on the approach of a train, but the traveler himself must not rely entirely upon its servant to do so.'" Kimball *v.* Friend, 95 Va. 142, 27 S. E. 901.

The erection of gates, gongs, or other devices at highway or street crossings to warn travelers of approaching trains does not excuse a traveler at such crossings from exercising ordinary care and caution. And while courts and text writers differ as to the degree of reliance that may be placed upon the invitation which an open gate or silent gong gives to the traveler to cross, they generally, if not universally, hold that the same degree of care and caution is not required of him, as if there was no such invitation. Kimball *v.* Friend, 95 Va. 140, 27 S. E. 901.

Effect of Gates on Decree of Care Required.—A traveler approaching a railway crossing where gates or other devices are used for the purpose of warning travelers of approaching trains must use that degree of care which an ordinarily prudent person would use under like circumstances before going on the track. While the same degree of care is not required as at crossings where no such devices are used, still he must use his senses to ascertain whether or not a train is approaching. He can not rely entirely on an open gate as a guaranty of safety. Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

Maintenance of Gate Sufficient Consideration for Contract.—Although a street railway company may have the right to cross a railroad at grade without the consent of the railroad company, yet the benefits derived from the increased safety to its passengers furnishes a sufficient consideration for its contract with the railroad company to pay one-half the costs of the erection and maintenance of a gate at such crossing, and the salary of a watchman. Richmond, etc., R. Co. *v.* Richmond, etc., R. Co., 96 Va. 670, 32 S. E. 787.

The crossing of railways at grade is always attended with danger, and that when this crossing occurs in the streets of a city the danger is greatly enhanced. It was, therefore, for the mutual convenience, safety, and protection of the two companies that some arrangement should be made by which the danger incident to the situation might be diminished, if not wholly obviated. Richmond, etc., R. Co. *v.* Richmond, etc., R. Co., 96 Va. 673, 32 S. E. 787.

Not a Warning to Prevent Frightening of Horses.—It is not the purpose of gates at a street crossing to warn persons traveling the street to keep at a sufficient distance to prevent their horses from becoming frightened by an engine or train, as they are only lowered to shut street travelers off the crossing until an approaching engine or train passes. Southern R. Co. *v.* Cooper, 98 Va. 306, 36 S. E. 388. See generally, the title ANIMALS, vol. 1, p. 378.

b. Watchman.

Watchman Substituted for Gates.—Where a railroad company has been permitted by a city to temporarily substitute a watchman for gates at a grade crossing, and during that time an accident has occurred at such crossing, it is error to instruct the jury as to the duty imposed upon the company concerning the erection and mainte-

nance of gates, and to omit all reference to the presence or absence of the watchman. Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333.

Watchman Required by Ordinance.—The ordinance of the town of North Danville required that any railroad operating in the town should "flag each and every train while crossing any of the public streets or highways." At the time of this accident no flagman was at the crossing. Under these facts the jury gave a verdict in favor of the plaintiff for $9,000; and the court overruled the motion to set it aside. Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 863, 12 S. E. 946.

The train which caused the accident complained of approached a grade crossing in a city at a rate of speed prohibited by city ordinances. No notice was given of its approach. The headlight was extinguished, and the watchman at the crossing failed to perform his duty. The deceased was passing along a much frequented street, approaching a crossing where, under the city ordinance, there should have been a watchman to warn him, and there was no train due at the time. It was held, the railroad company was guilty of negligence, and although the accident might not have happened, if the deceased had stopped or paused, still the failure of deceased to stop, did not, as a matter of law, make a case of contributory negligence so plain as to justify the court in withdrawing it from the consideration of the jury. Southern R. Co. *v.* Aldridge, 101 Va. 142, 143, 43 S. E. 333.

c. Duty to Give Signal by Bell or Whistle.

(1) In General.

It is the duty of a railroad train when approaching a place where the track crosses either a street, highway or other public crossing to give warning of its approach by sounding its bell or whistle, in order that travelers who are about to cross the track may be warned of the approach of the train. See Va. Code, 1904, § 1294d, p. 676; W. Va. Code, 1899, ch. 54, § 61, p. 508. Roberts *v.* Alexandria, etc., R. Co., 83 Va. 312, 2 S. E. 518; Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Marks *v.* Petersburg, etc., R. Co., 88 Va. 3, 13 S. E. 299; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Southern R. Co. *v.* Bryant, 95 Va. 214, 28 S. E. 183; Atlantic, etc., R. Co. *v.* Rieger, 95 Va. 418, 28 S. E. 590; Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7; Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388; Bass *v.* Norfolk, R. etc., Co., 100 Va. 3, 40 S. E. 100; Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 248; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553; Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532; Christy *v.* Chesapeake, etc., R. Co., 35 W. Va. 117, 12 S. E. 1111; Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457; Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 18 S. E. 897; Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; Young *v.* West Virginia, etc., R. Co., 44 W. Va. 218, 28 S. E. 932; Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866.

No train has a right to cross a public highway without signing its approach to warn the persons who might be traveling there. Roberts *v.* Alexandria, etc., R. Co., 83 Va. 315, 2 S. E. 518.

Statutory Provisions—Virginia.—By an act of assembly (acts of assembly, 1893-1894, p. 827), it was provided "that a bell and steam whistle shall be placed on each locomotive engine operated on any railway in this state, and said whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached; provided that at street crossings within the limits of incorporated cities or towns the sounding of the whistle may be omitted, unless re-

quired by the council of any such city or town, and the company shall also be liable for all damages which shall be sustained by any person by reason of such neglect." Simons *v.* Southern R. Co., 96 Va. 154, 31 S. E. 7. This act was repealed by the act of 1904, p. 368, ch. 253, and the present statutory regulation on the subject is found in the Virginia Code, 1904, § 1294d, and subsection 24, which requires railroad locomotives to sound their whistle outside incorporated cities and towns, at a distance of not less tha three hundred yards from the place where a railroad crosses upon same level any highway or crossing.

"The legislature of Virginia has emphasized this duty of the railroad company for the protection of human life by requiring that a bell and steam whistle shall be placed on each locomotive engine operated on any railway in this state, and that 'the whistle shall be at least twice sharply sounded, not less than three hundred yards before a highway crossing is reached,' and also in making the company 'liable for all damages which shall be sustained by any person by reason of such neglect.' Acts, 1893-94, p. 827." Southern R. Co. *v.* Bryant, 95 Va. 214, 28 S. E. 183.

West Virginia.—Section 61, ch. 54, W. Va. Code, 1887, enacts that a bell or steam whistle shall be rung or whistled by the engineer or fireman of a locomotive at least sixty rods from the place where the railroad crosses any street or highway, and kept ringing or whistling for a time sufficient to give notice of the approach of a train before the street or highway is reached, and inflicts a penalty of not over $100 for its neglect; and that the railroad corporation shall be liable to any party injured for damages by reason of such neglect. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 533; Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 18 S. E. 897.

Ringing Bell or Blowing Whistle Sufficient—West Virginia.—Under the statute of West Virginia (see W. Va. Code, 1899) ch. 54, p. 580, § 61, it has been held, that it is sufficient if either the bell is rung or the whistle is blown as the train approaches the crossing, the court holding that the statute did not require both the bell to be rung and the whistle blown. Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553.

Requirement Previous to Passage of Statute.—Prior to the enactment of the statute (March 5, 1894), the servants of a railroad company, operating one of its trains, were required to give notice of its approach to a public crossing, and if they failed to do so and injury resulted from such failure, the company was liable therefor. Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 172, 21 S. E. 238.

Independently of any statute, it is the duty of a railroad company to give timely warning of the approach of its trains to the crossing of a public highway. While the company has the right of way at public crossings, it must give timely warning of the approach of its trains. This duty is emphasized by statute in Virginia. Acts, 1893-94, p. 824. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

Station Signal as Substitute for Crossing Signal.—It can not be determined, as a matter of law, that a long, loud blast for a station signal is a sufficient substitute for the crossing signal of two sharp blasts at least three hundred yards before reaching the crossing required by the statute. Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7.

A special train has no right to cross a public thoroughfare at an unusual rate of speed without slackening its speed, and blowing the whistle or ringing its bell; and where no ordinary precaution on the part of the plaintiff's decedent would probably have prevented the accident the railroad company is liable. Roberts *v.* Alexandria, etc., R. Co., 83 Va. 315, 2 S. E. 518.

Failure to Sound Whistle Negligence.—Where a statute imposes upon a railroad company the duty of sounding the whistle on its locomotive engines approaching a crossing of a highway for the purpose of preventing a collision with travelers on the highway, or frightening their teams, and the company fails to perform that duty, it is negligence, for the consequences of which the company is liable. Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388; Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

Where, by statute or municipal ordinance, the railroad is required on approaching a crossing to ring a bell or sound a whistle, the omission to do so is negligence rendering the company liable, provided the failure of duty is the proximate cause of the injury, and they are not able to show that the omission was reasonable and prudent. Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 461. See also, Young *v.* West Virginia, etc., R. Co., 44 W. Va. 218, 28 S. E. 932.

If the servants of a railroad company, having in its charge one of its engines and trains running within the corporate limits of a city in this state, to and over a public wharf therein, shall fail or neglect to give notice at least sixty rods before its approach to such wharf by ringing the bell or blowing the whistle of the locomotive for a sufficient time to give notice of its approach thereto, such failure or neglect is of itself negligence on the part of such railroad company. Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 243.

Train Moving or About to Move.—It is the duty of the engineer in charge of a train moving or about to move to give timely warning of its approach to a crossing or other place where the public have a right to go. Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 248.

Does Not Excuse Traveler's Want of Care.—Failure to ring a bell, or blow a whistle, on an engine, as required by § 61, ch. 54, W. Va. Code, 1887, is negligence for which a railroad company is chargeable; but this does not excuse a traveler on a highway crossing a railroad track from the exercise of such reasonable care and caution as the law requires, to ascertain whether a train is approaching the crossing. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532.

Failure Must Be Proximate Cause of Injury.—Failure to ring bell or blow whistle at crossings, though required by law, will not render the company liable, unless that be the proximate cause of the injury, and there be no such negligence by the plaintiff as will prevent his recovery. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 533.

The failure of a railroad company to sound the whistle of its locomotive, in the manner prescribed by law, on approaching a highway crossing is negligence, and if a traveler on the highway is injured, there is some presumption that the injury was caused by the neglect, unless the traveler's own fault is manifest. Such negligence, however, does not entitle the traveler to recover, unless it was the cause of the injury. Whether it did cause the injury or not is to be determined by all the facts and circumstances of the case. Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 419, 28 S. E. 590.

Although a railroad company may have failed to sound the whistle of its locomotive, on approaching a public crossing, in the manner prescribed by law, yet if it gave another or other warnings, which in fact notified the plaintiff who was injured at the crossing of its approach, or which would have given him notice if he had been exercising ordinary care, so that he could have avoided the injury complained of, he can not recover. Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 419, 28 S. E. 590.

Not Intended as a Protection to Horses.—Bells are used on locomotives to lessen the danger to travelers on a street or highway of a collision with an engine crossing the same, and courts will take judicial notice of this fact, but they are not intended or useful in warning persons to keep at such distance from the track of the company as will prevent their horses from becoming frightened at a passing engine. Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388. See also, the title ANIMALS, vol. 1, p. 378.

Street Railway.—The people of the city have the same right to pass along an intersecting street crossing as the street car has to go across. It is, therefore, the duty of the company to give notice or warning of the approach of its car. Bass *v.* Norfolk R., etc., Co., 100 Va. 3, 40 S. E. 100.

When Ringing or Whistling Insufficient.—"Merely ringing the bell or sounding the whistle on the engine, when the train is standing near, with its rear to the crossing, is not sufficient warning to passersby of an intention to back the train, and without other notice the company will be negligent." Marks *v.* Petersburg R. Co., 88 Va. 3, 13 S. E. 299.

(2) To Whom Duty Is Owed.

Persons Using Track at Crossing.—The statute (W. Va. Code, ch. 54, § 61) requiring the bell to be rung or a whistle to be blown at crossings, is designed for those passing over the tracks at such crossings, not for those using the track elsewhere for their convenience as a footpath. Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385; Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866.

Animals.—The statutory requirement of blowing the whistle or ringing the bell sixty rods before reaching a crossing is intended to warn persons who are about to use the crossing in passing over the public road, and not for the purpose of preventing dumb animals from going upon the crossing. Toudy *v.* Norfolk, etc., R. Co., 38 W. Va. 694, 18 S. E. 896. See also, the title ANIMALS, vol. 1, p. 378.

C. CONTRIBUTORY NEGLIGENCE OF TRAVELER.

See also, the title NEGLIGENCE.

1. In General.

Where an action was brought to recover damages from a railroad company because of injury which resulted to plaintiff's intestate at a crossing, it was held, that where the negligence of the plaintiff's intestate contributed to his injury, there can be no recovery. Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548.

The omission of the signals or warnings required by the statute is negligence in a railroad company prima facie, entitling an injured party to recover, and he is not, after proving such negligence and his injury, called on to prove that he is not guilty of contributory negligence; but, when it appears from the evidence adduced by a plaintiff, or is satisfactorily shown by the defendant, that the plaintiff is guilty of contributory negligence, then it falls under the general principles of the law of contributory negligence above stated. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532. See also, Young *v.* West Virginia, etc., R. Co., 44 W. Va. 218, 28 S. E. 932.

Defendant's Failure to Use Caution.—No recovery can be had by the plaintiff where his negligence in any degree contributed to the injury received by colliding with a railroad train at a public crossing, unless the defendant, being aware of the plaintiff's danger, and having the opportunity to avert it, fails to use ordinary caution to do so. Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457.

2. Degree of Care Required of Travelers.

See also, ante, "Special Precautions at Crossings," II, B, 2.

a. Steam Railroad Crossings.

Ordinary Care. — Pedestrians are bound to take ordinary precautions for their own safety, even if there was any negligence on the company's part. Norfolk, etc., R. Co. *v.* Wilson, 90 Va. 263, 18 S. E. 35; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 172, 21 S. E. 238.

A passenger about to cross a railroad at a public crossing is bound to use ordinary care to avoid getting into a position in which a collision with a moving train is inevitable. Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Eutcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457.

A court did not err in instructing a jury that if they believe from the evidence, and from a view of the place where the accident is alleged to have taken place, that the view of an approaching train was obstructed by buildings or otherwise, and that ordinary care would have required other precautions, and that the defendant did not use such other precautions, then they must conclude that the defendant was guilty of negligence; and if they believe further from the evidence that the plaintiff did not know that the train was nearing the gate, so as to endanger his passing through, but acted as an ordinarily prudent man would act under the circumstances, they must find for the plaintiff such damages as are proper, not exceeding the amount claimed in the declaration. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 68, 4 S. E. 21.

Extraordinary care or caution is not required of persons using a public crossing, to avoid the unforeseeable negligence of those in charge of a railroad train. Meeks *v.* Ohio River R. Co., 52 W. Va. 99, 43 S. E. 118.

Effect of Gates on Degree of Care.— See ante, "Gates," II, B, 2, a.

Slowness in Crossing.—A traveler in a covered wagon, open at each end and drawn by two horses, was traveling on a street in a city, parallel with a railroad track. On reaching the intersection of two streets, and being about to cross the track, he looked up and down for trains, and seeing none, turned to pass over at the crossing. A fast mail train was coming in on time at four or five miles an hour; and a box car, on a side track, in some degree, prevented engineer from seeing the wagon until within twenty-five or thirty feet, when he at once did all he could to stop, but a collision occurred between the engine and the hind end of the wagon, which was slowly going across the track, breaking the wagon and the traveler's thigh. In action by the injured person against the company for damages, it was held, though defendant may have been guilty of some negligence in leaving the box car on the siding, still plaintiff's own negligence in turning short and crossing track slowly without having used reasonable care to ascertain if train was coming, was the proximate cause of the collision, and he can not recover. Nash *v.* Richmond, etc., R. Co., 82 Va. 55. The court in this case said: "He ought to have known that traveling parallel with the track, as he had been doing for some distance, there was nothing to indicate to those in charge of a passing train that he was about to slowly cross their track. That he was a venturesome person is shown by the slowness with which he crossed the track, and the remark of his sister, 'I think you can go clear, as you generally do.'"

b. Street Railway Crossings.

The rules for determining contributory negligence, as applied to street railways, are in some respects quite different from those applicable to steam railroads running on their own land. Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618; Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

The rights of street cars on a city street, no matter by what power propelled, are not superior to those of any

other vehicle, but simply equal. Between crossings, as well as at crossings, vehicles may cross street car tracks in full view of approaching cars, if it is consistent with ordinary prudence to do so. Whether or not it is negligence for one to attempt to drive across a street car track when he sees a car coming one hundred yards off is a question for the jury under all the facts and circumstances of the case. It is not negligence as a matter of law. Richmond Traction Co. *v.* Clarke, 101 Va. 382, 43 S. E. 618.

The same rule as to the negligence of a traveler is not applicable in crossing the track of a street railway at a street crossing in a city, as at a railroad crossing. The cases are quite different. In the first place, the cars of a street railway have not the same right to the use of the tracks over which they travel. The steam railroad is itself a highway, and the company has a property interest in and to its right of way (with us, usually the fee), even where the public have an easement for highway purposes over the same land. A street railway is not a highway. A street railway has no property interest in the street. It has the mere right to use it in common with the public generally. It has no right to use the street for other or different purposes than those for which it was dedicated or condemned, and because its use by the street cars is not a new and independent one, but merely in aid of the identical use for which the street was laid out, the owners of street cars are not required to pay compensation to the abutting landowners for its use. Reid *v.* Norfolk, etc., R. Co., 94 Va. 117, 125, 26 S. E. 428, 36 L. R. A. 274, 64 Am. St. Rep. 708. Bass *v.* Norfolk R., etc., R. Co., 100 Va. 1, 40 S. E. 101.

3. Duty to Stop, Look and Listen.

a. Duty to Stop.

It is the duty of one about to cross a railroad to look and listen for approaching trains, and if the view is obstructed, or hearing is rendered difficult by reason of noises in the neighborhood, a higher degree of caution is required of both the travelers and the railroad company than if said obstructions and noises did not exist, the degree of caution required of both parties being in proportion to the danger caused by the obstruction and noise. But under the facts in this case it can not be said that it was the duty of the traveler, as a matter of law, to stop in order to look and listen, if such duty exists in any case. Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333.

If the view of a traveler on the highway approaching a railroad crossing is so obstructed that he can not see an approaching train in time to stop his team before colliding with it, if he knows that a train is due at such crossing at or about such time, and if he is unable to hear the approaching train when his team is in motion, whether by reason of the force or direction of the wind, or of noises in the vicinity made by his own wagon, or other causes, ordinary care requires him to stop his team while he may do so, and listen for the train. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 534.

b. Duty to Look and Listen.

(1) Steam Railroad Crossings.

As a general rule the law is well settled that a traveler before going upon a railroad crossing must look and listen for approaching trains. New York, etc., R. Co. *v.* Kellam, 83 Va. 857, 3 S. E. 703; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21; Marks *v.* Petersburg R. Co., 88 Va. 9, 13 S. E. 299; Norfolk, etc., R. Co. *v.* Stone, 88 Va. 310, 13 S. E. 432; Hogan *v.* Tyler, 90 Va. 19, 17 S. E. 723; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Washington, Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183; Southern R. Co.

v. Bruce, 97 Va. 93, 33 S. E. 548; Bass *v.* Norfolk R., etc., Co., 100 Va. 4, 40 S. E. 101; Southern R. Co. *v.* Aldridge, 101 Va. 142, 43 S. E. 333; Richmond Traction Co. *v.* Clarke, 101 Va. 386, 43 S. E. 618; Richmond, etc., R. Co. *v.* Gordon, 102 Va. 501, 46 S. E. 772; Portsmouth, etc., R. Co. *v.* Peed, 102 Va. 663, 47 S. E. 850; Ayers *v.* Norfolk, etc., R. Co., 2 Va. Dec. 528; Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 555; Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 534; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1013.

Failure to Look and Listen Negligence.—A traveler approaching a crossing must vigilantly use his eyes and ears and look in every direction to make sure the crossing is safe. Failure so to do is contributory negligence, except where view of track is obstructed, or where party injured is a passenger going to or from train, or where direct act of company's agent induced traveler to cross without precaution; or where company, after discovering his negligence, fails to use due care to avert its consequences. Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299.

It is the duty of a traveler in approaching a railroad crossing over a highway to look both ways for approaching trains before attempting to cross the railroad track, and a failure to do so is generally held to be negligence as a matter of law. Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183; Bass *v.* Norfolk R., etc., Co., 100 Va. 4, 40 S. E. 100; New York, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703.

It is the settled law of this state, and generally, that, before a person attempts to cross a railroad track, he must look and listen, except in cases of a peculiar nature, where there are facts excusing the performance of that duty; and, if he fails to do this, he can not recover, although the railroad company is guilty of negligence, unless after it discovered his peril, or ought to have discovered it by the exercise of ordinary care, it might have averted the injury. Ayers *v.* Norfolk, etc., R. Co., 2 Va. Dec. 528.

It is the duty of a traveler on the highway crossing a railroad to look carefully for an approaching train, and if looking leaves any doubt, or the view is obstructed, he must also listen, before attempting to cross; otherwise, he will himself be guilty of negligence, which will prevent his recovery for an injury received in crossing. Obstructions rendering the view obscure and unreliable call for greater caution on his part. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 532.

Intestate in his carriage, with top up, approached defendant's railroad crossing, slowing his horse to a walk when near it. At that point the track was straight. At twenty-five yards from it, and up to it, he had a view of it for miles. Until his horse was on the track, he did not look out for the train. Then he attempted to hurry his horse across in front of the train. He failed, and was killed. Testimony as to whistleing was conflicting. It was held, intestate was guilty of contributory negligence, and an instruction to this effect was not improper. New York, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703.

Endeavor to Look and Listen Effectively.—It is the duty of a traveler about to cross a railroad track to use his eyes and ears to avoid danger. The track itself is a proclamation of danger. He should look in both directions from which a train could come, and listen, and, if his faculties warn him of the near approach of a train, he should keep off the track. It is not sufficient to look and listen at a great

distance from the point of crossing, or under such circumstances that he will be unable to stop if warned of an approaching train. He must exercise care to make the act of looking and listening effective. The care must be in proportion to the known danger. If he fails to use these necessary precautions and injury ensues, he can not recover, unless the defendant company, by the exercise of ordinary care and diligence, might have prevented the injury after it discovered, or ought to have discovered, his peril. Washington Southern R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Southern R. Co. *v.* Bryant, 95 Va. 219, 28 S. E. 183; Richmond Traction Co. *v.* Clarke, 101 Va. 386, 43 S. E. 618.

Train Which Might Have Been Seen.—Where a person, after standing near a railroad crossing, attempts to cross and is run over by a train, which he might see or hear if he looks or listens, is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell. Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299; Hogan *v.* Tyler, 90 Va. 19, 17 S. E 723; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 350.

A person, at 8 p. m., going north, without previously looking at the gateman, while on or near a well-lighted track, south of a freight train moving west, was struck by a passenger train backing to the east. It was held, that he was guilty of contributory negligence for not looking before he attempted to cross the track, and there could be no recovery of damages, though the railroad company was guilty of negligence. Ayers *v.* Norfolk, etc., R. Co., 2 Va. Dec. 526.

Presumption as to Stopping and Looking.—In an action for damages for the death of a person killed by a train of a railroad company, the fact that no proof is offered to show that the decedent, in going on the track, stopped and looked for an approaching train, does not raise the presumption that he did not stop and look, unless the evidence shows that he must have seen the approaching train if he had looked. McVey *v.* Chesapeake, etc., R. Co., 46 W. Va. 111, 32 S. E. 1013.

Rebuttal Presumption.—"In the case of Marks, etc., *v.* Petersburg R. Co., 88 Va. 1, 10, 13 S. E. 299, which was an action for damages for causing the death of a traveler at a street crossing by the defendant railroad company's cars, it was said by Judge Lewis, in discussing the subject of contributory negligence: 'If a person attempts to cross a railroad at a highway crossing without using his senses of sight and hearing, even though the company be negligent, the law, as well as common prudence, condemns his act as careless. But this is a mere presumption, which may be repelled by evidence showing that the case is within one or more of the exceptions to the general rule before mentioned.'" Quoted in Richmond, etc., Co. *v.* Gordon, 102 Va. 501, 46 S. E. 772.

Accident on Side Track.—Defendant's track ran on a city street. From it a side track led to a wharf through a gate surrounded by high fences, and on the east by buildings that prevented persons coming from the wharf from seeing approaching trains. No watchman was at the gate. At time of accident defendant was pushing a train to the wharf, but gave no signals. Plaintiff was driving out, when some one called him and he looked back, and the train collided with his truck and ran over his foot, whereby he sustained injury. It was held, it was plaintiff's duty to look and listen for approaching trains with the care of an ordinarily prudent man; if he failed to do so, he can not recover, unless, when defendant saw him, or should have seen him, it failed to use proper means to

avoid the accident. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

(2) Street Railway.

Omission Not Negligence as a Matter of Law.—While, generally speaking, one who is about to cross a street railroad should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad. It is not negligence, as a matter of law, to omit to do so. The question is, whether a prudent man, acting prudently, would have thought it unnecessary to do so. Portsmouth, etc., R. Co. *v.* Peed, 102 Va. 663, 47 S. E. 850; Bass *v.* Norfolk R., etc., Co., 100 Va. 6, 40 S. E. 100.

Failure to look and listen for an approaching street car by a person about to cross a street railway track at a street crossing, is not negligence as a matter of law. The test of due care, in such case, is to be determined by what a prudent man, acting prudently, would do under like circumstances. The same rule does not apply to a person crossing a railroad on a public highway. Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

Action of Prudent Man.—Generally speaking, one who is about to cross a street railroad should both look and listen for cars, but this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad. It is not negligence, as a matter of law, to omit to do so. The question is whether a prudent man, acting prudently, would have thought it unnecessary to do so. Portsmouth, etc., R. Co. *v.* Peed, 102 Va. 663, 47 S. E. 850.

Meaning of Term "Ordinary Care."—While it is difficult to frame a perfectly clear and accurate definition of the term "ordinary care," a jury could not have been misled by an instruction which told them that it was not negligence as a matter of law for one about to cross a street railway to omit to look and listen for cars, and that the question was whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it unnecessary to do so. Richmond, etc., Co. *v.* Gordon, 102 Va. 498, 46 S. E. 772.

c. Excuse for Failure to Look and Listen.

Where View Is Obstructed.—A traveler about to cross a railroad, at a public crossing, is excused from the duty of looking for approaching trains when looking would be unavailing on account of obstructions to the view. If injured in attempting to cross under such circumstances the propriety of his going upon the track is a question for the jury to determine. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

If place of accident was such that a person driving out could not see approaching train, plaintiff's not looking in front of him was not contributory negligence, unless he knew the train was approaching. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

Forgetfulness of danger or absence of thought about the railroad is no excuse for a failure to look or listen. Beyel *v.* Newport News, etc., R. Co., 34 W. Va. 538, 12 S. E. 534.

4. Going on Crossing with Knowledge of Danger.

Crossing in Front of Express Train.—The deceased passed along defendant's railroad every morning, and crossed it, going to his work. On the morning in question, between daylight and sunrise, he had been walking for some distance by the side of the track, and towards an express train approaching at a high rate of speed, and tried to cross the track in front of the train, and was killed. It was held, that defendant was not liable for his death. Campbell *v.* Richmond, etc., R. Co., 2 Va. Dec. 53.

Persons Seeing the Train Approach.—If a person using his senses saw a train approaching, and undertook to cross the track, instead of waiting for

the train to pass, and was injured, the consequences of his mistake and temerity can not be cast upon the defendant. New York, etc., R. Co. *v.* Kellam, 83 Va. 858, 3 S. E. 703.

Negligence of Company's Servants.—The failure of the engineer to sound the whistle or ring the bell, if such were the facts, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity can not be cast upon the defendant. New York, etc., R. Co. *v.* Kellam, 83 Va. 858, 3 S. E. 703. See also, Marks *v.* Petersburg, 88 Va. 8, 13 S. E. 299.

"Although the jury may believe from the evidence that the defendant or its employees gave no signal of the approach of its cars, either by ringing bells or by calling out, or otherwise, yet, if the plaintiff knew the train was then nearing the gateway to pass through, or could by such observation or wachfulness in approaching the railroad track as a man of ordinary prudence under the circumstances would have used, have ascertained that the train was approaching to pass through in time to have avoided it by the use of such means as an ordinarily prudent man would have used under the circumstances, and did not so avoid it, he was guilty of such contributory negligence as bars his recovery." It needs no argument to show that in this action of the court there was no error. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 66, 4 S. E. 21.

Failure to Take Proper Precautions.—One crossing a railroad at a place where the public is licensed to cross, who knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precaution in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train. Norfolk, etc., R. Co. *v.* Wilson, 90 Va. 263, 18 S. E. 35.

Failure to Heed Warning.—Plaintiff's intestate, a one-eyed woman fifty-three years old, reached within four feet of railroad track at crossing over frequented street and stopped on walkway to wait till freight train passed. It passed her, but stopped before its rear car had got half-way across the street, which was less than sixty feet wide. Brakeman at switch fifteen feet distant signalled engineer with hand and voice to back. Train moved slowly back, having no outlook on leading car. In meantime intestate remained on walkway between brakeman and train, in unobstructed view of both. When train had reached within two or three steps of her she started across the track, was run over and killed. It was held, company was guilty of negligence, but intestate's own negligence was the proximate cause of the injury, and plaintiff can not recover. Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299.

5. Contributory Negligence of Afflicted Persons.

Defective Hearing.—The plaintiff's intestate, who was run over and killed by a street car, being deaf, and having

given no intimation of an intention to cross the track until the car was so close to him that it could not be stopped in time to avert the accident, the defendant company was entitled to an instruction asked telling the jury that it is the duty of a person approaching a street car track to exercise the care which ordinarily prudent persons would exercise, and to make such use of his faculties as ordinarily prudent persons would make use of under similar circumstances, and if such person is deaf, it is more incumbent on him to exercise his sight; and if they believe from the evidence that the deceased failed to exercise such care, and his failure to do so contributed to the accident in which he met his death, they must find for the defendant. In the case at bar, the addendum made by the court was, under the evidence, erroneous. Portsmouth R. Co. *v.* Peed, 102 Va. 663, 47 S. E. 850.

Person Subject to Epilepsy.—Plaintiff's intestate, subject to epileptic fits, attempted to cross railway at a point beyond a street crossing, where there was a ditch four feet deep, and where crossing was forbidden. In so doing he was seized with a fit and fell on the track, and was killed by a freight train, backing slowly, with bell ringing. It was held, deceased was guilty of contributory negligence, and also a trespasser; and verdict for his administrator should be set aside. Tyler *v.* Kelley, 89 Va. 282, 15 S. E. 509.

Blind in One Eye.—The fact that a person is blind in her right eye, does not relieve her from the duty of ordinary care in crossing or about to cross a railroad track, at a point where it intersects with a street or highway, but imposes upon her the duty of greater precaution to avoid injury. Marks *v.* Petersburg R. Co., 88 Va. 8, 13 S. E. 299.

6. Injury Caused by Backing of Traveler's Horse.

See generally, the title ANIMALS, vol. 1, p. 378.

Plaintiff's horse had calmly approached defendant's train as it passed very close to him, and after it passed having safely cleared the track, homeward bound, became frightened at the steam from the engine on its return, and backed the wagon against the train, whereby plaintiff was injured. It was held, defendant not liable, as it could not foresee such unusual conduct on the part of the horse. Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 861, 12 S. E. 946; Richmond, etc., R. Co. *v.* Yeamans, 90 Va. 752, 19 S. E. 787.

Where a plaintiff, acquainted with a crossing, and aware that the place was used for shifting cars, was seen by engineer of the shifter, that had just passed, to drive his one-horse wagon safely across the track within a few feet of the shifter, the horse not noticing it, and to proceed some nine feet from the track, when, the engineer not observing, the horse balked and backed the wagon on to the track into collision with the shifter, which, having coupled on to a train of cars, was backing down the track, whereby injury resulted to wagon, horse and plaintiff, it was held, error to refuse to set aside the verdict for the plaintiff as not warranted by the evidence. Richmond, etc., R. Co. *v.* Yeamans, 86 Va. 860, 12 S. E. 946.

D. ACTIONS FOR INJURIES AT CROSSINGS.

1. Evidence.

Burden of Proof.—The burden of showing that the deceased was not in the exercise of ordinary care and caution in approaching the crossing was upon the defendants, unless it was disclosed by the plaintiff's evidence, or can be fairly inferred from all the circumstances of the case. Kimball *v.* Friend, 95 Va. 138, 27 S. E. 901.

In an action against a railroad company to recover damages resulting from negligently failing to give timely warning of the approach of one of its trains to a public crossing, the burden is on the plaintiff to prove such neg-

ligence. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

Presumptions of Negligence.—Driving upon a railroad track at a public crossing at a slow gait, without stopping, is not evidence per se that the traveler did not listen for approaching trains. The negligence of the railroad company being established, in the absence of evidence to the contrary, the presumption, though slight, is that the traveler did his duty in approaching the track. Southern R. Co. *v.* Bryant, 95 Va. 213, 28 S. E. 183; Kimball *v.* Friend, 95 Va. 138, 27 S. E. 901.

Where a traveler is killed at a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

Proximate Cause of Injury.—In an action of trespass against a railroad company for injuries received at a railroad crossing by reason of the failure of the defendant to give the signal required by statute, in order that the plaintiff should recover, he must not only prove that the defendant failed to give the signal required by statute, but that such failure was the proximate cause of his injury. Butcher *v.* West Virginia, etc., R. Co., 37 W. Va. 180, 16 S. E. 457.

Proof of the failure of a railroad company to give the crossing signal required by statute, and of injury to the plaintiff, are not of themselves sufficient to support a verdict against the company. But such verdict will not be disturbed where the evidence tends to show that the injury would not have been inflicted, but for the failure of the company to give such signal. Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7.

General Allegation of Negligence.—The allegation in a declaration that the defendant, "without ringing the bell or blowing the whistle, or giving any warning whatever," is a general allegation, under which the plaintiff may introduce any evidence tending to prove any negligence on the part of the defendant wherein it failed to give plaintiff warning of an approaching train. Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

2. Province of Court and Jury.

Conflict of Evidence.—The testimony of a witness who denies that a railroad whistle was sounded on a given occasion is as positive evidence as the testimony of another who affirms the fact, where each has equal opportunity of hearing, and the attention of the former, because of special circumstances, is equally drawn with that of the latter to the sounding of the whistle. The denial of the one and the affirmance of the other produces a conflict of evidence which it is the province of a jury to determine. Southern R. Co. *v.* Bryant, 95 Va. 212, 28 S. E. 183.

Contributory Negligence of Traveler.—Where the view of the track is obstructed, and the railroad company has failed to give notice of the approach of its train to a crossing upon the highway, and a person in attempting to go across the track, not being able to see the train on account of obstructions, and being obliged to act upon his judgment at the time of crossing, is injured, the propriety of his going upon the track under such circumstances is not a question of law to be decided by the court, but a matter of fact to be determined by the jury. Southern R. Co. *v.* Bryant, 95 Va. 219, 28 S. E. 183.

Whether a traveler approaching a railroad crossing used due care or not is a question for the jury, to be determined from all the facts of the case. Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

Sounding Whistle.—It was said by Judge Buchanan, in Atlantic, etc., R.

Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590. "The legislature had determined where the whistle was to be sounded, and it was not for the court or jury to determine that sounding it at some other place or in some other manner was equally as good. The question which the jury had to determine was not whether one kind of warning was as good as another, but whether under all the circumstances of the case, although the defendant may have failed to sound the whistle in the manner required by statute, the plaintiff's injury was proximately caused by the defendant's negligence." See also, Simons *v.* Southern R. Co., 96 Va. 155, 31 S. E. 7.

But it is error to leave it to the jury to determine whether sounding the whistle at some other place or in some other manner than that prescribed by the statute was equally as good. Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 419, 28 S. E. 590.

Failure to Close Gates.—In cases where the failure to close a gate at a railway crossing is followed by a collision between a train and a traveler, the question of negligence or contributory negligence is one for the jury. Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

"It may be that a silent gong is not as strong an assurance to the traveler that the track can be crossed in safety as an open gate, but it is a circumstance upon which he may rely, and which the jury must consider in connection with the other facts of the case in determining the question of contributory negligence." Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

III. Obstruction of Crossing.

Unlawful Obstruction.—Obstruction of streets by a railroad company, unless the train is standing to load or unload passengers, and unless a passway is left open, is unlawful (acts, 1883-'84, p. 499); and the company is liable to fine and for such damages as may be caused thereby to any person. Code, § 2900. But these damages must be proved, not inferred. Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473.

Injury to Stock.—Instruction that the stock reached the obstructed crossing without the negligence of the plaintiffs, then if the obstruction turned or caused the stock to turn up the railroad track and were killed by a passing train, then the jury shall find for the plaintiffs, is erroneous, in assuming as a matter of inference that the injury was caused by the obstruction. Richmond, etc., R. Co. *v.* Noell, 86 Va. 19, 9 S. E. 473. See generally, the title ANIMALS, vol. 1, p. 375.

Proximate Cause.—Where a railroad company left a box car standing on a side track so near a crossing that it prevented the engineer on an approaching train from seeing a wagon which was about to cross the track, in consequence of which the train ran into the wagon and injuries resulted therefrom, it was held, that while the company may have been guilty of some negligence in leaving the box car on the siding, still if the plaintiff's own negligence was the proximate cause of the injury, he can not recover. Nash *v.* Richmond, etc., R. Co., 82 Va. 55.

Cross Remainders.

See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

CRUEL AND UNUSUAL PUNISHMENT.—See Com. *v.* Wyatt, 6 Rand. 701. And see the title CONSTITUTIONAL LAW, ante, p. 199.

Cruelty.

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CRUELTY TO ANIMALS.

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CROSS REFERENCES.

See the title ANIMALS, vol. 1, p. 373.

I. Definition and Nature.

Construction of Words Torture and Torment.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, the words "torture" and "torment" are used as generic terms, and include such acts as beating, depriving of necessary sustenance and others. The circumstances and the manner of the torturing and tormenting as the case may be must be stated. State *v.* Gould, 26 W. Va. 258.

Nature of Offense.—West Virginia Code, 1899, ch. 149, § 14, provides that cruelty to animals (more specifically described in said section) shall be deemed a misdemeanor. So also, § 1, ch. 74, of acts of 1875. See State *v.* Gould, 26 W. Va. 258.

Virginia Code—Corresponding Section.—In the Virginia Code for section corresponding to W. Va. Code, 1889, ch. 149, § 14, providing that cruelty to animals shall be deemed a misdemeanor, see Va. Code, 1904, § 3796a.

II. The Indictment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

A. FORM AND ALLEGATIONS.

Sufficiency of Indictment.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, the following form is sufficient: "The grand jurors of the state of West Virginia in and for the body of the county of Wood, and now attending the said court and upon their oaths present, that Stephen Gould on October 13, 1881, in the said county, did unlawfully and willfully and cruelly beat, shoot, torture, and otherwise ill-treat a certain beast called a mule, the owner or owners of which said mule is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." State *v.* Gould, 26 W. Va. 258.

Description of Offense.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, where either of the words "overdrive," "overload," "deprive of necessary sustainance," "unnecessarily and cruelly beat" or "needlessly mutilate or kill" is used to describe the offense, it is not necessary to add circumstances under or manner in which the act was done. State *v.* Gould, 26 W. Va. 258.

Ownership and Value.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, it is not necessary to set forth the ownership or value of the animals. State *v.* Gould, 26 W. Va. 258.

Allegation as Nature of Animal—Judicial Notice.—In an indictment under § 1, ch. 74, of acts of 1875, provid-

ing that cruelty to animals shall be deemed a misdemeanor, it is not necessary to allege that a mule is a domestic animal, because the court will take judicial notice of the fact that a mule is a domestic animal in this state. State *v.* Gould, 26 W. Va. 258.

Joinder of Counts.—In an indictment under § 1, ch. 74, of the acts of 1875, making it a misdemeanor to overdrive, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill any domestic animal, as the language describes seven separate and distinct offenses of a similar character, it is a fatal defect to unite two offenses in one court. State *v.* Gould, 26 W. Va. 258. But see post, "Surplusage," II, B.

B. SURPLUSAGE.

"Shoot, Torture and Illtreat"—Ownership.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, in the following form: "The grand jurors of the state of West Virginia in and for the body of the county of Wood, and now attending said court upon their oaths present that Stephen Gould, on October 13, A. D., 1881, in the said county, did unlawfully and willfully and cruelly beat, shoot, torture, and otherwise ill-treat a certain beast called a mule, the owner or owners of which said mule is to the grand jurors unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state," the words "shoot," "torture," and otherwise "ill-treat," and the words "the owner or owners of which said mule is to the grand jurors unknown" are mere surplusage. State *v.* Gould, 26 W. Va. 258.

Words "Torture and Torment."—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, the adding in any one count for overdriving, overloading, or depriving of necessary sustenance or unnecessarily or cruelly beating or needlessly mutilating or killing, the words "and torture," "and torment," or either of them would not cause such count to be fatally defective as including a charge of more than one offense in a single count, the added words "and torture," "and torment" being mere surplusage. State *v.* Gould, 26 W. Va. 258.

III. Evidence.

Act Heard but Not Seen.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, it was held, that the jury had a right to infer that the defendant cruelly beat a mule where testimony showed that mule went into a barn followed by the defendant with a clapboard, and that witness heard defendant striking the mule in the barn but could not see him.

IV. Security to Keep the Peace.

See generally, the title BREACH OF THE PEACE, vol. 2, p. 615.

Security to Keep the Peace.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, that part of the judgment was set aside which required the defendant to give a bond with approved security to keep the peace and be of good behavior or in default thereof be imprisoned till such bond be given. No one but persons not of good fame are required to give securities for their good behavior except in a very few cases set out specifically in the statute law. (W. Va. Code, ch. 153, §§ 1, 9, 11.)

Also by the common law no man can be required to give securities to keep the peace or be of good behavior, simply because he has committed a past misdemeanor. State *v.* Gould, 26 W. Va. 258.

V. Review.

See the titles APPEAL AND ERROR, vol. 1, p. 581; MANDATE AND PROCEEDINGS THEREON.

Reversible Error.—In an indictment under § 1, ch. 74, of acts of 1875, it was held reversible error for the court in rendering a judgment upon a verdict of guilty under this statute to add to its judgment as a part thereof an order requiring a defendant to give a bond with approved security to keep the peace or be for good behavior, and in default thereof, be imprisoned till such bond is given. State *v.* Gould, 26 W. Va. 258. See the title BAIL AND RECOGNIZANCE, vol. 2, p. 196.

Mandate by Appellate Court.—In an indictment under § 1, ch. 74, of acts of 1875, providing that cruelty to animals shall be deemed a misdemeanor, where the court in rendering judgment upon a verdict of guilty under the statute, adds to its judgment as a part thereof an order requiring defendant to give a bond with approved security to keep the peace and be of good behavior or in default thereof be imprisoned till such bond is given, and such judgment is reversed by the appellate court, proper judgment will be entered by said court without remanding it to the court below, because the court below in effect said that no imprisonment should be added as further punishment. State *v.* Gould, 26 W. Va. 258.

CUL DE SAC.—See Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685, 692. And see generally, the title STREETS AND HIGHWAYS.

Cumulative Evidence.

See the titles CONTINUANCES, vol. 3, p. 270; EVIDENCE; NEW TRIALS.

Cumulative Punishment.

See the title SENTENCE AND PUNISHMENT.

Cumulative Remedies.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 49; ACTIONS, vol. 1, p. 126; ARBITRATION AND AWARD, vol. 1, p. 710.

Cumulative Voting.

See the titles ELECTIONS; STOCK AND STOCKHOLDERS.

Curative Acts.

See the titles ACKNOWLEDGMENTS, vol. 1, p. 120; CONSTITUTIONAL LAW, vol. 3, p. 176.

CURATOR.—See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; INSANITY; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

The word **curator** annexed to the name of a defendant against whom a decree is rendered is descriptive merely, and the decree is a personal decree, although there be superadded a direction to the defendant "as **curator**" to collect and apply certain funds to its payment. Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

Cure by Verdict.

See the title AMENDMENTS, vol. 1, p. 359.

CURRENT EXPENSES.—See Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 282. See also, the title MUNICIPAL CORPORATIONS.

CURRENT FUNDS.—The words of the bond that it is "to be paid in **current funds,**" does not necessarily raise the presumption, that it is to be paid in another and more valuable medium; but their proper interpretation depends upon the time when and the circumstances under which they are used. The most just and reasonable interpretation of the words **current funds,** is, that they are intended to guard against any contingency of an obligation to pay in coin. Meredith *v.* Salmon, 21 Gratt. 762. See also, Wrightsman *v.* Bowyer, 24 Gratt. 439; Sexton *v.* Windell, 23 Gratt. 538.

CURRENT MONEY.—In Smith *v.* Walker, 1 Call 38, it is said: "This bond is 'for value received this 15th day of May, 1778, I promise to pay, etc., one hundred and forty-one pounds **current money** of Virginia, etc.,' which imports that the value was then received, and therefore evidence to show that the contract was in 1774, would be in express contradiction of the words of the bond, which the rule supposes can not be done. It is said, however, that parol evidence may be received, because the words **current money** are equivocal; but it means paper as well as specie; and as the former is perfectly consistent with the other parts of the bond, the case is to be governed by the general directions of the act."

CURTESY.

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CROSS REFERENCES.

See the titles DESCENT AND DISTRIBUTION; DIVORCE; DOWER; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN; WILLS.

I. Definitions and Distinctions.

See post, "Requisites," II.

"Curtesy is the estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple, or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate." Breeding *v.* Davis, 77 Va. 639.

"When a man takes a wife seized during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive (during the coverture) and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy. 2 Bl. Com. 126." Breeding *v.* Davis, 77 Va. 639; 2 Minor's Inst. (4th Ed.) 114.

Tenancy, by the curtesy is a mere prolongation of the tenancy by the marital right, enabling the plaintiff to hold for his own life what would otherwise terminate with the death of his wife. Porter *v.* Porter, 27 Gratt. 602.

Curtesy Initiate.—The estate by the curtesy initiate, before the act of 1876-1877, was a marital right of the husband to the possibility of an estate by the curtesy consummate, to an estate for life, in the wife's realty, if there should be or had been issue, and if the husband should survive the wife. Browne *v.* Bockover, 84 Va. 432, 4 S. E. 745.

West Virginia.—Under the present (1899) Code of West Virginia, "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by curtesy in the same. An estate by the curtesy in the lands of which a married woman may hereafter die seized, shall exist and be held by her husband therein, whether they had issue born alive during the coverture or not." W. Va. Code, 1899, ch. 65, § 15, p. 666; Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228. But the former statute, W. Va. Code, 1868, ch. 65, § 15, as amended by acts 1872-1873, ch. 207, § 2, providing that "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," did not dispense with any of the four common-law requisites of curtesy; marriage, seisin of the wife, issue born alive and death of the wife, but was only declaratory of the common law. Winkler *v.* Winkler, 18 W. Va. 455; Fulton *v.* Johnson, 24 W. Va. 95.

Distinguished from Marital Right.—"Although the tenancy by the curtesy is ordinarily, to appearance, a mere prolongation of the tenancy by the marital right, enabling the husband to hold for his own life what otherwise would terminate with the life of the wife, yet the tenancy by the marital right attaches to some estates to which the tenancy by the curtesy can not attach, though there should be issue of the marriage, as, for example, estates for life—even estates pur autre vie. And to other estates it can not attach, in which there may be curtesy, as, for example, estates held for the separate use of the wife. In such estates, under some circumstances, there may be curtesy; but it is of their very essence not to be subject to the marital right." Porter *v.* Porter, 27 Gratt. 599.

II. Requisites.

A. IN GENERAL.

Curtesy Initiate.—The requisites of curtesy initiate are marriage, seisin of the wife during coverture and birth of issue alive. Carpenter *v.* Garrett, 75

Va. 129; Wyatt *v.* Smith, 25 W. Va. 816; Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740; Porter *v.* Porter, 27 Gratt. 599.

Curtesy Consummate.—In order to entitle the husband to an estate by the curtesy consummate, the above requisites must exist and the death of the wife in the husband's lifetime must also occur. Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740; Muse *v.* Friedenwald, 77 Va. 57; Carpenter *v.* Garrett, 75 Va. 129; Porter *v.* Porter, 27 Gratt. 599; Hutchings *v.* Commercial Bank, 91 Va. 75, 20 S. E. 950; Wyatt *v.* Smith, 25 W. Va. 816.

B. MARRIAGE.

The tenancy by curtesy being a species of marital right, therefore marriage was an essential requisite to its existence. Porter *v.* Porter, 27 Gratt. 602; Carpenter *v.* Garrett, 75 Va. 129; Breeding *v.* Davis, 77 Va. 639; Browne *v.* Bockover, 84 Va. 432, 4 S. E. 745; Winkler *v.* Winkler, 18 W. Va. 455; Fulton *v.* Johnson, 24 W. Va. 95; Wyatt *v.* Smith, 25 W. Va. 816; Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228.

It was the general doctrine of the common law that marriage alone, without the birth of issue, casts upon the husband an estate in all the wife's real property in possession, whether of inheritance or of freehold, for life during the joint lives of husband and wife. Upon the birth of issue the husband became tenant by curtesy in all his wife's real estate of inheritance. See Porter *v.* Porter, 27 Gratt. 602; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56; Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997; Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 359; Guernsey *v.* Lazear, 51 W. Va. 329, 41 S. E. 405; Wyatt *v.* Smith, 25 W. Va. 815.

C. SEISIN OF THE WIFE.

Necessity for Actual Seisin.—Seisin in law of the wife was not sufficient to invest the husband with an estate as tenant by the curtesy. Nothing short of seisin in fact, or actual seisin would effect this. Carpenter *v.* Garrett, 75 Va. 129; Winkler *v.* Winkler, 18 W. Va. 455; Stuart *v.* Stuart, 18 W. Va. 675; Fulton *v.* Johnson, 24 W. Va. 95; Jones *v.* Thorn, 45 W. Va. 186, 32 S. E. 173.

Under Va. Code, 1819, ch. 107, § 2 (see Va. Code, 1887, § 2274), allowing the widow to remain on the premises until the assignment of her dower, free of rent, where the widow thus remains in possession, she is seised of the premises; and if her daughter, one of the heirs of her husband, marries, has issue born alive and dies in her mother's lifetime, the husband of the daughter is denied curtesy because of the lack of actual seisin during coverture. Carpenter *v.* Garrett, 75 Va. 129.

Distinction between Seisin in Fact and Seisin in Law.—"Seisin in fact or in deed, as Lord Coke calls it, or actual seisin, means possession of the freehold by the pedis positio of one's self or one's tenant or agent, or by construction of law, as in case of a commonwealth's grant, a conveyance under the statute of uses, or doubtless of grants or devise, where there is no actual adverse occupancy. Seisin in law is a right to the possession of the freehold, when there is no adverse occupancy thereof, such as exists in the heir after descent of lands upon him before actual entry by himself or his tenant." Carpenter *v.* Garrett, 75 Va. 129; Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994; 2 Minor Inst. (4th Ed.) 123.

There is a seisin in deed and a seisin in law, and the difference between the two is, that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from his ancestor, while the possession is vacant, before he has made an actual entry. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

Livery of Seisin.—At common law livery of seisin means delivery of actual corporeal possession. There may be, it is true, a seisin in law as well as in

deed or fact; but where the word is used, it certainly may be taken to mean seisin in fact as well as law. If any distinction is to be drawn, it would first import actual possession. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

Purchaser at Judicial Sale.—By virtue of a decree of confirmation of a judicial sale of vacant and unoccupied lots or lands, the purchaser has, by construction of law, such possession as amounts to such seisin in fact as will entitle the husband of such purchaser to curtesy in such lots or land. Seim *v.* O'Grady, 42 W. Va. 77, 24 S. E. 994.

Trust Estate.—Where real estate is devised to trustees for the use of the wife and family of the testator's son, and to his heirs forever, and the son ceases to have a family, he is not thereby entitled to any curtesy in his wife's interest in the property in case of her death before their youngest child attains majority, the wife never having in fact been seised of the land during the coverture. Stuart *v.* Stuart, 18 W. Va. 675.

Thus where one dies intestate, seised in fact of an estate of inheritance in land, and one of his heirs is a married woman and dies, she has seisin in fact so as to entitle her surviving husband to curtesy in her share. Bragg *v.* Wiseman, 55 W. Va. 330, 49 S. E. 90.

Seisin of Coparcener.—Actual possession of land descended to several heirs by some of the coparceners gives actual possession to a married woman coparcener so as to entitle her husband to curtesy in her share, though he or she were never in actual possession. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

Seisin Without Entry.—If one die intestate seised in fact of land, that seisin in fact is cast by descent on his heir, and the heir has seisin in fact without entry. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

Allegation of Seisin.—When a bill alleges that a person was "seised and possessed" of land, it prima facie imports seisin in fact, not mere seisin in law. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

D. BIRTH OF ISSUE.

At common law issue born alive of the marriage was a requisite of curtesy. Breeding *v.* Davis, 77 Va. 639; Browne *v.* Bockover, 84 Va. 424, 4 S. E. 245; Porter *v.* Porter, 27 Gratt. 599; Carpenter *v.* Garrett, 75 Va. 129; Wyatt *v.* Smith, 25 W. Va. 813.

W. Va. Code of 1868.—The West Virginia Code, 1868, ch. 65, § 15, as amended by acts, 1872, 1873, ch. 207, § 2, providing that "if a married woman die seised of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," did not dispense with the requisite as to birth of issue, but was merely declaratory of the common law. Winkler *v.* Winkler, 18 W. Va. 455. See also, Fulton *v.* Johnson, 24 W. Va. 95.

Act of 1882.—But since the act of 1882, W. Va. Code, 1899, ch. 65, § 15, the birth of issue is no longer a requisite to curtesy in West Virginia, it being provided by said section that "an estate by the curtesy in the lands of which a married woman may hereafter die seised shall exist and be held by her husband therein, whether they had issue born alive during the coverture or not." Winkler *v.* Winkler, 18 W. Va. 455. See also, Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228; Fulton *v.* Johnson, 24 W. Va. 95.

As soon as a child was born, the husband's right to curtesy was said to be initiate. Wyatt *v.* Smith, 25 W. Va. 813.

E. DEATH OF WIFE.

The death of the wife during the lifetime of her husband is a requisite of curtesy consummate. Porter *v.* Porter, 27 Gratt. 599; Carpenter *v.* Garrett, 75 Va. 129; Muse *v.* Friedenwald, 77 Va. 57; Breeding *v.* Davis, 77 Va. 639; Browne *v.* Bockover, 84 Va. 424, 4 S. E.

245; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950; Winkler *v.* Winkler, 18 W. Va. 455; Fulton *v.* Johnson, 24 W. Va. 95; Wyatt *v.* Smith, 25 W. Va. 816.

When Estate Becomes Vested:—Curtesy in a wife's separate estate vests in her husband first upon her death. McNeeley *v.* South Penn Oil Co., 52 W. Va. 617, 44 S. E. 508.

III. Nature and Incidents.

A. CURTESY INITIATE.

In General.—After the birth of issue a husband, as tenant by the curtesy initiate, is seised of a freehold estate in the wife's land in his own right, and the interest of the wife is a mere revisionary interest, depending upon the life estate of the husband. Breeding *v.* Davis, 77 Va. 639. See also, Graham *v.* Durham, 10 W. Va. 357.

Liability for Debts.—Where, prior to the adoption of the West Virginia Code of 1868, the husband by marriage and the birth of issue alive had become a tenant by the curtesy initiate of the freehold property of his wife, the life estate of the husband in such estate is liable for the payment of his debts, notwithstanding the provision of ch. 66 of the said Code, and of the West Virginia Constitution of 1872. Wyatt *v.* Smith, 25 W. Va. 813; Guernsey *v.* Lazear, 51 W. Va. 331, 41 S. E. 405.

And this right initiate, as well as the estate consummate, was liable to be taken for the husband's debts. Nor would equity interfere in favor of the wife or children to prevent his creditors from subjecting the life estate to the debts of the husband. Wyatt *v.* Smith, 25 W. Va. 816.

M., the wife of P., was entitled to real estate by descent from her father and by devise from W., but her husband had not reduced any part of it into possession when he made a deed, by which he conveyed to C. and L. all his interest and right in said estate in trust for the sole and separate use of his wife, M., free from all claim by him, with full power in her to control and dispose of the same as if she was not a married woman. The real estate was afterwards divided, and M. came into actual possession of it, and she sold a part of it to McD., retaining the title, who improved it, and sold it again to her; and she executed her bond to S., by direction of McD., for a part of the purchase money. She also executed to B. a bond as security for G. Upon a creditor's bill by S. to subject the land of M. to pay his debt, it was held, whatever interest the husband had in the real estate of his wife, M., whether as tenant by the mere marital right, or as tenant by the curtesy initiate, was conveyed by the deed in trust for his wife; and such estate was liable for his debts. Garland *v.* Pamplin, 32 Gratt. 305.

Effect of the Married Woman's Act on Curtesy Initiate.—The Married Woman's Act, acts, 1876-1877, pp. 333, 334 (see Va. Code, 1887, § 2284, et seq.) giving the wife the power to possess, enjoy and devise her separate estate as if sole, destroys the tenancy by the curtesy initiate; but if the wife dies without having alienated the lands, the husband's curtesy attaches. Breeding *v.* Davis, 77 Va. 639, 46 Am. 740. See also, Campbell *v.* McBee, 92 Va. 68, 22 S. E. 807.

Under the Married Woman's Act, the husband's inchoate tenancy by the curtesy, and the right to reduce into his possession his wife's choses in action are destroyed, neither being vested rights. Alexander *v.* Alexander, 85 Va. 353, 7 S. E. 335.

Under the Married Woman's Act, the husband has only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests in the husband during the life of the wife. This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncer-

tain future. Previous to the act, it could be sold on execution against the husband. Now the wife has the sole control of her real estate during her life, and the husband has no interest until her death. This estate at best is now a bare possibility, dependent on his surviving his wife. Breeding *v.* Davis, 77 Va. 639.

Liability for Debts under Married Woman's Act.—Since the passage of the Married Woman's Act, the husband's curtesy initiate in his wife's lands can not be sold to pay his debts. Welsh *v.* Solenberger, 85 Va. 441, 8 S. E. 91.

Where property which constituted a wife's separate estate was conveyed by a deed in which the husband united, a judgment against him did not constitute a lien on the husband's estate by the curtesy in such property, since during the wife's life the husband had no interest in the property to which the judgment could attach. Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 39 S. E. 231, 7 Va. Law Reg. 253.

The married woman's separate estate act (W. Va. Code, 1899, ch. 66), abolished both the curtesy initiate and consummate estates formerly vested in the husband. And, during the wife's life, the husband has not even a shadow of estate in his wife's separate realty. He has only a possibility of a future estate. This is because that statute declares that her separate property and its rents, issues and increase shall be her sole and separate property in all respects as if she were a single woman, "and the same shall in no way be subject to the control of her husband nor liable to his debts." Guernsey *v.* Lazear, 51 W. Va. 330, 41 S. E. 405.

A judgment against the husband is no lien, during the wedlock, on such supposed curtesy, and a conveyance by wife and husband of such separate estate can not be fraudulent as to such demand though such conveyance may have been made with intent to keep the property from being subjected to the husband's debt. Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405.

Power to Partition.—Where a wife becomes interested as a coparcener in a tract of land, inheriting the same from her deceased father, her husband, if he is entitled to curtesy by reason of issue of the marriage, can make a valid partition of the land with the other heirs of the decedent, either by written agreement, or by parol, or partly by writing and partly by parol. Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 359. See also, Otley *v.* McAlpine, 2 Gratt. 341.

How Present Value Computed.—See Va. Code, 1887, § 2281; W. Va. Code, 1899, ch. 65, § 17, p. 666.

B. CURTESY CONSUMMATE.

The death of the wife is one of the requisites for curtesy. During the wife's life, after issue born alive, the husband is said to be tenant by the curtesy initiate. Upon her death only, is he tenant by the curtesy consummate. Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740.

Reimbursement of Husband.—Where lands which a married woman has inherited from her father have been applied by the executor to the payment of her father's debts, her husband is entitled, as tenant by curtesy, to be reimbursed out of the father's personal estate by an amount equal to the rents and profits which the executor has misapplied. Taliaferro *v.* Burwell, 4 Call 321.

Liability for Debts.—The husband's estate by the curtesy consummate exists in the wife's lands unaliened by her during her lifetime, though devised by her will. Such estate is subject to the liens of the husband's creditors acquired during the coverture, in preference to the general liens of her creditors upon her real estate. Acts, 1876-77, pp. 333, 334; acts, 1877-78, p. 248; Browne *v.* Bockover, 84 Va. 424,

4 S. E. 745. See also, Wyatt *v.* Smith, 25 W. Va. 816.

Effect of Judgment against Husband.—The husband has no interest, during the lifetime of the wife, in the real estate acquired by her as a separate estate under the act of April 4, 1877, as amended by the act of March 14, 1878. If the wife dies intestate and the husband is entitled to curtesy, a judgment against the husband during the coverture will attach to his estate by the curtesy, but in subordination to a deed of trust made by the husband and wife during the coverture. Campbell *v.* McBee, 92 Va. 68, 22 S. E. 807.

But in property which was the wife's statutory separate estate, during her life, the husband had no interest upon which the lien of the judgments could attach, and she having aliened the property by a conveyance in which he united, his right by the curtesy was defeated. Breeding *v.* Davis, 77 Va. 639; Campbell *v.* McBee, 92 Va. 68, 22 S. E. 807; Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 611, 39 S. E. 231.

It seems that after the death of a wife a judgment would attach on the husband's curtesy in her separate estate. Many authorities so hold. Of course a common-law curtesy in lands not separate estate vested in the wife before the Code of 1868 would be liable. Wyatt *v.* Smith, 25 W. Va. 813; Guernsey *v.* Lazear, 51 W. Va. 331, 41 S. E. 405.

Ascertainment of Tenant's Interest—Right to Minerals.—A tenant by curtesy, agreeing to take a gross sum in the proceeds of the sale of realty in lieu of a life estate therein, is entitled to the value of his deceased wife's interest in the realty, with a deduction for the value of the coal therein, where the land was chiefly valuable for the coal, and the mines had not been opened, as a life tenant has no interest in unopened mines or right to open or work the same. Bond *v.* Godsey, 99 Va. 564, 39 S. E. 216, 7 Va. Law Reg. 264, and note, p. 268.

West Virginia.—Where coal land is leased by a wife in 1895 for the purpose of mining and removing coal, and no mine is actually opened on said land until after her death, as to the right of her husband to curtesy in the royalty of such mine will be considered as open at the time of the wife's death. Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228.

Where a wife is seized of a separate estate of inheritance in lands in West Virginia, a portion of which consists in coal lands, and executes a lease to a party, authorizing him to open and operate coal mines in consideration of a royalty to be paid by such lessee, although no coal mine is opened on said land at the time of her death, the husband will be entitled to an estate by the curtesy in the royalties arising from said lease, although no issue was born of the marriage. Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228.

Right to Timber.—In ascertaining the value of the interest of a tenant by the curtesy in realty, the value of the timber on the land should not be deducted, where the value of the land is increased by the cutting of such timber. Bond *v.* Godsey, 99 Va. 564, 39 S. E. 216, 7 Va. Law Reg. 264.

May Obtain Partition.—A tenant by the curtesy of lands purchases the reversionary interest of one of three heirs. Another interest is held by infants. It was held, that a court of equity will decree a partition of the land, at the suit of the tenant by the curtesy. Otley *v.* M'Alpine, 2 Gratt. 340. See also, Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 362.

May Cause Redemption of Mortgage.—A tenant by curtesy, may insist upon the redemption of the mortgage in order to the due enforcement of his claims. Gatewood *v.* Gatewood, 75 Va. 408.

IV. Estate Subject to Curtesy.

A. IN GENERAL—MUST BE ESTATE OF INHERITANCE.

There can be no curtesy except in a

fee simple estate in land. Muse *v.* Friedenwald, 77 Va. 57; Porter *v.* Porter, 27 Gratt. 599.

Thus, tenancy by the curtesy does not attach to an estate for life, even estates pur autre vie. Porter *v.* Porter, 27 Gratt. 599.

At common law the husband was entitled to curtesy in all the real estate of which the wife died seized, whether such estate was separate estate or not. Winkler *v.* Winkler, 18 W. Va. 455; Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228; Chapman *v.* Price, 83 Va. 392, 11 S. E. 879.

Curtesy in Personal Property.—It was held, in Taliaferro *v.* Burwell, 4 Call 321, that the husband had no right of curtesy in the slaves or personal estate of the wife.

B. DETERMINABLE ESTATES.

A wife, owning an estate in lands and personal property determinable upon her death under age and without issue, had issue, which died immediately, and then died under age. Held, that her husband was entitled to curtesy in the lands, but had no interest in the personal property. Taliaferro *v.* Burwell, 4 Call 321. See also, Jones *v.* Hughes, 27 Gratt. 560.

C. WIFE'S EQUITABLE SEPARATE ESTATE.

"A husband, if he survives his wife and the common-law requisites exist, is entitled to curtesy in any real estate held by her as her equitable separate estate, which may remain at her death undisposed of by her during the coverture, or by will, under a power to that effect vested in her by the instrument creating the separate estate, just as in any other real estate of inheritance owned by her, unless his marital rights are excluded by such instrument. Whether they are excluded or not depends upon the intention of the grantor." Jones *v.* Jones, 96 Va. 749, 32 S. E. 463; Chapman *v.* Price, 83 Va. 392, 11 S. E. 879; Kiracofe *v.* Kiracofe, 93 Va. 591, 25 S. E. 601; Winkler *v.* Winkler, 18 W. Va. 455, 467. See also, Stuart *v.* Stuart, 18 W. Va. 691; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950.

Estate Created by Husband.—But a husband is not entitled to curtesy in an equitable separate estate of the wife, created by him, although all the common-law requisites for curtesy exist. He is excluded by the nature of the transaction. Jones *v.* Jones, 96 Va. 749, 32 S. E. 463; Ratliff *v.* Ratliff, 102 Va. 887, 47 S. E. 1007.

Consequently, a husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her or to another person for her, in the absence of a reservation in the conveyance of his right therto at her death. Burks' Separate Estates, 16; Sayers *v.* Wall, 26 Gratt. 354; Irvine *v.* Greever, 32 Gratt. 411; Dugger *v.* Dugger, 84 Va. 130, 4 S. E. 171; Jones *v.* Jones, 96 Va. 753, 32 S. E. 463.

It has been held, "that in order to give the wife a separate use, words indicating such intention are necessary in a conveyance from a stranger to the wife; but that it seemed to be 'well settled that they are not necessary in a conveyance direct from the husband to the wife. The law attaches to absolute deeds, and transfers a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law and equity.' Whitten *v.* Whitten, 3 Cush. R. 191, supports the same doctrine. It is treated as the settled doctrine; and, according to this authority, the deed from Reuben Sayers to his wife, if absolute, vested in his wife a separate estate, though such words are not used; and consequently he is not entitled to curtesy." Sayers *v.* Wall, 26 Gratt. 374.

Estate Established by Stranger.—Where the equitable separate estate is

created by a stranger, the intention to exclude must be plain and unequivocal, or the husband will be entitled to curtesy. Burks' Separate Estates, 14, 15; Chapman *v.* Price, 83 Va. 392, 11 S. E. 879; Mitchell *v.* Moore, 16 Gratt. 275; Nixon *v.* Rose, 12 Gratt. 425; Charles *v.* Charles, 8 Gratt. 486; Jones *v.* Jones, 96 Va. 752, 32 S. E. 463.

Devise to Son's Wife and Family.—A testatrix by her will leaves to trustees for the use of her son's wife and his family certain real estate, and, when her son ceases to have a family, to his heirs forever. The true construction of this will is, that the real estate is devised to the trustees for the use of the wife and children of the testatrix son, who were living at the time of the testatrix's death, as joint tenants in fee simple but subject to duty on the part of the trustees to apply or permit to be applied the rents, issues and profits of such real estate to the support and maintenance of such wife and children as a family, excluding therefrom such child as may not be residing at the father's home; but such application of the rents and profits of such real estate is to cease, when the wife dies, when all the daughters have married or attained the age of twenty-one, and when all the sons have attained the age of twenty-one, as at that time the family within the meaning of the will will have ceased to exist; and such rents, issues and profits can not longer be so applied, though the family in its most comprehensive sense continues to exist, the father and married daughters or adult sons continue to live at the homestead. The son of the testatrix, if his wife dies before the youngest child attains his majority, is not entitled to any curtesy in his wife's interest in this land. Stuart *v.* Stuart, 18 W. Va. 675.

Not Affected by Married Woman's Act.—The Married Woman's Act, acts. 1877-78, p. 248, after providing for the curtesy of the husband and the dower of the wife to be unaffected by the act, provides further, "that the sole and separate estate created by any gift, grant, devise or bequest shall be held according to the terms and powers, and be subject to the provisions and limitations thereof, and to the provisions and limitations of this act, so far as they are [not] in conflict therewith." Held, that the word "not," as inserted in brackets, was admitted by inadvertence and its insertion is necessary to carry out the intention of the legislature. Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950, overruling Hutchings *v.* Commercial Bank, 1 Va. Dec. 761.

Under the Married Woman's Act, as construed above, where property is conveyed to a trustee for the separate use and benefit of the wife, free from the debts and liabilities of her husband, there is created an equitable separate estate, which must be governed by the provisions of the instrument creating the same, and the wife may devise such estate to others than her husband. Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950.

West Virginia.—An estate by the curtesy in the separate estate of the wife remains in the husband, unimpaired by statutes for the better securing of the property of a married woman, which declare that she shall hold the property to her sole and separate use, and that it shall not be subject to the disposal of her husband, or be liable for his debts. Alderson *v.* Alderson, 46 W. Va. 242, 33 S. E. 228.

D. WIFE'S STATUTORY OR LEGAL SEPARATE ESTATE.

See also, the title SEPARATE ESTATE OF MARRIED WOMEN.

A husband is not entitled to curtesy in the statutory separate estate of his wife which he has created for her benefit. He is excluded by the nature of the transaction. Ratliff *v.* Ratliff, 102 Va. 881, 47 S. E. 1007.

In the separate estate of a married woman there is no estate in the husband to have possession and profits

during the wedlock, and no curtesy initiate. No estate by curtesy until the death of the wife. Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405.

Where a father gives his married daughter land "to have and to hold in her own right, free from any claims or demands from her husband or any person or persons claiming under, through, or against him in any way, now or at any time hereafter," she has a sole and separate estate therein, which she can dispose of by will free from the right to curtesy which the husband would otherwise have. Chapman *v.* Price, 83 Va. 392, 11 S. E. 879.

How Nature of Estate Determined.—Whether a separate estate is an equitable separate estate or a statutory separate estate must be determined from the language and provisions of the instrument to be construed in each case. If the instrument grants powers or imposes restrictions not granted or imposed by the statute, but which are consistent with the rules and principles of equity, the estate will be construed to be an equitable and not a statutory separate estate, and that which prior to the passage of the Married Woman's Act, was held to be an equitable separate estate, retains that character, is controlled by the provisions of the settlement by which it was created, and is governed by the rules and principles applicable to such estate. Dezendorf *v.* Humphreys, 95 Va. 473, 28 S. E. 880; Jones *v.* Jones, 96 Va. 749, 32 S. E. 463.

The reasons for excluding the husband from curtesy in the equitable separate estate, which he has created, with equal force deny his right to curtesy in lands that he has conveyed, or caused to be conveyed, to her without reservation of his marital rights, where such lands constitute, as in the case at bar, statutory separate estate. Ratliff *v.* Ratliff, 102 Va. 887, 47 S. E. 1007.

At common law, in the grant of an estate of inheritance to a married woman, the husband's right to curtesy could not be excluded; but the husband may be deprived of his curtesy in the married woman's "separate estate," where the intention so to do is plainly manifested in the instrument creating such estate. Chapman *v.* Price, 83 Va. 392, 11 S. E. 879.

The husband has no interest, during the coverture, in the wife's statutory separate estate upon which judgments can attach as liens, and an alienation by husband and wife, during the coverture, defeats his curtesy. Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 39 S. E. 231.

West Virginia Statute.—It is provided by statute in West Virginia that the husband shall be entitled to curtesy in the wife's separate estate. Winkler *v.* Winkler, 18 W. Va. 455.

No Vested Estate during Wife's Life.—"In State *v.* McAllister, 38 W. Va. 512, the court expressed the opinion that the separate real estate of a married woman was not subject to curtesy initiate in the husband, as known at the common law; that he had no vested estate during the wife's life, and that his curtesy could not vest until her death." See Guernsey *v.* Lazear, 51 W. Va. 329, 41 S. E. 405.

V. How Curtesy Defeated.

A. CONVEYANCE IN LIEU OF CURTESY.

The Code of West Virginia, ch. 65, § 16, provides that "If any estate, real or personal, be delivered by the wife to the husband in lieu of his curtesy, and he accepts the same, he shall be barred of his curtesy in the residue thereof." Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 142; Guernsey *v.* Lazear, 51 W. Va. 328, 41 S. E. 405.

B. BY DIVORCE.

A divorce a mensa et thoro, where there is a decree for the perpetual separation of the parties, has the same effect upon the rights of property which either party may acquire after the de-

cree as a divorce a vinculo matrimonii would have. Va. Code, 1887, § 2264; Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

A divorce a vinculo matrimonii, although for a supervenient cause, or for a cause which, while it existed at the date of the marriage, is yet by statute specially declared to dissolve the marriage only from the time of the sentence, operates as a bar to dower or curtesy. Porter *v.* Porter, 27 Gratt. 599; Harris *v.* Harris, 31 Gratt. 13; Cralle *v.* Cralle, 79 Va. 182; Cleek *v.* McGuffin, 89 Va. 324, 15 S. E. 896. See 2 Minor's Inst. (4th Ed.) 137.

Upon decreeing the dissolution of a marriage, whether from the bond of matrimony or from bed and board, the court may make such further decree as it may deem expedient in regard to the estate, etc., of the parties. Va. Code, 1887, § 2263. See Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12; Cralle *v.* Cralle, 79 Va. 182; Francis *v.* Francis, 31 Gratt. 283; Harris *v.* Harris, 31 Gratt. 13; Porter *v.* Porter, 27 Gratt. 599; Carr *v.* Carr, 22 Gratt. 168; Bailey *v.* Bailey, 21 Gratt. 43.

Curtesy and dower are barred by a decree of divorce a vinculo matrimonii; and the same principle applies to maintenance, in the absence of any provision in the decree as to the property rights of the parties. Cralle *v.* Cralle, 79 Va. 182.

But the divorce which breaks the bonds of matrimony perpetually, dissolves the marital relation between them, so that the man ceases forever to be the husband and the woman to be the wife, must necessarily defeat the consummation of curtesy. Porter *v.* Porter, 27 Gratt. 606.

Deeds of Separation.—As to the validity of deeds for the voluntary separation of husband and wife and their effect upon the marital rights of the parties, see Dooley *v.* Baynes, 86 Va. 650, 10 S. E. 974; Switzer *v.* Switzer, 26 Gratt. 574.

Husband and wife separated by agreement setting apart to the wife one-third of the land descended to her from her father, free from all claims of the husband, but stipulating nothing as to the remainder whereon he continued to reside, it was held, he derived his tenancy by the curtesy through his wife, and did not hold adversely to her, or to her heirs after her death. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

C. BY DESERTION.

Where a husband willfully deserts his wife and such desertion continues until her death, he is thereby barred of all interest in her property as tenant by the curtesy. Va. Code, 1887, § 2296; W. Va. Code, 1899, ch. 65, § 16, p. 666.

As to what constitutes desertion, see Thornburg *v.* Thornburg, 18 W. Va. 522; Bailey *v.* Bailey, 21 Gratt. 43.

D. BY ANTENUPTIAL CONTRACT.

Where a husband by an express contract before and in contemplation of marriage agrees to surrender his right to the enjoyment of the property during coverture and his right to take as survivor, there remains nothing to which his marital right can attach during the coverture, or after the death of the wife. Charles *v.* Charles, 8 Gratt. 486.

The only power the wife has to deprive the husband of his right of curtesy is that she may, by his consent, deliver to him an estate in lieu of his curtesy. If she does not do this in her lifetime she can not effect it by any provision in her will, which can not take effect until her death, and therefore can not operate as an agreement, such as is required by the statute, to bar curtesy. The husband may, as we have seen, by the provisions of his will, bar the dower of his wife, or, at least, compel her to elect whether she will take the provision made for her in lieu of dower, or whether she will renounce the will, and take under the

law. Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 142.

A deed of marriage settlement will not divest the marital rights of the husband to a greater extent than the terms of the instrument clearly require. Mitchell *v.* Moore, 16 Gratt. 275; 2 Minor's Inst. (4th Ed.) 126.

E. BY HUSBAND'S JOINING IN WIFE'S CONVEYANCE.

A husband's right to curtesy in the statutory separate estate of his wife is defeated by the execution of a deed by her in which he united. Bankers' Loan, etc., Co. *v.* Blair, 99 Va. 606, 7 Va. Law Reg. 253, 39 S. E. 231; Campbell *v.* McBee, 92 Va. 68, 22 S. E. 807; Breeding *v.* Davis, 77 Va. 639.

L. is insolvent, and there are liens on his real estate. P., father of L.'s wife, devised to her one undivided sixth part of "Mansfield" farm. L. and wife convey said sixth to W., for $3,886, payable in certain stocks and bonds, and W. simultaneously conveyed said stocks, etc., and said sixth interest, to trustees, for the purpose of paying out of the proceeds of said stock, etc., the liens of judgments against L., on said sixth interest and to hold the residue "subject to any appointment which the wife of L. may make in writing addressed to said trustees." It was held, this is not a settlement of the husband's life estate, as tenant by the curtesy, on his wife, but a sale by L. and wife to W. of her own land and of her husband's marital interest therein. Tebbs *v.* Lee, 76 Va. 744.

F. BY INSTRUMENT CREATING WIFE'S ESTATE.

See ante, "Wife's Equitable Separate Estate," IV, C; "Wife's Statutory or Legal Separate Estate," IV, D.

G. DEED OF WIFE.

A married woman, not living separate and apart, but with her husband, undertook, by deed dated April 20, 1878, to sell and convey a certain tract of land, part of her real estate, to two of her sons, and without her husband joining in such deed. It was held, said pretended deed was wholly ineffectual to divest the grantor of her ownership of such land, and did not pass any interest therein, legal or equitable, to the said grantees. The said grantor having died intestate, her other heirs at law and the surviving husband, as tenant by the curtesy, have a right to have such a deed set aside and removed as a cloud upon their title; the former as remaindermen in fee, according to their interests, subject to the life estate of the surviving husband. Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207.

H. BY WIFE'S DEVISE.

Prior to the statute, Va. Code, 1849, ch. 122, § 3; Va. Code, 1887, § 2513, a married woman having an equitable separate estate in fee could not dispose of it by will, unless the power to make such disposition was expressly conferred by the instrument creating the estate, such power not being an incident of the estate. West *v.* West, 3 Rand. 373.

"But, at the general revision of the laws in 1849, the rule of West *v.* West was changed, so as to allow a married woman to dispose of her equitable separate fee by will. Code of 1849, ch. 122, § 3, which provision was carried, without change, into the present Code. Section 2513. The effect of this was to enlarge the powers of the woman and to give her the right to dispose of her equitable separate fee by will, though the power was not expressly conferred (and was not denied) by the instrument creating the estate. Such was the construction placed on the statute in the summary of the law, in Justis *v.* English, 30 Gratt. 571, and such seems to have been the construction of Judge Lomax also. See 3 Lomax's Dig. (2d Ed.) p. 11, note 1." Note to Kiracofe *v.* Kiracofe, 2 Va. Law Reg. 530.

Under Va. Code, 1887, § 2513, a married woman owning an equitable sep-

arate estate in fee may, unless prohibited by the instrument creating it, devise the same, and thereby deprive her husband of curtesy therein. The power to make such devise is given by statute and has the same effect as if incorporated into the instrument creating the estate, unless such instrument restrains the power. Kiracofe *v.* Kiracofe, 93 Va. 591, 25 S. E. 601, 2 Va. Law Reg. 527; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950; Chapman *v.* Price, 83 Va. 392, 11 S. E. 879. See articles by Professor R. C. Minor, of the University of Virginia, in 1 Va. Law Reg. 651, et seq., criticising the decisions of the court in Chapman *v.* Price and Hutchings *v.* Commercial Bank.

In grant by parents of an estate of inheritance in lands to married daughter occurs the following habendum: "To have and to hold in her own right, free from any claims or demands from her husband, or any person claiming under, through or against him in any way, now or at any time hereafter." Afterwards, the wife by her will devised the land to her children, and died leaving her husband surviving. His creditors brought their bill to subject his supposed curtesy in the land to his debts. It was held, the terms of the devise created a separate estate in the wife with power of alienation, which she exercised, and thereby excluded her husband and all claiming under him from all claim on the land. Chapman *v.* Price, 83 Va. 392, 11 S. E. 879.

Although it is provided by W. Va. Code, 1887, ch. 78, § 11, that unless the husband shall renounce any provision made for him by the wife's will he shall have no other interest in her estate than is given him by the will, a failure on his part to renounce such provision will not deprive him of curtesy, unless he has agreed to accept the provision in lieu thereof, such agreement being the only mode by which curtesy can be barred under W. Va. Code, 1887, ch. 65, § 16. Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139; Beirne *v.* Von Ahlefeldt, 33 W. Va. 663, 11 S. E. 46.

Under this statute, curtesy can not be barred by a provision of the will of the wife, even when it is expressed to be for that purpose; but such bar can be made effectual only by agreement between husband and wife inter vivos; that is, by the wife delivering to the husband as estate which he agrees to accept in lieu of his curtesy. Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 142.

A husband, although failing to renounce the provisions of a will made in his favor by his wife, who had no children at the date of the will, will not be deprived of his curtesy by an afterborn child that survived his wife. Beirne *v.* Von Ahlefeldt, 33 W. Va. 663, 11 S. E. 46.

I. CONVEYANCE OF HUSBAND.

It was formerly held, that the husband's interest in the real property of his wife even if curtesy initiate was subject to his disposal by deed without the concurrence of his wife. Garland *v.* Pamplin, 32 Gratt. 305.

Where a wife is seized in fee of land not separate estate, and her husband makes a deed purporting to convey the fee, but void as to the wife, such deed vests in the grantee as life estate, either for the joint lives of the husband and wife, or by the curtesy, according to the facts, and the statute of limitations does not begin to run against the wife's reversion until the termination of said life estate. Arnold *v.* Bunnell, 42 W. Va. 473, 26 S. E. 359; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56.

CUSTODIA LEGIS.—Interference with property in **custodia legis** as contempt of court, see the title CONTEMPT, ante, p. 236. See also, the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 87; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; RECEIVERS.

When property is lawfully taken by virtue of legal process, it is in the **custody of the law.** August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143, citing Bouv. Law Dic.

CUSTODY.—By the act of April 16th, 1852, Sess. Acts, ch. 92, § 4, p. 77, which authorizes the plaintiff to file interrogatories to a defendant in **custody,** and authorizes the court upon notice to the plaintiff or his attorney, to discharge a defendant from custody, applies to a defendant in **custody** of his bail, as well as defendant in jail. Levy *v.* Arnsthall, 10 Gratt. 641.

In Levy *v.* Arnsthall, 10 Gratt. 648, it is said: "The word **custody** in English statutes has been construed to embrace the **custody** of the bail. The statute 5 Geo. 2, ch. 30, § 5, is an instance of this. That statute enacts that a bankrupt in coming to surrender, shall be free from all arrests or imprisonment of any of his creditors, and after his actual surrender for forty-two days, etc., provided he was not in **custody** at the time of his surrender. A defendant in **custody** under the common-law right of his bail has been held to be in **custody** in the meaning of that statute. Petersdorff on Bail, pp. 91 and 406, 10 Law Libr. 50 and 226."

Custody of Children.

See the titles DIVORCE; HABEAS CORPUS; PARENT AND CHILD.

Customs and Usages.

See the title USAGES AND CUSTOMS.

Customs Duties.

See the titles REVENUE LAWS; TAXATION.

Cutting Timber.

See the title ADVERSE POSSESSION, vol. 1, p. 203. See also, the titles CURTESY, ante, p. 148; DOWER; TREES AND TIMBER; TRESPASS; WASTE.

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See the titles CHARITIES, vol. 2, p. 790; TRUSTS AND TRUSTEES.

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CROSS REFERENCES.

See the titles ABUTTING OWNERS, vol. 1, p. 60; ASSAULT AND BATTERY, vol. 1, p. 729; BONDS, vol. 2, p. 507; BREACH OF PROMISE OF MARRIAGE, vol. 2, p. 613; DEATH BY WRONGFUL ACT; DETINUE AND REPLEVIN; EJECTMENT; EMINENT DOMAIN; EXPERT AND OPINION EVIDENCE; FALSE IMPRISONMENT; FRAUD AND DECEIT; IMPROVEMENTS; INJUNCTIONS; JOINT TENANTS AND TENANTS IN COMMON; JURISDICTION; LANDLORD AND TENANT; LIFE INSURANCE; MALICIOUS PROSECUTION; MORTGAGES; NUISANCES; PUBLIC LANDS; PUBLIC OFFICERS; REMITTITUR; SALES; SHERIFFS AND CONSTABLES; TRESPASS; TROVER AND CONVERSION; VARIANCE; VERDICT; WASTE.

As to measure of damages for breach of warranty in sale of land, see the title COVENANTS, vol. 3, p. 741. As to set-off of unliquidated damages, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM. As to action for damages in equity, see the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; JURISDICTION. As to mitigation of damages in slander and libel, see the title LIBEL AND SLANDER. As to measure of damages for breach of warranty in sale of personal property, see the title WARRANTY. As to assessment of damages, see the titles INQUEST AND INQUIRIES; VERDICT. As to measure of damages in action on indemnifying bond, see the title INDEMNITY. As to amount in controversy, see the titles APPEAL AND ERROR, vol. 1, p. 477; JUSTICES OF THE PEACE. As to damages for wrongful eviction, see the title LANDLORD AND TENANT. As to damages for personal injuries on streets and highways, see the title STREETS AND HIGHWAYS. As to necessity for inquiry of damages, see the title INQUEST AND INQUIRIES. As to measure of damage in action on prisons bounds bond, see PRISONS AND PRISONERS. As to measure of damages for failure to give possession of leased premises, see the title LANDLORD AND TENANT. As to damages in appellate court, see the title APPEAL AND ERROR, vol. 1, p. 627.

I. Definitions.

A. IN GENERAL.

A number of definitions have been given of the word "damages." Thus Blackstone defines it: "The money given to a man by a jury as a compensation for some injury sustained." 2 Bl. Comm. 438. The Civil Code of California of 1874 thus defines it: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in default a compensation therefor in money, which is called damages." See vol. 2, p. 384, § 3281. Rutherford defines it: "Every loss or diminution of what is a man's own, occasioned by the fault of another." See Ruth. Inst. (Balt. Ed. 1832), bk. 1, ch. 17, § 1. And Webster, in his dictionary, defines it as "the estimated reparation for detriment or injury sustained." These definitions are all substantially the same. Pegram *v.* Stortz, 31 W. Va. 221, 6 S. E. 490.

The words "damages for a wrong" are, in substance, according to their legal definition, equivalent to the words "money due on contract;" the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning. "Then, are the words 'damages for a wrong' in substance the same as 'money due on contracts?' The meaning of the word 'damages' is a compensation, recompense, or satisfaction in money; 'wrong' means any deprivation of right, breach of contract, or injury done by one person to another. Hence 'damages for a wrong' means 'money given for a breach of contract' as well as any other deprivation of right or injury to person or property. The words 'damages for a wrong' therefore not only include 'money due on contract,' but money which one is entitled to recover off of another for any purpose whatsoever, and is the much broader and more inclusive expression." O'Connor *v.* Dils, 43 W. Va. 54, 26 S. E. 354, cited and approved in Richmond *v.* Henderson, 48 W. Va. 389, 37 S. E. 653.

This is an action brought before a justice of the peace, and, as held in O'Connor *v.* Dils, 43 W. Va. 54, 26 S. E. 354 (Syl., point 1), "common-law forms of action, in so far as justice's trials are concerned, are entirely abolished by § 49, ch. 50, Code;" and syllabus, point 2, holds "the words 'damages for a wrong' are, in substance, according to their legal definition, equivalent to the words, 'money due on contract,' the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning." Lovings *v.* Norfolk, etc., R. Co., 47 W. Va. 582, 35 S. E. 962.

B. COMPENSATORY DAMAGES.

Compensatory damages are such as indemnify the plaintiff, including injury to property, loss of time and necessary expenses, counsel fees and other actual losses. Ogg *v.* Murdock, 25 W. Va. 146.

Damages are either actual or compensatory, exemplary or punitive. As expressed by Riely, J., in Norfolk, etc., R. Co. *v.* Neely, 91 Va. 540, 22 S. E. 367, "Actual or compensatory damages are the measure of the loss or injury sustained, while exemplary or punitive damages are 'something in addition to full compensation, and something not given as his due, but for the protection of the public.'"

Compensatory damages are such as measure the actual loss, and are given as amends therefor. Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311.

C. EXEMPLARY DAMAGES.

See the title EXEMPLARY DAMAGES.

II. Damnum Absque Injuria.

There can be no negligence charged upon a person unless he rests under a duty to the person complaining of damage at his hands; for if there is no

duty violated, though there may be grave damage befalling the complaining party, he has no ground of action. It is a case denominated in law as "damnum absque injuria,"—damage done, but without violation of a right in the injured party; a misfortune unaccompanied by a breach of duty by the party inflicting the injury. Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 993.

Unless an act is wrongful in the sense of being unlawful, it will not sustain a suit for damages. Pickens *v.* Coal River, etc., Co., 51 W. Va. 445, 41 S. E. 400.

"A legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law mere damnum is not enough; there must also be injuria; that is, 'Exdamno absque injuria non oritur actio.'" 1 Jag Torts, § 7. We must nicely distinguish between damnum and injuria. We commonly use the words "injury" and "damage" indiscriminately, but in the rule above these Latin words are distinct. "Damnum" means only harm, hurt, lost, damage; while "injuria" comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is damnum absque injuria. Such is the case under the first count of the declaration. The plaintiff had a perfect right to operate its business. So had the defendants the right to operate theirs." Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 592, 88 Am. St. Rep. 892, 56 L. R. A. 804.

Damages to Abutting Owners.—Consequential damages to property by the construction of a railroad in front of property abutting on the railroad, is damnum absque injuria for which no compensation can be had. Richmond Traction Co. *v.* Murphy, 98 Va. 104, 34 S. E. 982; Fisher *v.* Seaboard, etc., R. Co., 102 Va. 363, 46 S. E. 381.

A municipal corporation, acting within scope of its powers with reasonable care and skill, in opening, grading and improving its streets, is not liable to the adjacent owner whose land is not actually taken, for consequential damages to his premises, unless there is a provision in its charter, or in some statute, creating the liability. It is damnum absque injuria. Smith *v.* Alexandria, 33 Gratt. 208; Kehrer *v.* Richmond, 81 Va. 745; Roanoke Gas Co. *v.* Roanoke, 88 Va. 810, 14 S. E. 665; Davenport *v.* Richmond, 81 Va. 636; Richmond, etc., R. Co. *v.* Richmond, 26 Gratt. 83.

Fair Competition.—Damage to another in his business resulting from fair competition is not actionable, unless he violates some such right as by interfering and inducing another to violate his contract. Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 892, 56 L. R. A. 804.

One may, without liability, in furtherance of his own interest in the competition of business, establish any works competing with another, and may induce customers of that other to withdraw their patronage from him, in order to obtain business for himself, though it injure, and is intended to injure that other person's business, if there is no contract between such person and his customers. The motive of the person so doing, though malicious, is not material, his acts being lawful. But if he induce such withdrawal of custom not in bona fide neighborly advice, nor in free right of competition to benefit his own business, but wantonly only to injure that other person, he is liable to action. What one may do thus, several, with same justification, may combine to do. Transporta-

tion Co. *v.* Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 892, 56 L. R. A. 804.

Injuries to Fishing Rights on Navigable Waters.—The plaintiff in the court below was the lessee of a fishery on the Potomac River, on a point where the tide ebbs and flows, and the stream is navigable for the largest vessels. The value of this landing was greatly impaired by the construction of the Alexandria and Fredericksburg railroad along the line of the river, and the plaintiff brought his action to recover damages for the injury. One of the questions raised in the case is whether the owners of property on the navigable waters are entitled to compensation for injuries of this character. It is insisted by defendant's counsel that the Potomac, being a navigable river at that point in question where the tide ebbs and flows, the state owns the bed of the stream to high water mark; and that the privilege of fishing in its waters is a mere license which may be revoked at any time; and, further, that the legislature may lawfully authorize the construction of a railroad along the water front, and the owner can claim no compensation for any injury which he may sustain; it is damnum absque injuria. It is a sufficient answer to this view to say that the legislature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in the enjoyment of these rights. Alexandria, etc., R. Co. *v.* Faunce, 31 Gratt. 764.

III. Necessity of Resultant Damage.

A. IN GENERAL.

There must be actual damages done to warrant compensatory damages. Douglass *v.* Railroad Co., 51 W. Va. 533, 41 S. E. 911, citing 12 Am. & Eng. Ency. Law (2d Ed.) 1073.

The plaintiff must not only show that he has sustained damages, by reason of his rights being violated, but must show with reasonable certainty the extent of such damages. And he must also show that such damages are the natural and proximate result of the injury complained of. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875.

Where one granted to a railroad company a strip of land for its use in the construction of its railroad, and on the residue of the tract a fill or bar is made in a stream by blasting and throwing into it rock and other refuse material in the work of construction of such railroad, which fill is not necessary for the construction and maintenance of the railroad, and which entails injury to a mill situate on such residue, the plaintiff may recover nominal damages from the mere fact of such wrong; but, if compensatory damages are asked, the plaintiff must in some way show, by evidence, data and means by which the jury can ascertain and fix the amount of damages. The jury can not go by merely arbitrary conjecture. Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521.

B. NOMINAL DAMAGES.

Whenever a party has violated the rights of another, the party whose rights have been so violated, has a cause of action against the other for damages, but in the absence of proof of some actual damage resulting from the wrongdoer's act, nominal damages only can be recovered. Building, Light, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521; Hare *v.* Parkersburg, 24 W. Va. 554; Newbrough *v.* Walker, 8 Gratt. 16.

Burden on Plaintiff to Show Actual Damages.—Where an actionable wrong by the defendant is shown, the plaintiff may recover nominal damages from the mere fact of such wrong; but, if compensatory damages are asked, the plaintiff must in some way show, by evidence, data and means by which the

jury can ascertain and fix the amount of damages. The jury can not go by merely arbitrary conjecture. Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521. See Hare *v.* Parkersburg, 24 W. Va. 554; Newbrough *v.* Walker, 8 Gratt. 16.

Where a mere breach of contract is shown, without actual damage calling for compensation, nominal damages may be recovered from the mere fact of such breach of contract; but, if compensatory damages are demanded for actual damages, the plaintiff must in some way show by evidence facts and data affording means by which a jury can safely ascertain and fix the amount of damages. A jury can not go by mere arbitrary conjecture or estimate. Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894; Robinson *v.* West Virginia, etc., R. Co., 40 W. Va. 583, 21 S. E. 727; Douglass *v.* Ohio River R. Co., 51 W. Va. 533, 41 S. E. 912.

"A jury must have definite evidence by which to find a certain sum as compensation for actual loss before it can render a verdict for compensatory damages. For a broken contract merely it can find nominal damages, but not compensatory; for the very term compensatory damages implies that there must be actual loss before compensation can be given, and there must be definite basis given by the evidence upon which a jury can define and fix the amount of the loss, otherwise any assessment is without law and against law. If the plaintiff can not show such a basis it is his misfortune his evidence fails to show a loss of such substantial, tangible cast as that we can take hold of it and weigh and fix it in dollars. A jury is never permitted to grope in the dark and merely surmise, approximate or guess at damages." Douglass *v.* Ohio River R. Co., 51 W. Va. 533, 41 S. E. 911.

Breach of Covenant.—In an action for breach of the covenant of "good right to convey" the property in question, nominal damages only can be recovered, where, before actual injury is sustained, the title to the property is perfected by inurement. Building, Light, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58.

Compensatory damages can not be recovered of a railroad company for breach of covenant to construct and maintain necessary cattle guards where the land owner fences off his remaining land on both sides of the railroad right of way, and the land between such fences occupied by the right of way, is not used for stock, and division line between the land of the grantor and an adjoining owner is partly unfenced so as to allow cattle to pass from the adjoining owner to the land occupied by the railroad, and it is not shown that cattle have passed along the railroad either way through the division line, and no damages shown unless it be possibly extra labor to attend cattle passing over a private crossing at the division line, no outlay being shown. Douglass *v.* Ohio River R. Co., 51 W. Va. 533, 41 S. E. 911.

For Abandonment by Lessee of His Contract of Rent.—The measure of damages to the lessor in such a case is generally the amount of the rent that would have accrued during the term of rental, had the lessee carried out his part of the contract. But if the lessor succeeds in rerenting the property before the lessee's term expires, then the measure of damages is the difference between the amount lessee contracted to pay, and the sum lessor receives from the new tenant. If the lessor suffers no actual damage, he is nevertheless entitled to nominal damages for the breach of the contract. James *v.* Kibler, 94 Va. 165, 26 S. E. 417.

Error.—The failure to give nominal damages, unless it be upon a matter which involves the settlement of a right other than a right to recover damages, is not a ground for reversal. Briggs *v.* Cook, 99 Va. 273, 38 S. E. 148; Smith *v.* Weed Sewing Machine

Co., 26 O. St. 562; Chambers *v.* Frazier, 29 O. St. 362; Hill *v.* Butler, 6 O. St. 207.

IV. Liquidated Damages and Penalties.

See the title PENALTIES AND FORFEITURES.

Definition.—It is well recognized in all the authorities that it is competent for parties entering on an agreement to avoid all future questions of damage which may result from a violation thereof, and to agree upon a definite sum as that which shall be paid to the party who alleges and establishes the violation. In such a case the damages so fixed are termed liquidated, stipulated or stated damages. Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711; Stony Creek L. Co. *v.* Fields, 102 Va. 1, 45 S. E. 797.

Right to Stipulate Damages for Breach of Contract.—Parties entering on an agreement, may avoid all questions of future damage, as a result of the breach of the contract, by agreeing upon a definite sum which shall be paid by the party in default to the other contracting party. And in such a case, the party violating the agreement is not responsible in damages, for any sum greater than that stipulated, whatever may be the real damage. Welch *v.* M'Donald, 85 Va. 500, 8 S. E. 711.

"I would be prepared to hold that the question of damages was not left open by the contract of the parties; but that the amount thereof was limited to the value of work and material, for which no notes had been issued at the time the work was abandoned. This was the measure of damages agreed on by the parties themselves; and we think, in a case of this character, in which the damages must be of necessity to a great extent conjectural, the measure agreed on by the parties should govern the court." Ould *v.* Myers, 23 Gratt. 402.

"The law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it, should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of an instrument, ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our offer is to ascertain the intent of the parties, and if it be not contrary to law, to carry their intent into execution. In the present case, no evidence has been adduced of the amount of damage sustained by the plaintiff." Ould *v.* Myers, 23 Gratt. 403.

Agreement to Arbitrate.—The measure of recovery for refusal to comply with agreement to arbitrate, is ordinarily the costs and expenses incurred in and about the submission, unless, indeed, there be a bond with a penalty in the nature of liquidated damages. Morse on Arbitration, 239. Corbin *v.* Adams, 76 Va. 61.

Liquidated Damages or Penalty—How Determined.—Whether a given sum agreed to be paid in case of the breach of a contract is to be regarded as liquidated damages or as a penalty must depend on the facts of the particular case, regardless of the name by which the parties have called it. If the contract is for the doing of a single specific act, and there is no adequate means of determining from the contract or otherwise the precise damages which may result from its breach, the sum agreed will generally be regarded

as liquidated damages and not a penalty; but, when from the nature of the contract or the work to be performed it is not difficult or impossible to ascertain the damages resulting from a breach, the sum stipulated will generally be regarded as a penalty. Stony Creek Lumber Co. *v.* Fields, 102 Va. 1, 45 S. E. 797.

Payment of Periodical Amounts.—Where a per cent. of periodical payments under a contract to cut and deliver wood is reserved until the contract is completed, the sum reserved is not to be regarded as stipulated or liquidated damages but as a penalty or security for the completion of the work, or the payment of the damages resulting from a failure to complete it. Stony Creek Lumber Co. *v.* Fields, 102 Va. 1, 45 S. E. 797.

Where there is a stipulation in a contract for obtaining a certain per cent. at a contract price, as a security for the completion of the work, the cases are not harmonious as to whether this is to be considered as liquidated damages or in the nature of a penalty. Each case must depend in a great degree on its own fact. In Virginia such stipulation was held, to create a penalty, because in the contract under consideration there was nothing to indicate that it would be impossible or even difficult to establish by competent proof the actual damages resulting from its breach, if a breach be shown. Stony Creek Lumber Co. *v.* Fields, 102 Va. 1, 45 S. E. 797.

Contracting parties may state a definite sum as the damages to be paid to the injured party in case of breach of contract. Where defendants agreed to pay as such damages "five dollars per day for each day after 22d of June that this contract remains unfulfilled," held; plaintiffs have no right of action for any damages resulting from delay other than the stipulated five dollars per day; and a count, an instruction, or a verdict based upon any other theory, is illegal and erroneous. Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711.

Alternative Agreements.—A court of equity can not specifically enforce a contract to build a railroad, or to procure a railroad to be built by others. And where the chief object of a contract is to secure the building of a railroad, and one of the parties stipulates that upon failure to build such a railroad he will pay a sum certain in money, or will transfer and deliver certain stock, a court of equity will not entertain a bill to enforce the transfer of the stock. Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362.

Upon the case stated, if the payment of the money, or the transfer of the stock be regarded as a penalty, or as a forfeiture, a court of equity will not enforce it; if as liquidated damages, then a full, adequate, and complete remedy is afforded at law, and equity has not jurisdiction. Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362.

Where A makes a contract with B to secure the building of a railroad and stipulates that upon failure to build such a railroad he will pay a sum certain in money or will transfer and deliver certain stock, it was held, that equity will not entertain a bill by B to enforce the transfer of the stock, and the rule is the same whether or not the stock, or in lieu thereof the money, agreed to be transferred by A in case of a failure to perform the contract, is to be considered as a penalty or as liquidated damages, because in neither case is B entitled to the relief sought. Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362.

A contracts to pay to B, £260, current money, in final settlements, at the rate of 20s. such settlements, for each 13d. current money, on the 1st of December next, B agreeing, that the same may be discharged by the payment of a like sum, in said settlements, at any time on or before the 1st of November preceding, at the rate of 20s. such settlements, for each twenty-six pence,

current money. Held the contract is not usurious, but the thirteen pence is to be considered as a penalty and the time of delivery is, the 1st of November. Groves *v.* Graves, 1 Wash. 1.

Where the bill is "to pay by a given day with interest from a prior day if not punctually paid, followed by a penalty of double the amount of the debt," it was held, that this was a penalty against which a court of equity will relieve. Mosby *v.* Taylor, Gilm. 172.

Construction of Agreement by Equity in Doubtful Cases.—Courts of equity in doubtful cases construe such agreements as we are here considering as creating a penalty or forfeiture rather than liquidated damages. For, if it be determined that it is but liquidated damages, the jurisdiction of a court of equity is at an end, but if it be construed as a forfeiture or penalty, then it affords no obstruction to the interposition of the court of equity, because it will prohibit either the enforcement or the voluntary payment of the penalty or forfeiture, and will compel the performance of the alternative contract if a proper case be made. Courts of equity, therefore, always strongly incline to that construction which declares it to be a forfeiture or penalty rather than liquidated damages. Ewing *v.* Litchfield, 91 Va. 581, 22 S. E. 362.

Enforcement of Contract in Equity.—So far from liquidated damages constituting an exception to the rule that courts of equity will not entertain suits for damages for breach of contract, it seems that if the damages for the breach of a contract have been liquidated by the parties to the contract (that is, ascertained and agreed upon), that fact, so far from inviting the assistance of a court of equity, is sufficient to repel it. Ewing *v.* Litchfield, 91 Va. 581, 22 S. E. 362.

In proper cases, where parties have no other adequate remedy, a court of equity will specifically enforce contracts, but it will neither enforce a penalty or a forfeiture, nor permit it to be enforced in a court law; nor will it permit a party, by the voluntary payment of the agreed penalty, to defeat the enforcement of the alternative contract. Ewing *v.* Litchfield, 91 Va. 575, 22 S. E. 362.

In cases of doubt whether the provisions of a contract constitute a forfeiture, a penalty, or liquidated damages, courts of equity strongly incline to that construction which declares it to be a forfeiture, or a penalty, rather than liquidated damages. For if it be construed as a forfeiture, or a penalty, it will entertain jurisdiction to prohibit either the enforcement or the voluntary payment of the penalty or forfeiture, and will compel the performance of the alternative contract, if a proper case be made; but if it be construed as liquidated damages, the jurisdiction of the court of equity is at an end. Ewing *v.* Litchfield, 91 Va. 576, 22 S. E. 362.

Partnership—Implied Authority of Partners.—The implied authority of a general partner does not extend to contracts for liquidated damages, penalties, or forfeitures, as such contracts do not belong to the ordinary usages of mercantile law. In such cases, to bind the noncontracting members of the firm, there must be either express authority prior thereto, or ratification thereafter, or they must in some manner inure to the benefit of the firm. Waldron *v.* Hughes, 44 W. Va. 126, 29 S. E. 505.

It is settled law that the implied authority of a member to bind the firm does not embrace the right to sign a sealed instrument, to confess a judgment, submit to arbitration, or to agree on a fixed penalty, forfeiture, or liquidated damages, as all such matters, being out of the ordinary transactions of commercial business, can only be made binding on the firm by special authority granted, or after ratification. Waldron *v.* Hughes, 44 W. Va. 126, 29 S. E. 505.

V. Speculative, Remote or Contingent Damages.

A. PROXIMATE AND REMOTE CONSEQUENCE.

Generally.—The law does not hold a person responsible in damages for the remote consequences of his act, but only for those which are natural and proximate and necessarily result from the wrongful act. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; Slaughter *v.* Denmead, 88 Va. 1019, 14 S. E. 833; Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468; James *v.* Adams, 8 W. Va. 568; Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563; Crescent Horseshoe, etc., Co. *v.* Eynon, 95 Va. 152, 27 S. E. 935; Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. Rep. 919.

Difficulty Found in Applying Rule.—The general rule that a person is responsible in damages, for all injuries that are the natural and proximate result of his wrongful act, is well settled, but difficulty is often found in applying the rule to a particular case. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875.

In Gerst *v.* Jones, 32 Gratt. 526, and note, it is said: 'It is well settled, that the plaintiff is entitled, as a general rule, to recover such damages as are a natural and proximate result of the wrongful act of the defendant. Peshine *v.* Shepperson, 17 Gratt. 472, 485." The principal case is also cited and followed in Burruss *v.* Hines, 94 Va. 416, 26 S. E. 875; Fishburne *v.* Engledove, 91 Va. 558, 22 S. E. 354. That the question of the amount of damages is one for the jury, see footnote to Daingerfield *v.* Thompson, 33 Gratt. 136, where the principal case is cited with a large number of others. Peshine *v.* Shepperson, 17 Gratt. 472.

The law refers an injury to the proximate, and not to the remote cause. A man guilty of negligence is not responsible for all the consequences that may or do flow therefrom, but only for such consequences as a prudent and experienced man, fully acquainted with all the circumstances which in fact exist at that moment, could have foreseen or reasonably anticipated. Fowlkes *v.* Southern R. Co., 96 Va. 742, 32 S. E. 464.

This question of what was the proximate and what was the remote cause of damages was considered by this court in Washington *v.* Baltimore, R. Co., 17 W. Va. 196-199; and, the principle established that the determinate pecuniary damages which can be recovered from any tort of any description must always be the natural and proximate consequence of the act complained of, and not its remote consequence. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 493.

A defendant is not liable for damages resulting from an event which was not expected, and could not have been anticipated by a person of ordinary prudence. Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

An action for compensatory damages can not be sustained against a railroad company for failure to build fences or cattle guards under an agreement to do so, merely for such failure; there must be actual loss from such failure as its proximate cause. Douglass *v.* Ohio River R. Co., 51 W. Va. 524, 41 S. E. 911.

In an action to recover the price of fertilizers sold, where the defense is a breach of warranty of the quality of the fertilizer, it is not error to instruct the jury that they are to look to the evidence for proof of the warranty and its breach, and, if established, they must find for the defendant "such damages" as have resulted naturally from the breach of the said warranty." "Naturally" here means legitimately, and the instruction leaves it to the jury to determine from the evidence the amount of such damages. Reese *v.* Bates, 94 Va. 322, 26 S. E. 865.

B. UNCERTAIN, SPECULATIVE AND CONTINGENT DAMAGES.

1. In General.

Damages which are in their nature uncertain, speculative or contingent, can not be recovered. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; James *v* Adams, 8 W. Va. 568; Slaughter *v.* Denmead, 88 Va. 1019, 14 S. E. 833; Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434; Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 573; Peshine *v.* Shepperson, 17 Gratt. 472.

"The general principle that you can not measure damages by mere speculation or conjecture is well settled by the above cases." Kyle *v.* Ohio River R. Co., 49 W. Va. 300, 38 S. E. 489.

Damages such as are recoverable at common law must not only be the proximate result of the act complained of, but they must be certain and definite, and not speculative in their character. Connelly *v.* Western Union Telegraph Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

2. In Actions for Breach of Contract.

General Rule in Cases of Contracts.—Only such damages can be recovered for a breach of contract, as can fairly and reasonably be considered as naturally arising from the breach of the contract in question, according to the usual course of things, or as having been in the contemplation of the parties when the contract was made, as a probable result of a breach of it. Slaughter *v.* Denmead, 88 Va. 1022, 14 S. E. 833, citing and approving Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563; Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this latter rule, speculative, contingent and remote damages, which can not be directly traced to the breach complained of, are excluded. Under the former rule such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as might naturally be expected to follow its violation. It is not required that they must have contemplated the actual damages which are to be allowed; but the damages must be such as the parties may be fairly supposed to have contemplated when they made the contract. A more precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. Western Union Tel. Co. *v.* Reynolds, 77 Va. 186.

3. In Actions for Torts.

The general rule is that damages for which a party is liable in tort are such, and only such, as are the reasonable and probable consequence of his acts. Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190.

In cases of tort the determinate pecuniary damages must always be the natural and proximate consequence of the act complained of by the plaintiff. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 492.

It is the province of the court to determine in the first instance whether or not the facts offered in evidence, tending to prove an injury to the plaintiff, are too remote from the defendant's act of negligence to constitute an element of the plaintiff's recovery. Fowlkes *v.* Southern R. Co., 96 Va. 742, 32 S. E. 464.

There is a marked difference in the manner in which the two sorts of determinate pecuniary loss must be stated by the plaintiff in his declaration. If it be directly sustained, it is called general damages; but, if it be only consequential pecuniary loss, it is called special damages. All damages must be

the result of the injury inflicted. Those which are directly sustained, or general damages, as they are called, always necessarily result from the injury. These may be shown under the general allegation of damages at the end of every declaration; for the defendant is, by the rules of pleading, presumed to be aware of the necessary consequences of his conduct; and therefore can not be surprised by the proof of them, though they be not specially mentioned in the declaration. But it is different with all consequential losses. The damages thus arising through the natural consequences of the act complained of, as well as the proximate result of such act, are not the necessary result of such act. The damages resulting from such consequential losses are the special damages I have spoken of. To prevent a surprise upon the defendant, the rules of pleading require that these should be particularly specified in the declaration; and, if they are not, the plaintiff will not be permitted to produce before the jury any evidence of them at the trial. Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

"It seems to me that the great weight of authorities make no sort of distinction in the rule which is to govern the juries in ascertaining the measure of damages in any sort of tort, whether it be malicious or not, so far as the consequences of the defendant's act, of which complaint is made, is concerned, which the jury may legitimately consider. In all cases they can take into consideration only the natural and proximate consequences of the defendant's act, and never its remote consequences. The law is so laid down by Greenleaf on Evidence (vol. 2, § 256); and he not only lays down the law thus broadly, to use his language: 'The damages to be recovered must always be the natural and proximate consequence of the act complained of,' but he neither suggests in the text or in his notes that there is any dispute about the correctness of the law as thus stated, and its application to all cases, whether the act of the defendant was or was not malicious; and it does seem to me that he was entirely justified in thus laying down the law both by reason and by the immense number of cases of all sorts in which it had, without any controversy, been regarded as law applicabe to all sorts of cases." Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

In an action to recover damages for personal injuries, it is not error to instruct the jury that they should take into consideration, in addition to the expenses in paying a loss already incurred and suffered, such as would naturally, reasonably and probably result to the plaintiff as a consequence of his injuries. Norfolk R., etc., Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502.

Fact That Legislature May Act.—Upon the trial of an issue to ascertain the amount of damages sustained by a ferry franchise by the erection and operation of a bridge, the jury are to regard the franchise as permanent, and in estimating the damage can not take into consideration the fact that the legislature may repeal the law creating the exclusive privilege of transporting persons and things across the river within half a mile of the ferry. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

Carriers—Injury Resulting to Woman from Pregnancy.—In Fowlkes *v.* Southern R. Co., 96 Va. 742, 32 S. E. 464, the facts were these: The plaintiff, a married woman, in a pregnant condition, was told by the ticket agent of the defendant company, that she would make close connection with a train on another railroad, at a certain point on defendant's line, for her destination, which was her father's home. On the train's reaching the junction where she was to catch her train, she found that there would be no train for her destination that day. The day was hot and sultry, and a storm was brewing. There

was no station where she could wait or any accommodation at the place. She finally succeeded in hiring a buggy to convey her to her father's house, eight miles distant; as a result of the jolting of the ride, the wetting she got and her worrying, she became sick, had abdominal pains, hemorrhage from the womb, and finally a miscarriage, and some months afterwards another miscarriage. Since that time she has been in bad health. Keith, P., in delivering the opinion of the court said: "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded. In other words, the law always refers the injury to the proximate, not to the remote cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined and concatenated as cause and effect to support an action. * * * The negligent act proved in this case was committed at the time the ticket was purchased, and it seems to us manifest that a most prudent and experienced man, acquainted with all the circumstances which existed at that moment, could never have foreseen or anticipated the consequences that supervened. It might reasonably have been anticipated that a failure to make the connection at Mosely Junction would involve delay and inconvenience, but not that the plaintiff would procure a buggy, and in the face of a storm, in her delicate condition, drive over a rough road to her father's house, and that a miscarriage would be the result."

4. In Condemnation Proceedings.

In assessing damages, in condemnation proceedings, the commissioners should consider the actual value of the land with all of its adaptation to general and special uses at the time of their assessment, and not its prospective, speculative, or possible value, based upon future expenditures and improvements. Richmond, etc., Electric R. Co. *v.* Seaboard, etc., Railway, 103 Va. 399, 49 S. E. 512.

C. PROFITS.

1. In General.

Mere speculative and conjectural estimates of profits which might have been made, or of the loss of gains and profits which might have been made, are not a legitimate basis upon which to fix damages. Douglass *v.* Ohio River Co., 51 W. Va. 524, 41 S. E. 911; Kyle *v.* Ohio River R. Co., 49 W. Va. 300, 38 S. E. 489; Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

"A plaintiff will not ordinarily be allowed to give evidence of or to recover profits or expected gains, for it is generally conjectural whether there will be any profits or gains. The prohibition against the recovery of profits or gains, when not excluded as unnatural or remote, is due mainly to the inability to prove with reasonable certainty that the injury prevented the receipt of profits or gains, and their amount. But if it be shown that the loss of profits or gains was the natural and proximate result of the wrongful act, and

their extent is also satisfactorily proved, they may be recovered." Riely, J., in Burruss *v.* Hines, 94 Va. 413, 416, 26 S. E. 875, citing Bolling *v.* Lersner, 26 Gratt. 36. Says the court, in Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563, 572, "Profits or advantages, which are the direct and immediate fruits of the contract entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps the only inducement to the arrangement." Cited and approved in Trigg *v.* Clay, 88 Va. 335, 13 S. E. 434. See also, Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525; Hare *v.* Parkersburg, 24 W. Va. 554; Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

In Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4, it is said that "in ascertaining damages where there is an interference with, or a withholding of property, or a breach of contract, the gain prevented, if provable, may be recovered. Profits which are the difference between the agreed price of something contracted for and its ascertainable value or cost, are recoverable. See Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525; Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434; Consumers' Ice Co. *v.* Jennings, 100 Va. 725, 42 S. E. 879.

The value and profits of land being in the nature of damages ought to be ascertained by a jury, and not by commissioners. Eustace *v.* Gaskins, 1 Wash. 188.

2. In Actions for Breach of Contract.

a. In General.

The general rule seems to be that the party injured by a breach of contract, is entitled to recover all his damages, including gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. It is only uncertain and contingent profits, therefore, which the law excludes; not such as being the immediate and necessary result of the breach of contract, may be fairly supposed, to have entered into the contemplation of the parties when they made it, and are capable of being definitely ascertained by reference to establish market rates, or other like definite criteria, according to the case. James *v.* Adams, 8 W. Va. 569; Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563.

There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of such profit is strictly the measure of damages. Wood's Mayne on Damages, p. 82. It has been held, that when the defendants refused to allow the contract to be executed, that the jury should allow the plaintiffs as much as the performance of the contract would have benefited them. Profits or damages, which are the direct and immediate fruits of the contract entered into between the parties, are part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, and the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration, and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563.

"The rule has not been uniform or very clearly settled as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as

the direct and immediate results of its fulfillment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement." State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385.

Loss of profits resulting from a breach of contract may be recovered when they are the natural result, in the contemplation of the parties, of the breach, and can be proved with reasonable certainty. Bristol, etc., R. Co. *v.* Bullock, etc., Co., 101 Va. 652, 44 S. E. 892.

Profits, which are the difference between the agreed price of something contracted for and its ascertainable value or costs, are recoverable, as in the case of the Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525. But where the profits are dependent upon future bargains or states of the market, they are not, as a general rule, subjects of recovery. Newbrough *v.* Walker, 8 Gratt. 16; Peshine *v.* Shepperson, 17 Gratt. 472, 486; 1 Sedgwick on Damages, §§ 174, 176. Grubb *v.* Burford, 98 Va. 560, 37 S. E. 4.

"I have stated what I deem the true mode of measuring this damage. It is not contingent upon future bargains or speculations or a future status of the market or upon the profits which might be made out of continuing the business of selling organs, but is based on the reasonable supposition, that, when this contract was broken by the plaintiff, the defendant by previous bargains or otherwise had then an opportunity of disposing of and delivering in all probability about seven organs, the sale of which, if sold at the prices at which he was selling them, would have brought him $350 more than the price he was to give for them. There is in this no element of conjecture or speculation; and this mode of measuring the damage from the breach of the contract, if it was such a contract, as I think the jury from the evidence thought it was, is not in conflict with the views of even the counsel for the plaintiff, as above expressed." Sterling Organ Co. *v.* House, 25 W. Va. 95.

b. Specific Applications of Rule.

If a surviving partner acquire from the representative of his deceased partner's estate, the interest of the decedent in the partnership assets for an inadequate price, through some mistake of fact, or under a mistaken claim of right calling for redress, the measure of relief, in the absence of all fraud, is the real value of the interest at the date of the sale, with interest thereon from that date. "In a case where the survivor has continued the business and used the assets of the firm, and it is plainly just that he should be made to account for profits—so many elements, labor, skill, foresight, and other personal qualities, and fortunate business connections, as well as capital, combine to create profits—that it is often most difficult to estimate with any degree of accuracy the proportion of profits to be attributed to capital and what to other elements; and any estimate is at best conjectural, and liable to do injustice." Tennant *v.* Dunlop, 97 Va. 234, 33 S. E. 620.

Where a state board is authorized to cause the execution of a work, and makes a contract therefor, such contract is binding on the state. The rights of the contracting parties under it are the same as in other cases of the like kind, and the measure of damages for the breach of such contract is regulated by the settled rule on the subject, viz.; that the plaintiff should have a fair compensation for all labor done, materials furnished and expenses incurred, together with such profits as he was likely to have realized as the direct and immediate fruits of the contract, had it been fulfilled. Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563.

If a contract were to repair machinery, and, if not well done, that the

same should be returned for a second effort at repair, and there is a failure to return, the measure of recovery by the party doing the work would not be the specific sum fixed by the contract for good repair, but the profit which would have been realized on the whole work had the machinery been returned. Electric Supply, etc., Co. *v.* Consolidated Light, etc., Co., 42 W. Va. 583, 26 S. E. 188, citing Hare *v.* Parkersburg, 24 W. Va. 554; State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385.

Failure of One Party to Perform.—The plaintiffs can recover for prospective profits when they are prevented from going on by being ordered to desist from the work, or by the omission to perform some condition precedent to its further prosecution by the other party. Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563.

In an action by a contractor to recover the profits on a contract which he was prevented from fulfilling by the refusal of the other party to accept performance. "The probability that the defendant might have rejected all the brick when completed, and that the plaintiff would have thereby sustained the complete loss thereof, is too uncertain a contingency to render plaintiff's estimate of his profits so uncertain as to prevent recovery therefor. All that the plaintiff was required to prove was that the profits claimed were reasonably certain to have been realized but for the wrongful act of the defendant." Barrett *v.* Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

In an action to recover for the price of bricks manufactured under contract, and also to recover prospective profits on other bricks contracted to be manufactured, but which the plaintiff was unable to manufacture by reason of the failure of the defendant to pay for those already manufactured, the plaintiff can only recover for the bricks already manufactured the contract price thereof, with legal interest from the time payment should have been made. Not having performed his contract, the plaintiff can not recover prospective profits on the bricks not manufactured. The measure of damages for the breach of a contract to pay money is, with a few exceptions, the principal sum, with legal interest thereon from the time the payment was due. Bethel *v.* Salem Improvement Co., 93 Va. 354, 25 S. E. 304, distinguishing Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563.

Injury to Grazing Land by Railroad.—Compensatory damages can not be recovered of a railroad company for breach of a covenant to fence its track, when the land through which the railroad passes is used, not for stock, but only for cropping, and no damages shown otherwise than omission by the owner to graze stock on the land because of his fear of possible injury to it from trains, or loss of estimated profits by grazing over those from agriculture, which might have been realized, if fences had been made. Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

In an action against a railroad company for breach of a covenant to fence his track, when the land through which the railroad passes is used, not for stock, but only for cropping, and no damages are shown otherwise than omission by the owner to graze stock on the land because of his fear of possible injury to it from trains, or loss of estimated profits, by grazing over it for agriculture, which might have been realized if the fences had been made, the court said: "Douglass made profits from this land every year by cropping. Evidence was admitted to prove that by grazing the land he could have made a certain sum more yearly than by graining the land. This evidence was improper and unavailing because it proposed an improper basis for an allowance of damages. Profits by grazing, or any other business to be carried on in future, is dependent on

numerous contingencies, and any estimate of future profits can only be conjectural, speculative, simply guess work. This process of getting at damages is not allowed by law. Beatty Lumber Co. *v.* Western Union Tel. Co. (1902) cases there cited. The United States supreme court in Howard *v.* Stillwell Co., 139 U. S. 199, held, that expected profits from grinding wheat and selling its flour could not be taken into consideration in an action for failure to finish a mill at a time agreed upon. Douglass claimed that he did not put cattle on the land from fear that they would be killed by trains. Loss from that cause would be purely conjectural. Such loss, though possible, can not be considered where we have to assess damages as actual, based on actual loss. The cattle might not have been hurt. If hurt, when hurt, the company would have to pay their value. Shall we make it pay for cattle not hurt, not even on the premises? Again, the evidence discloses no certain criterion for assessment of damage." Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

"But mere speculation or conjecture as to profits or gains is one thing, whilst reasonable approximation of the value of a hay crop to come from grass growing in a meadow on the first of May, is another. The grass on the 1st of May would be of very little value. Is one who destroys it to be let off merely with that? It seems to me that when there is a crop of grass or any way growing crop lacking only a few weeks for maturity, it constitutes a substantial, tangible, basis of reasonable estimation of damages, forming a legal basis of measurement of damages. We must consider that a partly grown crop has a potentiality of maturity under the laws of nature enabling us to say, with fair and reasonable certainty, that it will, by the law of nature, come to the full grown matured crop. 'Seed time and harvest shall not fail.' This is not conjectual profit; it is reasonable certainty. To warrant damages, to give the measure, absolute certainty is not required. Reasonable certainty is all that is required in law. It was proper to receive evidence of the usual, natural crop of hay on the meadow attested by past experience. The maturity of that crop was within reasonable probability and it was not improper to admit evidence of the usual value of the crop." Kyle *v.* Ohio River R. Co., 49 W. Va. 300, 38 S. E. 489.

Loss of Profits by Delay—How Estimated.—In an action by an electric manufacturing company against a street railway to recover the contract price for a certain electrical appliance, the defendant filed a plea of set-off as by reason of the delay of the electric manufacturing company in delivering the appliance, the defendant had sustained damages to a certain sum by reason of the loss of profits. It was held, that such net profits can not be ascertained by simply deducting from the receipts the bill for fuel and an estimate of the costs of the skilled labor employed. The amount of damages was not proven with reasonable certainty. The proof was too speculative and conjectural to enable the court to fix with a sufficient degree of certainty upon a definite sum as the amount of damage sustained. Bristol, etc., R. Co. *v.* Bullock Electric Mfg. Co., 101 Va. 652, 44 S. E. 892.

Contract to Pay Money at Fixed Time.—It is the ordinary case of a failure to comply with a contract to pay money at a stipulated time. In such cases the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiffs by the use of the money, in addition to the interest, would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiffs can bring their case within some well recognized ex-

ception to the rule. Bethel *v.* Salem Improvement Co., 93 Va. 354, 25 S. E. 304.

Performance Prevented by Defendant.—A plaintiff contractor who sues for the profits on his contract, which he was prevented from fulfilling by his employer, without fault on his part, is entitled to recover the full consideration for such contract, less the expense of fulfilling the same. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

Plaintiff in such a case is not bound to prove what his profits would have been with absolute certainty, but only such reasonable certainty as will satisfy a jury as to the reasonableness of his demand or estimate. Remote or doubtful contingencies are insufficient to destroy the reasonable certainty of such demand. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

"Defendant claims that the damages are speculative, and not certain. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309; Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911; Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Hare *v.* Parkersburg, 24 W. Va. 554; James *v.* Adams, 8 W. Va. 568. In the case of the United States *v.* Behan, 110 U. S. 339, the rule is stated to be, in case a contractor sues for the profits on a contract which he is prevented from fulfilling by breach of his employer without fault on his part, is the difference between the cost of doing the work and what he was to receive for it. 3 Sunderland on Damages, § 743; Baltimore, etc., R. Co. *v.* Stewart, 79 Md. 487. The plaintiff is not bound to prove such profits with absolute certainty, but with only reasonable certainty, and the fact that the employer might reject the work as not done to his satisfaction when completed, would not render such profits uncertain, especially if the contractor might get a larger price for the brick when completed than his employer agreed to pay him for the same." Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

Gains prevented by withholding or interfering with property, or by breach of contract, may be recovered if proved; and so may the difference between the contract price of an article and its ascertainable value or cost. But profits depending upon future bargains, or states of the market, are generally not recoverable. Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

In ascertaining damages where there is an interference with, or a withholding of, property, or a breach of contract, the gain prevented, if provable, may be recovered. Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

In an action by a cotenant to recover mesne profits, the true measure of damages is compensation for the actual loss sustained by the plaintiff in being deprived of the use of his property, and speculative profits, founded on an exaggerated notion of the real value of the property, are not recoverable. Evidence tending to establish such speculative profits is inadmissible, as it may mislead the jury in arriving at the fair rental value of the property. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

In an action of trespass for mesne profits, if the defendant at the time of the inception of the cause of action had knowledge of the plaintiff's title, although he honestly believed that he held the superior legal title, the measure of damages is not the actual receipts, but is the fair annual rental of the property, with legal interest, less the taxes paid by the defendant. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980.

Landlord and Tenant — Leases.—In an action for damages for failure of the landlord to give possession of property which has been leased, or from which he has ejected the tenant, where the gist of the action is being deprived of the benefit of the lease,

whether the action is covenant or tort, the general rule is that the plaintiff is entitled, as the measure of his damages, to the difference between the rent reserved, and the value of the premises for the term. He may also recover such special damages as have directly and necessarily been occasioned by defendant's wrongful act or default, but can not recover what he might have made on the premises during his lease, nor for loss sustained by selling his stock, agricultural implements, etc., for less than their value. Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827.

In Newbrough *v.* Walker, 8 Gratt. 16, it was held, in an action of covenant for the failure of the defendant to deliver possession of a mill to plaintiff under a lease, the plaintiff not having sustained any special damage, he is entitled to recover only the difference between the rent contracted to be paid and a fair rent for the property at the time it should have been delivered. A conjectural estimate of the profits which might have been made, is no legitimate basis upon which to fix the damages. Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 831.

In an action by a lessee against the lessor to recover damages for a refusal to renew a lease for certain iron ore lands, it was held, that the plaintiff could not recover profits that might be made on iron ore where no contract for the sale of it had been made; such profits are merely conjectural. Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

c. Profits to Be Realized on Subcontracts.

In an action to recover damages for a breach of a contract to deliver chattels, profits which the purchaser would have made on subcontracts actually made by him are sufficiently certain to be recovered. Consumers' Ice Co. *v.* Jennings, 100 Va. 720, 42 S. E. 879.

In the case at bar a vendor contracted to sell a bill of lumber of particular sizes and lengths, to be delivered on board a vessel at a designated time and place, knowing that his vendee had contracted to deliver the lumber to a subvendee for a particular purpose, and at a designated time and place. The vendee chartered a vessel to carry the lumber, and had it ready at the time and place stipulated, but the lumber was not then delivered, and only a part of it was delivered about a month afterwards. The vendee was prevented from otherwise employing the vessel by the repeated promises of the vendor to deliver the lumber. In consequence of these defaults of the vendor, the vendee was compelled to pay demurrage and dead freight on deficiency in cargo, and damages for failure to fulfill his contract with his subvendee, and, in addition, lost the profits he would otherwise have made on his contract. It was held, it was not error to refuse to set aside a verdict in favor of the vendee for the above items of demurrage, dead freight, damages and loss of profits. Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

In a suit for a breach of contract, the damages should not be based on a conjectural estimate of the profits, which might have been made out of the contract; but if the contract is for the delivery of a certain quantity of gravel, the jury may legitimately ascertain the damages sustained by a breach of contract, whereby the plaintiff was prevented from delivering the gravel by an improper cancellation of the contract by the defendant, by subtracting from the price to be paid for the gravel, when delivered, the cost to the defendant of delivering this quantity of gravel; and in determining this the jury may properly consider what had been the actual cost of delivering a like quantity of gravel by the defendant to the plaintiff under a previous and similar contract. Hare *v.* Parkersburg, 24 W. Va. 554, distinguishing Newbrough *v.* Walker, 8 Gratt. 16.

Notice of Amount of Profits to Be Realized from Subsale.—In an action by a buyer against a seller to recover for delay in delivering goods, in order to entitle a buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to the seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it. And, in order that the buyer may recover the full amount of damages, he must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss. Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

3. In Actions for Tort.

Fires Set by Locomotives.—In an action against a railroad company for negligently setting fire to and destroying the grass in the plaintiff's meadow, a crop of grass growing in a meadow, and partly matured, affords a basis for measurement of damages for the wrongful destruction of the crop by fire as for the value of the crop matured into hay; and evidence of the value of the usual crop of hay is admissible, and not to be rejected as proving profits mere conjectural or speculative. Kyle *v.* Ohio River R. Co., 49 W. Va. 296, 38 S. E. 489.

Trespass—Interruption of Plaintiff's Business.—In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry. Without information on these points, the jury would be without any guide to their discretion in the assessment of damages. But in such a case the probable profits of the business are not the measure of damages. They are necessarily dependent on contingencies, and, therefore, as a general rule, not recoverable as damages. Newbrough *v.* Walker, 8 Gratt. 16; 7 Cush. R. 516; 13 How. U. S. R. 307. But while the probable profits of the business do not furnish the measure of damages, they may be proved to the jury by general evidence, as well as the extent and character of the business, as affording the best guide to the jury of which the nature of the case admits, in the exercise of their judgment in the assessment of damages. Such evidence tends to show the character and degree of the injury for which amends is to be made. Peshine *v.* Shepperson, 17 Gratt. 472.

Where a party is engaged in the performance of a contract on a railroad, using his teams and utensils in removing dirt at so much per cubic yard, and his teams and utensils are seized and sold under an attachment wrongfully sued out against him, and the profit he is able to realize by the performance of his contract is easily and certainly ascertainable, and he is prevented from such performance by such seizure and sale, the profit he is thus prevented from realizing is an element of damage, and it is error to exclude evidence with reference thereto from the jury. State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385.

VI. Elements and Measure of Recovery.

A. IN GENERAL—RULE OF COMPENSATION.

The object of the law is to give compensation for the injury suffered. Where the loss is merely pecuniary, and admits of definite estimate, it is proper enough to speak of compensation, which implies the notion of equivalents. But that word becomes inappropriate, where the injury is not merely pecuniary, and does not admit of definite estimate. It is more appropriate to say that the object of the law is to give amends or reparation. The injury done depends upon the rights that are violated, and the extent

of the violation, and the amends or reparation in damages must be measured accordingly. Peshine *v.* Shepperson, 17 Gratt. 472, 485.

"The object of the law is to give amends or reparation." Joynes, J., in Peshine *v.* Shepperson, 17 Gratt. 472, 485, 94 Am. Dec. 468, or as expressed by Riely, J., in Burruss *v.* Hines, 94 Va. 413, 416, 26 S. E. 875. "The general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed." See also, Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

Damages That Admit of Definite Estimate.—Where the damages admit of definite and pecuniary estimate, the object of the law, is to give compensation for the injury suffered, and the verdict of the jury must be limited to the actual pecuniary loss of the plaintiff. Peshine *v.* Shepperson, 17 Gratt. 472.

Damages That Do Not Admit of Definite Estimate.—Where the damages do not admit of definite estimate, and there is no legal measure of damages, the law leaves the amount entirely to the sound discretion of the jury, and the court will not disturb the verdict of the jury unless the amount awarded is so large or small as to indicate that the jury acted under the impulse of some undue motive or some gross error or misconception of the subject. Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811; Bertha Zinc Co. *v.* Black, 88 Va. 303, 13 S. E. 452; Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830; Ward *v.* White, 86 Va. 212, 9 S. E. 1021; Benn *v.* Hatcher, 81 Va. 25; Farish *v.* Reigle, 11 Gratt. 697; Richmond Ry., etc., Co. *v.* Garthright, 92 Va. 635, 24 S. E. 267; Daingerfield *v.* Thompson, 33 Gratt. 136; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890; Va. Mid. R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791; Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354; Borland *v.* Barrett, 76 Va. 128; Peshine *v.* Shepperson, 17 Gratt. 472; Norfolk, etc., R. Co. *v.* Draper, 90 Va. 245, 17 S. E. 883; Miller *v.* Shenandoah Pulp Co., 38 W. Va. 558, 18 S. E. 740.

B. IN ACTIONS FOR BREACH OF CONTRACT.

1. In General.

As has been seen compensation to the party injured is the cardinal rule in assessing damages and this rule applies with particular force to cases of breach of contract. The object of the law, in such cases, is to put the injured party in such circumstances as he would have been had the other party carried out his part of the contract. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; James *v.* Adams, 8 W. Va. 568; Trigg *v.* Clay, 88 Va. 330, 13 S. E. 434; Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 573; Peshine *v.* Shepperson, 17 Gratt. 472; Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525; James *v.* Kibler, 94 Va. 165, 26 S. E. 417; Hare *v.* Parkersburg, 24 W. Va. 554; Patton *v.* Elk River Navigation Co., 13 W. Va. 259.

In an action for breach of contract the damages recovered must be such as will give, and only such as will give, compensation for the actual loss directly flowing from the breach of the contract. Hurxthal *v.* Boom Co., 53 W. Va. 89, 44 S. E. 520.

In an action for damages for breach of a contract, damages recoverable are the fair, natural and proximate result of the breach complained of by the defendant. Sterling Organ Co. *v.* House, 25 W. Va. 64.

Where the measure of damages for breach of a contract exceed the measure of reparation authorized by principles of equity, this is ground for relief in equity. Brevity *v.* Rennolds, Wythe, 121.

2. Specific Contracts Considered.

Working Contracts.—See the title WORKING CONTRACTS.

In an action to recover on a working contract, if the work is not done in accordance with the agreement, the measure of damages is a stipulated price, less the sum which it would take to complete the work according to the agreement. Smith *v.* Packard, 94 Va. 730, 27 S. E. 586.

If a contract were to repair machinery, and, if not well done, that the same should be returned for a second effort at repair, and there is a failure to return, the measure of recovery by the party doing the work would not be the specific sum fixed by the contract for good repair, but the profit which would have been realized on the whole work had the machinery been returned. Electric Supply, etc., Co. *v.* Consolidated Light, etc., Co., 42 W. Va. 583, 26 S. E. 188.

In an action of assumpsit upon a special contract for work performed by the plaintiff for the defendant, where the declaration contains the common counts and also special counts on the contract, if the plaintiff prove a substantial, though not strict, compliance with the contract alleged, and that the defendant has accepted the work as done, and received benefits therefrom, the plaintiff is entitled to recover the contract price of his work less such sum as will fully compensate the defendant for imperfections in the work done or materials used. Smith *v.* Packard, 94 Va. 730, 27 S. E. 586.

Contracts to Arbitrate.—Only remedy for refusal to comply with agreement to arbitrate is by action for damages, the measure of recovery being costs and expenses incurred, unless there be a bond with penalty in nature of liquidated damages. Corbin *v.* Adams, 76 Va. 58.

Telegraphs and Telephones.—Where a telegraph company has received a message for transmission and the usual charges according to their regulations, it is bound to transmit the message faithfully and promptly, whether it be in "cipher" or "intelligible," and should the company negligently fail to transmit such message altogether, or to transmit it faithfully and promptly, it will become liable to an action for damages by the party aggrieved, and the measure of damages in such case is such loss as the party aggrieved has sustained by reason of the wrongful act of the company in violation of the duties imposed on it by law. A more precise statement of the rule is: The company is liable to all the direct damages which both parties would have contemplated as flowing from the breach of the contract or violation of the duty, if, at the time, they had bestowed proper attention to the subject, and had been fully informed of all the facts. Western Union Tel. Co. *v.* Reynolds, 77 Va. 173.

Telegraph company received a cipher message for transmission, and the usual charges according to its regulations, and failed altogether to transmit it, whereby the sender lost a large sum of money, and brought his action for damages against the company. At the trial the defendant asked the court to instruct the jury that in order to make the defendant liable for more than nominal damages, they must believe from the evidence that the defendant was substantially informed of the meaning of the message and of the approximate extent of the plaintiff's liability to loss in case of failure to transmit the message promptly and correctly. The court below refused. On error to this court, it was held, the instruction was improper and rightly refused. Western Union Tel. Co. *v.* Reynolds, 77 Va. 173.

For Alteration of Telegram.—Plaintiff wired his brokers in Mobile to buy 500 bales of cotton for him. In transmission the number was by the mistake of the telegraph company, changed to 2500. Held, the measure of damages was the amount lost on the

sale at Mobile of the excess of the cotton above that ordered, or if not sold then, what would have been the loss on the sale of the cotton of Mobile in the condition and circumstances in which it was when the mistake was ascertained, including in such loss all the proper costs and charges thereon. Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. 122.

Contracts to Deliver Stock.—Where it is agreed to deliver stock of fluctuating value on a certain day, the measure of damages for failure to make such delivery, is not the nominal amount of said stock, but the true value of it, on the day agreed on for its delivery. Bull *v.* Douglas, 4 Munf. 303. See also, Groves *v.* Graves, 1 Wash. 1; Reynolds *v.* Waller, 1 Wash. 164. In Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225, the court held, that in such a case the plaintiff might recover the highest price the stock would have brought in market at any time after the day agreed on for its delivery.

I have this day, Sept. 26, 1859, borrowed of Mrs. P. five thousand dollars, in stock of the state of Virginia, on which interest is payable semi-annually; and for the repayment of the same, with the accruing interest, I bind myself, my heirs, etc., witness, etc., K. The stock was borrowed to be converted into money, and was sold in November for $4,755. Held, P. is entitled to the value of the stock at the time of the loan. Davis *v.* Knight, 24 Gratt. 406.

Contracts of Charter Party.—In the breach of a contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest on the money only. Wood's Mayne on Damages (1st Amer. Ed.), p. 15. That this is the rule is admitted. Bethel *v.* Salem Improvement Co., 93 Va. 359, 25 S. E. 304.

Contract of Charter Party.—In the case at bar a vendor contracted to sell a bill of lumber of particular sizes and lengths, to be delivered on board a vessel at a designated time and place, knowing that his vendee had contracted to deliver the lumber to a subvendee for a particular purpose, and at a designated time and place. The vendee chartered a vessel to carry the lumber, and had it ready at the time and place stipulated, but the lumber was not then delivered, and only a part of it was delivered about a month afterwards. The vendee was prevented from otherwise employing the vessel by the repeated promises of the vendor to deliver the lumber. In consequence of these defaults of the vendor, the vendee was compelled to pay demurrage and dead freight on deficiency in cargo, and damages for failure to fulfill his contract with his subvendee, and, in addition, lost the profits he would otherwise have made on his contract. It was held, it was not error to refuse to set aside a verdict in favor of the vendee for the above items of demurrage, dead freight, damages and loss of profits. Perry Tie, etc., Co. *v.* Reynolds, 100 Va. 264, 40 S. E. 919.

Marriage Contract.—In all other cases of breach of contract, as a general rule, the damages are limited to the direct pecuniary loss resulting from the breach, and no regard is had to the motives or feelings of the parties. But in the action for a breach of promise of marriage, though in form ex contractu, this rule does not prevail. It being impossible to fix any rule or measure of damages, it is permissible to take into consideration all the circumstances of the case, the loss of comfort, the injury to feelings, affections and wounded pride of the plaintiff. The jury being the proper judges of damages, having unlimited discretion over the subject, the court will not interfere with their verdict unless there be some reason to impute either undue prejudice, passion or corruption. Grubb *v.* Sult, 32 Gratt. 203.

Contracts of Sale.—See the title SALES.

3. Where Performance Is Prevented.

Where a party is not permitted to perform his part of the contract, by the fault of the other party, he may recover any damages he may have suffered by not being allowed to perform his part of the contract, such as wages paid to idle employees, and costs of keeping his plant in readiness; he may also recover the profits he would have made had he been allowed to carry out his part of the contract. Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525.

Where party fails to accept property at a stipulated price at a designated place, according to his contract, the measure of damages, is the difference between the amount it would have cost plaintiff to have the property at the designated place, and the amount defendant agreed to pay for such property. Alleghany Iron Co. *v.* Teaford, 96 Va. 372, 31 S. E. 525; Hare *v.* Parkersburg, 24 W. Va. 554.

In this last case Green, J., said: "It seems to me, there was no impropriety in the jury ascertaining the amount of damage the plaintiff below sustained in consequence of the breach of this contract by calculating what it would have cost him to perform his contract and taking that from what he was under the contract to get for the delivering of this * * *." See also, Patton *v.* Elk River Nav. Co., 13 W. Va. 259.

4. Expenditures Made Because of Breach of Contract.

In order to recover such expenditures, it must be made to appear, that they could be fairly and reasonably considered as naturally arising from a breach of the contract in question, or that they were contemplated by the parties in question at the time of the making of the contract. Slaughter *v.* Denmead, 88 Va. 1019, 14 S. E. 833, citing Kendall Bank Note Co. *v.* Comm'rs of Sinking Fund, 79 Va. 563. In Slaughter *v.* Denmead, plaintiff was not allowed to recover expenditures made in recovering cord wood washed away by winter and spring freshets on account of defendant having failed to transport such wood in November as per its agreement.

When a contractor, by reason of the termination of a partly executed contract, is entitled to compensation for services and outlay, part of which have been made in effecting permanent improvements, the services and expenditures relating to such improvements are not apportioned between the executed, and unexecuted, parts of the contract. Griffith *v.* Blackwater Boom, etc., Co., 55 W. Va. 604, 48 S. E. 442.

When an executionary contract, with a corporation, necessitating in its execution, work, labor, and the expenditure of money for materials, machinery, tools and appliances, and the construction of roads, and other improvements, as well as in carrying on the work, is terminated by dissolution of the corporation in consequence of its insolvency, the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses as aforesaid, subject to a deduction of all sums paid to him by the corporation and of the value of such materials, machinery and other property on hand. Griffith *v.* Blackwater Boom, etc., Co., 55 W. Va. 604, 48 S. E. 442.

C. IN ACTIONS FOR TORT.

1. In General.

In all actions of trespass, void or malicious aggravation, the true nature of damages is compensation. 26 Am. & Eng. Ency. Law 674. Bodkin *v.* Arnold, 48 W. Va. 108, 35 S. E. 980; Wilson *v.* Wheeling, 19 W. Va. 323.

In an action of trespass on a case, where there is no actual malice or design to injure, the plaintiff is entitled simply to compensatory damages, which consists in injury to his prop-

erty, loss of time, counsel fees, and other actual loss. Ogg *v.* Murdock, 25 W. Va. 139, citing Parsons *v.* Harper, 16 Gratt. 64.

Where two or more cotenants bring an action of trespass on the case to recover damages caused by the action of the defendant in constructing a dam and thereby overflowing their property, in such a suit it is proper for the court to instruct the jury that they will find, in assessing damages, if they believe from the evidence any were inflicted upon the property in question by the defendant, only such difference in the value of the said property at the time said damages were inflicted and the value of the said property before the said damage was so done. Rowe *v.* Shenandoah Pulp Co., 42 W. Va. 551, 26 S. E. 320.

Trespass by Railroad.—Railroad company, without authority, erected expensive improvements on plaintiff's land. Becoming insolvent, its franchises and property were purchased by another company. Held, the purchaser is liable for the land taken without considering the benefit from the construction of the railroad, and for the damage to the residue of the land. In such a case, the amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof; and as respects the land taken, including said improvements, is the fair cash market value of the land and said improvements at the time of the taking in view of the uses to which they have been put; and it was not error to refuse to allow a witness to testify that he had donated similar property to the company. Richmond, etc., R. Co. *v.* Humphreys, 90 Va. 425, 18 S. E. 901.

2. Personal Injuries.

a. In General.

The rule for the measure of damages in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice or design to injure and oppress, is to allow compensatory damages; that is, damages to indemnify the plaintiff, including injury to property, loss of time and necessary expenses, counsel fees and other actual loss; but not to allow vindictive or punitive damages to punish the defendant. Ogg *v.* Murdock, 25 W. Va. 139; Wilson *v.* Wheeling, 19 W. Va. 323.

"The rule for the measure of damages, in cases where the malice necessary to sustain the action is such only as results from a groundless act, and there is no actual malice or design to injure and oppress, is to allow compensatory damages—that is, damages to indemnify the plaintiff, including injury to property, loss of time, and necessary expenses, counsel fees, and other actual loss—but not to allow vindictive or punitive damages, to punish the defendant." Ogg *v.* Murdock, 25 W. Va. 139; Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262.

In an action for personal injuries, it was held, that the following instruction properly propounded the law and was rightly given: "The court instructs the jury that, if they find the issue for the plaintiff, Schwartz, in determining the measure of damages they may take into consideration the mental and physical pain and suffering endured by the plaintiff since he received the injury complained of, in consequence thereof, the character and extent of such injury, and its continuance, if permanent, together with his loss of time and service, and his disability, if any, resulting from said injury, to earn a livelihood for himself and family, and his necessary expenses for medicine and medical attention; and may find for him such sum as, in the judgment of the jury under the evidence, will be a fair compensation for the injury, not to exceed the sum of five thousand dollars." Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

b. Loss of Time.

In actions for personal injuries, the jury, in determining the measure of damages, may take into consideration the plaintiff's loss of time and service. Riley *v.* West Virginia Cent., etc., R. Co., 27 W. Va. 145; Parsons *v.* Harper, 16 Gratt. 64; Vinal *v.* Core, 18 W. Va. 1; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847; Daingerfield *v.* Thompson, 33 Gratt. 136; Borland *v.* Barrett, 76 Va. 128; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Wilson *v.* Wheeling, 19 W. Va. 323.

In estimating the damages for a personal injury negligently inflicted on a boy under twelve years of age, who has neither natural nor legal guardian, and who, so far as appears, is working for his own living, and receiving his own wages, his loss of time is a proper element for consideration by the jury. Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 908.

Married Women.—Under chapter 103 of the Virginia Code of 1887, a married woman can not recover damages for loss of time, because of injuries she has wrongfully sustained, unless it be averred and proved that she is a sole trader. Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388; Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

False Imprisonment.—The proof in an action of trespass on the case for false imprisonment is that the plaintiff was imprisoned from Friday to the afternoon of the following Monday, and there is not a particle of evidence to show that he sustained any injury or loss other than the loss of his time during his imprisonment. He says himself that he had no visible property and does not pretend that he was engaged in any business. He proved no data from which his loss of time while imprisoned can be estimated. It is not for the court to fix the amount of his damages further than to define the rule by which they are to be fixed by the jury, but when the damages found by the jury, as in this case, are in plain disregard of the limits thus fixed, it is the duty of the court to set aside the verdict and order a new trial. Ogg *v.* Murdock, 25 W. Va. 139.

c. Continuance and Permanency of Injury.

In actions for personal injuries, the jury, in determining the measure of damages, may take into consideration the character and extent of the injury, and its continuance if permanent. Daingerfield *v.* Thompson, 33 Gratt. 136; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455; Wilson *v.* Wheeling, 19 W. Va. 323.

In an action against a city for personal injuries resulting from a defective sidewalk, the following instruction was held unobjectionable: "The court instructs the jury that if they find the defendant guilty they are, in estimating the damage, at liberty to consider the health and condition of the plaintiff before the injury complained of, as compared with his present condition, in consequence of such injuries, and whether said injury is in its nature permanent, and how far said injury is calculated to disable the plaintiff from engaging in those pursuits and employments for which, in the absence of said injury, he would have been qualified, and also the physical and mental suffering to which he was subjected, or may be subjected, by reason of said injuries, and to allow such damages as in the opinion of the jury will be a fair and just compensation for the injury which the plaintiff has sustained." Evans *v.* Huntington, 37 W. Va. 601, 16 S. E. 801. See Wilson *v.* Wheeling, 19 W. Va. 323.

d. Medical Expenses.

In actions for personal injuries, the jury, in determining the measure of damages, may take into consideration the necessary expenses for medicine and medical attention the plaintiff may have incurred by reason of the injury.

Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Farish *v.* Reigle, 11 Gratt. 697; Daingerfield *v.* Thompson, 33 Gratt. 136; Borland *v.* Barrett, 76 Va. 128; Riley *v.* Railway Co., 27 W. Va. 145; Wilson *v.* Wheeling, 19 W. Va. 323; Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

In an action to recover damages for personal injuries to a child stepping on a live electric wire, the mother of the plaintiff was asked: "Has any money been expended for medicine?" She answered, "I spent I think in the neighborhood of $7." It was contended in the oral argument before the supreme court that the admission of this question and answer was error for which the judgment should be reversed, because the plaintiff could not recover except for such expenses as he, the infant, had himself incurred, whereas the answer showed that the mother had expended the sum mentioned. It was held, that however this might be, such objection can not be raised for the first time during an oral argument before this court. No exception was taken to the evidence at the time the question was asked. No bill of exception was subsequently asked for on the subject, and there was no mention of such an assignment of error in the petition to this court for a writ of error. Norfolk R., etc., Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502.

In estimating the damages for a permanent personal injury the jury may consider the physical and mental suffering of the plaintiff, loss of wages while unable to work in consequence of the injury, inability to follow such a calling or business as he could otherwise have followed, and expenses incurred for medical and surgical attention, medicine, nursing, etc. They may also take into consideration the plaintiff's probable duration of life, and to show this, standard mortality tables are usually esteemed the safest guides upon the subject, to be taken and weighed along with other facts and circumstances applicable to the expectation of the particular life under consideration. Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

"Instruction No. 14, refused by the court, and No. 14, as modified by the court, applied alone to the allowance of doctor's bills; No. 14 being that no such bills should be allowed, and the modified instruction allowing such as had been established by proof. The declaration alleges, among other things, that the plaintiff 'incurred great and heavy expense in his endeavor to be cured of the said injuries, which expense amounted to the sum of —— dollars.' The court therefore did not err in this instruction, as plaintiff had the right to recover his curative expenses, together with his other damages, if the same did not exceed the amount claimed, to wit, $5,000. Nor is instruction 14, as modified, inconsistent with instruction No. 1 given for plaintiff. No. 1 tells the jury to allow him his medical expenses, while No. 14, as modified, limits the same to the amount proved to have been expended." Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914.

Married Women.—A married woman, under ch. 103, of the Virginia Code of 1887, could not recover damages, for any expenses incurred by her in effecting her cure, unless she avers and proves that such money came out of her separate estate. Richmond R., etc., Co. *v.* Bowles, 92 Va. 738, 24 S. E. 388; Atlantic, etc., R. Co. *v.* Ironmonger, 95 Va. 625, 29 S. E. 319.

e. Impairment of Earning Capacity.

In actions for personal injury, the jury, in determining the measure of damages, may take into consideration, the plaintiff's disability, if any, resulting from the injury, to earn a livelihood for himself and family. Schwartz *v.* Shull, 45 W. Va. 405, 31 S. E. 914; Riley *v.* Railway Co., 27 W. Va. 145; Wilson *v.* Wheeling, 19 W. Va. 323; Daingerfield *v.* Thompson, 33 Gratt. 136; Borland *v.* Barrett, 76 Va. 128;

Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455.

f. Physical Pain and Suffering.

In actions for personal injuries, the jury, in determining the measure of damages, may take into consideration the mental and physical pain and suffering endured by the plaintiff since he received the injury complained of. Ampey's Case, 93 Va. 110, 25 S. E. 226; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462; Parsons *v.* Harper, 16 Gratt. 64; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Riley *v.* Railway Co., 27 W. Va. 145; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847; Daingerfield *v.* Thompson, 33 Gratt. 136; Borland *v.* Barrett, 76 Va. 128; Wilson *v.* Wheeling, 19 W. Va. 323.

Damages for Pain and Suffering.—"No method has yet been devised, nor scales adjusted, by which to measure or weight and value in money the degrees of pain and anguish of a suffering human being," * * * and the verdict of a jury will not be set aside on the ground of excessive damages, unless the damages be so great as to indicate that the jury was actuated by partiality or prejudice. Reily, J., in Richmond R., etc., Co. *v.* Garthright, 92 Va. 635, 24 S. E. 267, quoted and approved in Norfolk *v.* Johnakin, 94 Va. 287, 26 S. E. 830. See also, Farish *v.* Reigle, 11 Gratt. 697; Benn *v.* Hatcher, 81 Va. 33; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

In the case of a physical injury, damages for pain suffered, bodily and mentally, are allowed, for the reason that such mental suffering is necessarily a part of the physical injury, and inseparable therefrom. Kennon *v.* Gilmer, 131 U. S. 22; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462, and authorities cited. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

It was said by this court, in Richmond R., etc., Co. *v.* Garthwright, that no method has yet been devised, nor scales adjusted by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be, and that the verdict of the jury will not be disturbed unless the damages awarded be so great as to necessarily have been the result of prejudice or partiality. It must be clearly shown in the record that the jury was actuated by prejudice or partiality; otherwise, under the well-settled rules of the law, the verdict will not be disturbed. Southern R. Co. *v.* Oliver, 102 Va. 722, 47 S. E. 862.

There is no precise measure of damages for mental or physical pain, and, where they are elements of damages to be estimated by a jury, the verdict will not be set aside, unless the damages are so great as to suggest that the jury have been influenced by passion, prejudice, or ill will. Bolton *v.* Vellines, 94 Va. 394, 26 S. E. 847.

In an action to recover damages for a physical injury inflicted on the plaintiff, the jury may consider such inconvenience, discomfort, and mental suffering as might have been entailed upon him by the injuries, and also his consequent disability. Richmond Passenger, etc., Co. *v.* Robinson, 100 Va. 394, 41 S. E. 719.

In an action to recover damages for personal injuries sustained by the plaintiff while in discharge of his duty, when passing under an overhead bridge on the line of the defendant railway, "it was not error to tell the jury in the instruction under consideration, that, in estimating plaintiff's damages, they might take into consideration his mental as well as his physical suffering arising from his injury, and we do not think that the instruction, as a whole, misled or could have misled the jury in estimating plaintiff's damages, although it would have been better had the instruction simply told the jury

that the plaintiff claimed $10,000 damages, and they were authorized to award such sum as the evidence justified, not exceeding that amount." Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

Future Suffering.—"In Watson on Personal Injuries, § 384, p. 478, the learned author, in discussing the propriety of an instruction embodying the element of damage here objected to, says: 'But it is not perceived why the probability or likelihood of reasonable expectation of the future suffering does not satisfy the rule of reasonable certainty, and such is believed to be the weight of the best considered cases. An instruction so worded, indeed, would seem to be preferable to one simply stating the requirment to be reasonable certainty, because in the former case the jury would be advised in some measure as to what constitutes reasonable certainty. It has been held, accordingly, that a jury may be properly instructed to give damages for such future suffering as the plaintiff will probably endure, or in any reasonable probability will hereafter sustain.'" Norfolk R. Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502.

3. Injuries to Animals by Railroads.

See the title ANIMALS, vol. 1, p. 375.

In actions to recover damages for injuries to animals by railroads, the plaintiff can recover compensatory damages; that is, such as measure the actual loss, if no evil motive is shown, "no wanton conduct, no reckless indifference to the rights of the owner of the horse, and considering all the facts relating to the act complained of, if wrongful at all, it was certainly not the result of reckless indifference to the rights of the owner or of intentional violation of them, but, at the most, was the want of the exercise of judgment." Talbott *v.* West Virginia Central, etc., Co., 42 W. Va. 560, 26 S. E. 311.

4. Negligent Injury to Real Property.

a. In General.

"The rule of damages generally adopted in cases of negligent injury to real property is to allow the difference between the value of the plaintiff's premises before the injury happened and the value immediately after the injury, taking into the account only the damages which had resulted from the defendant's acts." Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 26; Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

b. Fires.

See the title FIRES.

For Destroying Fruit Trees.—The measure of damages for destroying by fire an orchard of fruit trees is the value of the trees destroyed; not "the cost of replacing the trees the first proper season for planting after the burning, and the value of the care and labor bestowed on said trees by plaintiffs before the burning, with interest on the value of the care and labor from the time it was bestowed." Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293, 7 S E. 236.

In an action against a railroad company to recover damages for the destruction of wood and timber upon the plaintiff's land, by reason of the negligence of the defendant in permitting fire to emit and drop thereon from its locomotive, the true rule in ascertaining the measure of damages as to the timber injured and destroyed by fire would be to find the difference between the market value of the timber where it stood before the burning, and afterwards, although it may, as it often does, constitute a very considerable element in the value of the land. When the destruction of the timber is total the market value thereof would measure the damage, and, when the destruction is partial, it will be the market value as it stood when the fire occurred, reduced by the value of the timber in its then condition, and the

same rule should apply with reference to the fire wood, rails, and fencing. Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 26.

5. Unlawful or Wrongful Sale of Property.

The measure of damages for a party whose property has been unlawfully sold by a wrongdoer, is the value of the land at the date of the sale. Sims *v.* Tyrer, 96 Va. 14, 30 S. E. 443.

Where property held by a trustee has been wrongfully disposed of by the trustee, if the property can not be followed in specie, or if the holder is a bona fide purchaser without notice, and so not liable to the trust, Judges Cabell and Baldwin were of opinion that the measure of compensation was the value of the land at the time of the sale, but Judges Brooks and Daniel were of opinion that the measure of compensation was the value of the land at the death of the trustee excluding permanent improvements made since the sale, or the value excluding improvements, at the time of filing the bill. Norman *v.* Cunningham, 5 Gratt. 63.

An administratrix who sells the property of the estate at a very great sacrifice, and purchases it herself, will be held to account for it at the appraised value. Cross *v.* Cross, 4 Gratt. 258.

J. C. bequeathed to his son, F. C., sundry slaves with limitations upon F. C.'s death without issue. F. C. sold some of these slaves, one to an unknown purchaser; and then died without issue. The parties entitled under the limitation over file a bill against the curatrix of F. C. and the purchaser of one of the slaves, to recover the slaves, or the value of those sold, and seek a discovery as to the unknown purchaser. Held, there being no other proof of the value of the slaves sold, except the price for which F. C. sold them, his estate is to be charged for them at that price. Cross *v.* Cross, 4 Gratt. 257.

6. Actions against Carriers.

a. Carriers of Passengers—Ejection of Passengers.

In actions against carriers to recover for unlawful ejection, the plaintiff is entitled to be fully recompensed for the injury, and the jury may consider the inconvenience, delay and fatigue to which he was put, and a suitable recompense for the injury done to his feelings in being expelled from the train, but the plaintiff is not entitled to recover in addition exemplary or punitive damages if there was no malice or intentional wrong. Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367; Norfolk, etc., R. Co. *v.* Lipscomb, 90 Va. 137, 17 S. E. 809; Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130. See Lovings *v.* Norfolk, etc., R. Co., 47 W. Va. 582, 35 S. E. 962.

Where a passenger is wrongfully ejected from a train by a conductor for nonpayment of fare, in good faith, in execution of the rules of the company, as he supposes, without malicious intent or circumstances of indignity or insult, without force, there ought not to be heavy or exemplary damages, but only such as compensate actual loss. Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

A passenger who is unlawfully expelled from a railroad train by the conductor thereof is entitled to recover damages therefor of the company. If the expulsion, though unlawful, did not proceed from any ill motive, and was not rudely or recklessly done, nor in such manner as to evince malice or a conscious disregard of the rights of others, and was simply the result of a mistake, the passenger can not recover punitive damages, but only compensation, and, on the evidence certified, his damages should be limited to compensation for the inconvenience, delay and fatigue to which he was put, and a suitable recompense for the injury done to his feelings, in being expelled from the train. Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

In a common-law action of trespass on the case for damages for the alleged violation by a defendant railway company of a special contract that the plaintiff embodied in the terms and conditions of what is a commutation ticket, by wrongfully ejecting the plaintiff from the train, a verdict for punitive and exemplary damages should be set aside by the court, firstly because such damages belong alone to actions of tort, and secondly because there was no evidence of a willful and malicious purpose or intent by the company, or its servants, to wrong or injure the plaintiff, or of any neglect of duty to the public, or of negligence or indifference; but, on the contrary, the evidence is full and conclusive that the plaintiff got upon the defendant's train, expecting to be expelled, and so conducted himself as to compel his expulsion from the train, with a view of suing the company for a wrongful expulsion, with the systematic and persistent design of making money by self-sought and self-inflicted martyrdom. Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Ratification of Servant's Acts.—Ticket provided that when presented to conductor, passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. Passenger offered to sign ticket, which offer conductor refused, and ejected him from the train for refusing to pay fare. Held, conductor not entitled to require passenger to "otherwise identify" himself, and defendant company was liable in damages for the expulsion. Where in such a case the defendant company subsequently ratified conductor's acts, plaintiff is entitled to exemplary damages. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757.

Mistake of Conductor—Penitence.—In an action against a carrier of passengers to recover damages for unlawful ejection, "it is apparent from this recital of the testimony that while the act of the conductor in expelling Neely was unlawful, it proceeded from no ill motive, and was not rudely or recklessly done. It was the result of a mistake on the part of the conductor, and due to negligence or absence of mind in reading the ticket of Neely when he took it up. But when he was assured by Armentrout that he had made a mistake, he manifested his penitence and did all in his power to rectify it. His subsequent conduct was conclusive against any imputation of malice and repelled all presumption of intentional wrong. It was clearly not a case for exemplary and punitive damages." Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367.

No Violence Used, etc.—In an action for damages by a passenger against a railroad company for being ejected from the defendant's train, in which it appeared that not a finger was laid upon him to force him from the train, but he got off of his own action under protest; it did not appear that he suffered from weather; he got off at a regular station; it was not shown that he was greatly delayed or lost anything thereby; there was no evidence that he was exposed to public humiliation, or that what was said to him by the conductor was heard by other passengers, but it did appear that the passenger is charged with crime, and where circumstances of insult and indignity attend, that fact may be considered fairly by a jury in estimating damages. The court nevertheless refused to set aside a verdict for $550 damages for excessiveness, though the court was of opinion that this verdict was heavy, because of the well-settled rule that the finding of the jury governs in such cases, unless so excessive as to induce the belief that it was governed by partiality, corruption, or prejudice, or misled by some mistaken view of the merits of the case. The mere fact that the amount materially differed from the judgment of the court will not be sufficient to justify any interference with the finding of the jury. Trice *v.* Chesapeake, etc., R.

Co., 40 W. Va. 271, 21 S. E. 1022, citing Farish *v.* Reigle, 11 Gratt. 697; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485; Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158; Sheets *v.* Ohio River R. Co., 39 W. Va. 475, 20 S. E. 566.

Inconvenience — Sickness — Loss of Position.—Just before the arrival of a train A. buys a ticket to B. station, enters the train, and is told by the conductor that it did not stop at B.; A. asks to be put off at R., a station short of B., where the train had to stop; but the conductor tells him he could not travel on that train on that ticket; stops the train at C. bridge, which was short of R., and in a low marsh, and in the afternoon, in a drizzling rain and eastern storm, against A.'s consent, puts off A., who was then sick, and had to walk three miles to his destination, in consequence of which exposure and fatigue A. became ill, was laid up two months, and lost his position, with his salary of $600 a year. At the trial of his action against the company for damages the jury allows him $500. The company moves to set aside the verdict, as contrary to the law and the evidence, excessive and punitive. The court below overrules the motion, and defendant excepts. On error, held, plaintiff was not only entitled under the circumstances to damages to the extent of the actual injury, but it was a proper case for exemplary damages. Richmond, etc., R. Co. *v.* Ashby, 79 Va. 130.

Wounded Feelings, etc.—In an action against a carrier of passengers, to recover damages for wrongful ejection, in which punitive damages were excluded, the court allowed compensation for the inconvenience he suffered in having to walk about a half mile further than he was accustomed to do when he got off the train at his regular destination; because of the fact that he arrived at his destination too late to accompany to church the friend he was going to visit, to his great disappointment. In short he was entitled to compensation for the inconvenience, delay and fatigue to which he was put, and a suitable recompense for the injury done to his feelings in being expelled from the train. He did not sustain any physical injury, nor suffer any pecuniary loss. He was not thrust out into inclement weather; the day was fair and warm. Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367. (Verdict for $800.)

b. Carriers of Goods.

Says the court in Tompkins *v.* Kanawha Board, 21 W. Va. 224: "The general rule is, that where personal property is being shipped to a certain place for sale, and a loss occurs, the measure of damages is the difference between the price at which the property was bought, and its market value at the place of and at the time when it should have been delivered. Boyd *v.* Gunnison, 14 W. Va. 1. This rule is established to ascertain what the party had in fact lost. But where he has actually contracted to sell the property in the place where it is to be delivered at a specified price, that price at which it was so contracted to be sold is the best evidence of its value, and of the loss which its owner had sustained."

c. Carriers of Live Stock.

In an action by a carrier of live stock, on the trial, the jury found a verdict in favor of the plaintiff for $742. The defendant company moved to set aside the verdict, but the court refused to do so. It was proved that the lambs would average about seventy-seven pounds each, and that they were worth in the New York market, the place where they were to be sold from seven and one-half to eight cents per pound. One hundred and forty-seven died before they could be gotten to market. It was held, on appeal, that the amount of the verdict of the jury was rather below than above the actual damages sustained, and therefore the court refused to set it aside as ex-

cessive. Norfolk, etc., R. Co. *v.* Harman, 91 Va. 601, 22 S. E. 490.

7. Injury to Business.

Certain wrongful acts will necessarily injure the business of the person whose rights are violated, and when such is the case, the jury may consider the injury to plaintiff's business, in assessing the damages. Peshine *v.* Shepperson, 17 Gratt. 472. See Daingerfield *v.* Thompson, 33 Gratt. 136. And in such a case, to ascertain the damages, the nature and extent of the merchant's business, whether profitable or not, are proper subjects of inquiry. Peshine *v.* Shepperson, 17 Gratt. 472.

Credit and Business Standing.—The jury in assessing the damages may take in consideration the loss of credit and business standing of the plaintiff. In Peshine *v.* Shepperson, 17 Gratt. 472, where the defendant entered the store of the plaintiff at nighttime, in collusion with his clerk, and carried off most of his stock, the court, by Joynes, J., said; "That such acts are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity. * * * The damages resulting from the credit and business standing of the plaintiff, * * * were therefore properly recoverable, as natural, proximate and necessary consequences of the acts of the defendants."

8. Injury to Plaintiff's Character.

The jury may take in consideration, in a proper case, the injury one's character receives, as in a case of malicious prosecution, slander, etc. Vinal *v.* Core, 18 W. Va. 1.

In trespass quare clausum fregit charging that a landlord broke and entered the plaintiff's premises, opened and searched her trunks, and did other wrongs, it was left undecided whether the jury in assessing damages might estimate the injury necessarily resulting to the plaintiff's character. Faulkner *v.* Alderson, Gilm. 221.

9. Counsel Fees.

See the title ATTORNEY AND CLIENT, vol. 2, p. 166.

Statement of General Rule. — The general rule is that counsel fees are not recoverable as damages. Ogg *v.* Murdock, 25 W. Va. 139. See also, Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847; Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. 455; Parsons *v.* Harper, 16 Gratt. 64; Gurnee *v.* Bausemer Co., 80 Va. 867.

If the injury was not wanton or malicious, and exemplary damages are not recoverable, the allowance of counsel fees is improper. Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875.

Where Injury Is Wanton or Malicious.—But if the injury is wanton or malicious, and exemplary damages are recoverable, counsel fees may be recovered as damages. Thus on the trial of an action for malicious prosecution or false imprisonment, where exemplary damages are recoverable, the fees paid or incurred to counsel for defending the original suit or proceedings may be proved, and, if reasonable and necessarily incurred, may be taken into consideration by the jury in the assessment of damages. 2 Greenleaf on Ev. 456; Parsons *v.* Harper, 16 Gratt. 64; Burruss *v.* Hines, 94 Va. 413, 26 S. E. 875; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847. See also, Vinal *v.* Core, 18 W. Va. 1.

Slander.—In an action on the case for suing out a capias and imprisoning the plaintiff, in an action of slander in which he was the defendant, he may prove as damage sustained by him, the amount of the fee paid by him to counsel for a motion to quash the capias. Parsons *v.* Harper, 16 Gratt. 64.

In an action for false imprisonment, the plaintiff is entitled to recover compensation for the loss of time, for the

suffering, bodily and mental, sustained in consequence of the wrongful act or acts, and for expenses incurred in procuring a discharge from restraint, including a reasonable attorney's fees. If the act complained of was committed with malice, the plaintiff may also recover punitive damages. Bolton *v.* Vellines, 94 Va. 394, 26 S. E. 847.

Dissolution of Injunctions.—It was held that the word "damages," as used in the statute providing that the obligors in an injunction bond shall pay all such costs as may be awarded against the party obtaining the injunction, and all such damages as may be incurred in case the injunction shall be dissolved, was not intended to cover an allowance for counsel fees. Wisecarver *v.* Wisecarver, 97 Va. 452, 34 S. E. 56.

That portion of § 13, ch. 178, of the Virginia Code of 1873, prescribing the penalty of an appeal and supersedeas bond, refers only to the damages mentioned in § 24 of the same chapter, and was not intended to cover the rents and profits of real estate in the possession of the appellant who had given a deed of trust thereon to secure a debt fully its value, he having obtained an injunction to prevent the sale of such real estate, which injunction was dissolved, and the bill dismissed, and the penalty of the appeal and supersedeas bond will not be fixed with reference to such "rents and profits." The word "awarded," in said § 13 refers to the words "damages and costs;" and the word "incurred" to the word "fees" therein, so as to make the meaning the same as if the sentence had been written, "and also to pay all damages and costs which may be awarded against, and all fees which may be incurred by the appellants or petitioners. Cardwell *v.* Allen, 28 Gratt. 184.

In an action on an injunction bond with condition "to pay all such costs as may be awarded against the plaintiff, and all such damages as shall be incurred in case the said injunction be dissolved," fees paid to counsel in the injunction suit can not be recovered as damages, although the bill be a pure bill of injunction. Wisecarver *v.* Wisecarver, 97 Va. 452, 34 S. E. 56.

A reasonable amount paid as compensation to counsel as an item of the expense necessarily incurred in procuring the dissolution of an injunction wrongfully obtained, may be recovered in a suit for damages upon an injunction bond. State *v.* Medford, 34 W. Va. 633, 12 S. E. 864.

The allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that defendant has been compelled to employ aid in ridding himself of an unjust restriction which has been placed upon him by the action of the plaintiff, and the true test with regard to the allowance of counsel fees as damages would seem to be that if they are necessarily incurred in procuring the dissolution of the injunction, when that is the sole relief sought by the action (the bill), they may be recovered; but if the injunction is only ancillary to the principal object of the action, and the liability for counsel fees is incurred in defending the action generally, the dissolution of the injunction being only incidental to the result, then such fees can not be recovered. State *v.* Medford, 34 W. Va. 633, 12 S. E. 864.

10. Mental Anguish and Suffering.

a. In General.

Mental suffering, when connected with bodily injury, is always to be considered in damages. But mental suffering alone, and unaccompanied by other injury, can not sustain an action for damages, or be considered as an element of damages. Anxiety of mind and mental torture are too refined and vague in their nature to be the subject of pecuniary compensation in damages, except where, in cases of personal injury, they are so inseparably connected with the physical pain that they can not be distinguished from it, and are

therefore considered a part of it. Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026; Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462; Bolton *v.* Vellines, 94 Va. 404, 26 S. E. 847; Parsons *v.* Harper, 16 Gratt. 64; Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 4 S. E. 211; Vinal *v.* Core, 18 W. Va. 1; Riley *v.* Railway Co., 27 W. Va. 145; Daingerfield *v.* Thompson, 33 Gratt. 136; Borland *v.* Barrett, 76 Va. 128; Riddler *v.* McGinnis, 22 W. Va. 253.

The general rule which has come down to us from England is that mental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, can not be made the basis of an action for damages. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

Damages such as are recoverable at law must not only be the proximate result of the act complained of, but must also be capable of definite ascertainment, or, to use the language of law writers and the decided cases, must be certain, definite, and not speculative in their character. Under this rule, damages for mental suffering alone, as an independent cause of action, were never allowed at common law. Connelly *v.* Western Union Tel. Co., 100 Va. 53, 40 S. E. 618, 93 Am. St. Rep. 919.

In the recent case of Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026, the rule of law as stated in 1 Amer. & Eng. Ency. L. 862, is cited with approval, viz.: "A rule that is more consistent with recognized legal principles, and that is supported by better authority, is that mental suffering alone, and unaccompanied by other injury, can not sustain an action for damages, or be considered as an element of damages. Anxiety of mind and mental torture are too refined and too vague in their nature to be the subject of pecuniary compensation in damages, except where, as in case of personal injury, they are so inseparably connected with the physical pain that they can not be distinguished from it, and are, therefore, considered part of it." Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

This court, in Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226, approved of an instruction which told the jury that in estimating damages they might take into consideration the mental as well as the physical suffering, arising from plaintiff's injuries. Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

Where a suit for damages against a telegraph company is predicated upon the alleged fact that the delay in the transmission and delivery of a message prevented plaintiff from attending the burial of his mother, and the proof shows that the message was received at 1 o'clock a. m., and was delivered promptly at the beginning of office hours in the morning, which message was so uncertain and vague as to fail to inform plaintiff of his mother's death, so that he was compelled to wire repeatedly before ascertaining the fact, and after receiving the message he could have attended the funeral if he acted promptly, he can recover no damages in such action. Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

b. Assault and Battery.

In actions for assault and battery, false imprisonment, and kindred wrongs, damages for mental suffering are allowed as a punishment, and then only because some actual damage, apart from the mental suffering, must necessarily be inferred from the act itself. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919; Riddle *v.* McGinnis, 22 W. Va. 253.

c. Death by Wrongful Act.

See generally, the title DEATH BY WRONGFUL ACT.

In Virginia and West Virginia mental anguish may be considered by the jury in assessing damages for death by wrongful act. The jury is not tied down to mere pecuniary loss. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Matthews *v.* Warner, 29 Gratt. 570; Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838; Portsmouth Street, etc., Co. *v.* Peed, 102 Va. 662, 47 S. E. 850; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489.

"It has been held, by the court of appeals of Virginia, in construing a similar statute, from which our statute was taken, that the measure of damages in the case of a man's death is not limited to the pecuniary value of his life to his estate; but may be exemplary, punitive, and given as a solatium. Matthews *v.* Warner, 29 Gratt. 570; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394." Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

In ascertaining the damages to be recovered by a wife for the wrongful death of her husband, the jury should consider all of the surrounding circumstances shown in evidence, the mental and physical anguish of the deceased, the mental anguish of the wife, the loss of the solace and comfort growing out of the husband's death, and the business habits and earning capacity of the husband as affecting his capacity to earn a livelihood for his family. Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732.

In an action, under the statute, for death by the wrongful act or neglect of another, the jury, in estimating the damages, may take into consideration compensation for the loss of deceased's care, attention and society to his family, together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering and mental anguish occasioned by his death, not exceeding in the aggregate $10,000. Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850.

Under the Virginia statute allowing damages for death by wrongful act, the recovery is not limited to such damages as are merely pecuniary or actual as has been held under the English act, and all those of the American states founded upon it, the jury may take into consideration the physical or mental suffering of the deceased, or the sorrow, suffering or grief of the surviving relatives who may be entitled to recover. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394, citing Matthews *v.* Warner, 29 Gratt. 570.

In an action by a husband for the negligent killing of his wife, it was held, that the recovery was not limited to merely pecuniary damages, but the fact that the plaintiff was benefited morally and pecuniarily "by his married condition, is admissible evidence to show a loss or damage to him by the negligent killing of the faithful, prayerful, industrious, and thrifty wife of his bosom. The law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case." Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838.

Mental and Physical Suffering of Deceased's Family.—In an action to recover damages for the death of a son occasioned by the wrongful act of another, it is error to instruct the jury, that in estimating the damages, they may take in consideration the effect the news of the son's death had upon the nervous system of the mother, as there is no necessary or probable connection between negligence which results in the death of a son, and the consequent nervous condition of his mother. Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525.

d. Libel and Slander.

See the title LIBEL AND SLANDER.

In actions for slander and libel, no matter how great the mental suffering,

from an insult or a charge of being guilty of degrading acts not amounting to a crime, such as being a blackleg, cheat, etc., no action would lie, unless special damage, apart from the mental suffering, was shown. Connelly *v.* Western Union Tel. Co., 100 Va. 54, 40 S. E. 618, 93 Am. St. Rep. 919.

No exact standard can possibly be laid down by which to ascertain the amount of damages in an action for libel. It is impossible to lay down any rule, by which, what is a just compensation for mental suffering, can be measured. It must be left to a jury to determine from all the circumstances of the particular case. The proper compensation for mental suffering and annoyance in such a case is a matter of opinion, based on the facts proven in the case. It can not be the subject of direct testimony. A witness would not be allowed to testify, what was the injury resulting from such mental suffering; for it would necessarily be only an opinion; and the witness, so testifying would be simply assuming the province of the jury, and determining the amount of damages, which should be awarded the plaintiff. Opinions must, from the very nature of the case, differ very greatly on such a question. Sweeney *v.* Baker, 13 W. Va. 158.

e. Seduction.

See the title SEDUCTION.

In an action by a father, for the seduction of his daughter, the jury may take in consideration the mental anguish of the father, in estimating the damages. Riddle *v.* McGinnis, 22 W. Va. 253.

In the case of an action of a father for the seduction of his daughter, no action would lie against the seducer, no matter how aggravated, nor how great the mental anguish, unless it was alleged and could be proven that the father, by reason of the wrongful act of the defendant, had sustained the loss of the services of his child, and thus some special damage shown. When this was shown, in aggravation of the damages, as a punishment for the wrong doing, damages for mental suffering were allowed. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919; Lee *v.* Hodges, 13 Gratt. 726.

f. Telegraphs and Telephones.

In General.—Damages for mental suffering, independent of any injury to person or estate can not be recovered against a telegraph company for negligent failure to deliver a message as promptly as possible, although the company is advised of the character of the message. The injuries in such cases are too hard to determine with any reasonable certainty; are more often assumed than real, and the suit is too liable to be wholly speculative. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

Virginia Statutes. — In an action against a telegraph company claiming damages for mental suffering occasioned by the nondelivery of a telegraphic message, it was held, that damages for mental suffering can not be recovered, independent of any injury to person or state, even where the telegraph company is advised of the character of the message, and fails to deliver it as soon as practicable, and this rule is not changed by the Virginia statute providing that upon the arrival of a dispatch at the point of destination it was to be delivered as promptly as practicable, under a penalty of $100 to the addressee, nor under the statute providing that telegraph companies shall be liable for special damages occasioned by the negligent failure of their operators in delivering dispatches. It then provides that, in the determination of the quantum of damages, the jury may consider "grief and mental anguish" occasioned to the plaintiff by the negligent failure. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

The purpose of § 2900 of the Virginia Code in allowing damages to any person injured by the violation of any statute was merely to preserve to the person injured the right to maintain his action for the injury he may have sustained by reason of the wrongdoing of another, and to prevent the wrongdoer from setting up the defense that he had paid the penalty of his wrongdoing under a penal statute. It was not intended to create a new ground for bringing an action for damages, and will not support an action for mental anguish only, although the defendant may have violated the provisions of § 1292 by failing to deliver promptly a telegram. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

The act of March 2, 1900 (acts, 1899-1900, p. 724), subjecting telegraph companies to special damages occasioned by the negligent failure of their agents to deliver dispatches, and allowing the jury, in the determination of the quantum of damages, to consider the grief and mental anguish occasioned to the plaintiff by such negligent failure, does not give any new cause of action for damages. To justify a recovery under this statute, the plaintiff must show two things; (1) the negligent failure of defendant's agent in delivering the message, and (2) special damages resulting to the plaintiff therefrom. Special damages must be alleged and proved, and then only can the jury add the additional sum for the grief and mental anguish occasioned the plaintiff by the negligent failure of defendant's agent. The act, taken as a whole, is substantially declaratory of the pre-existing law, and does not give a cause of action for mere mental anguish suffered from a failure to deliver a social telegram. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

Cases Distinguished. — "The only point decided in Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, was that a telegraph company is liable for the actual, ascertained money loss on a business transaction, resulting directly from its negligence in failing to transmit a dispatch upon which the usual charges of the company had been paid, whether the dispatch was understood by the company or not. There is nothing whatever in the opinion to sustain the view that under the statute damages may be recovered for mental suffering as an independent cause of action. That question was not involved in the case, and was not adverted to." Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

"It is claimed, however, for plaintiff in error, that this court has sanctioned his right of recovery in this case by its decision in Norfolk, etc., R. Co. *v* Neely, 91 Va. 539, 22 S. E. 367. That case was not one of mere mental anguish. Neely, the plaintiff, suffered other wrongs, inconveniences and damages, to which, according to the doctrine of well-recognized authorities, damages for his injured and insulted feelings might well be added." Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919.

11. Humiliation, Indignity and Insult.

In actions for trespass, injury to the reputation, humiliation, indignity and insult, such as breaking and searching plaintiff's trunks, pulling his nose, and other such acts of indignity, which can not be recompensed by an action of slander, may properly be considered by the jury in estimating damages; otherwise, the plaintiff would be without remedy for a crying injury, unless he could rely upon the injury to his character and reputation. Faulkner *v.* Alderson, Gilm. 221; Vinal *v.* Core, 18 W. Va. 1; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152.

In those actions in which exemplary damages may be awarded, the peculiar hardships and aggravations attendant upon the injury no less to the person

than to the feeling, and the reproach, humiliation and disgrace into which the injured party may be brought, are circumstances affecting the quantum of damages. Nadenbousch *v.* Sharer, 4 W. Va. 203.

In an action for false imprisonment the jury may, in estimating the damages, take into consideration, the humiliation, indignity and insults borne by plaintiff. Vinal *v.* Core, 18 W. Va. 1 See Borland *v.* Barrett, 76 Va. 128.

In an action against a carrier for false imprisonment, in which it appeared that the plaintiff was arrested, handcuffed, and led and driven, through a thoroughfare, a long distance on an unfounded charge, before he was tried on the merits, found innocent, and discharged, it was held, that the plaintiff was entitled to exemplary damages for the great indignity and humiliation to which he was subjected. And the amount of recovery is not limited to actual money loss sustained by the plaintiff for loss of time and actual expenses incurred by him in consequence of his being put off the train. Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

"The evidence shows that the defendant in error, who had been captain of the police of the city of Norfolk, whose term of office had expired, but who honestly believed that his official life was extended by law until his successor had qualified, appeared upon the streets in the uniform of an officer of police. For this he was arrested, carried through the streets in a prison van, first searched, and then kept in prison until released upon a writ of habeas corpus. For this indignity to which he was subjected by the plaintiffs in error, acting without a vestige of authority, the jury awarded him the sum of $1,000 as damages. The court of law and chancery of the city of Norfolk refused to set the verdict aside. There is no precise measure of damages in such cases. It is impossible to ascertain in money the exact equivalent for bodily or mental pain." Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847.

12. Interest as Damages.

In General.—As a general rule, interest can not be recovered in the shape of damages. Stuart *v.* Hurt, 88 Va. 343, 13 S. E. 438.

In Actions of Debt.—In an action of debt on a decree for an amount of interest thereby found due the plaintiff from the defendant; held, interest on the amount of the decree may be recovered in the shape of damages for its detention, though the decree makes no provision for the payment of interest thereon. Stuart *v.* Hurt, 88 Va. 343, 13 S. E. 438.

In Mercer *v.* Beale, 4 Leigh 189, Judge Tucker said: "That in an action of debt upon a judgment, the plaintiff may, in the shape of damages, recover interest upon his demands is a proposition too plain to have required proof;" although he subsequently says that, while interest on a judgment not carrying interest may be given, it is not a matter of course. And that such an action lies, and that the same judgment can be rendered upon a decree of a court of chancery as upon a judgment at law. Stuart *v.* Hurt, 88 Va. 343, 13 S. E. 438.

Rent Arrears.—Interest is not recoverable by way of damages, in an action of debt for rent arrears. Cooke *v.* Wise, 3 Hen. & M. 463; Skipwith *v.* Clinch, 2 Call 257; Newton *v.* Wilson, 3 Hen. & M. 470; Mickie *v.* Lawrence, 5 Rand. 571.

Contracts for Payment of Money.—Ir contracts for the payment of money, interest is not given as damages at the discretion of the court or jury, but as an incident of the debt which the court has no discretion to refuse. Tidball *v.* Shenandoah Nat. Bank, 100 Va. 741, 42 S. E. 867.

Indemnifying Bond. — The proper measure of damages in an action on a bond, to indemnify a sheriff for the

sale of property, seized under execution, is the actual value of the property seized and sold, with interest in the way of damages, on the amount of the value, from the day fixed on by the jury, as the time at which the property is to be valued, until the time of the trial. Crump *v.* Ficklin, 1 Pat. & H. 201.

In Actions for Tort.—In an action for a tort, interest on the damages from the date of the injury is not allowed. But should the jury in their verdict allow such interest, the court should not set the whole verdict aside, but only the interest, entering judgment for the damages alone. Brugh *v.* Shanks, 5 Leigh 598, citing and following Garrard *v.* Henry, 6 Rand. 110; Austin *v.* Jones, Gilm. 341.

Interest is not due upon the damages, until after judgment, against a public collector for failure to pay over taxes. Gaskins *v.* Com., 1 Call 194.

VII. Excessive and Inadequate Damages.

A. AS GROUND FOR NEW TRIAL.

1. Where Law Fixes Standard of Estimation.

If a verdict assessing damages violates the standard or measure of damages given by law, it is against law, and should be set aside. Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87; Norfolk, etc., R. Co. *v.* Highbert, 46 W. Va. 202, 32 S. E. 1032; Kay *v.* Glade Creek R. Co., 47 W. Va. 467, 35 S. E. 973; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

2. Where There Is No Legal Measure.

Where the case is one of indeterminate damages, and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case; but, if so excessive as to induce such belief, it will be set aside. Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S E. 1022, citing Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485; Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158; Sheets *v.* Ohio River R. Co., 39 W. Va. 475, 20 S. E. 566; Farish *v.* Reigle, 11 Gratt. 697.

The verdict of a jury will not be disturbed in cases where there is no legal measure of damages, unless it is so large or so small as to indicate that the jury has acted under the impulse of some improper motive, or some gross error, or a misconception of the subject. Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 881.

3. Excessive Damages.

a. In General.

The court will not disturb a verdict as excessive, unless it has been influenced by passion, partiality, or prejudice. Bailey *v.* McCance, 2 Va. Dec. 630; Bertha Zinc Co. *v.* Black, 88 Va. 303, 13 S. E. 452; Borland *v.* Barrett, 76 Va. 128, 44 Am. Rep. 152; Farish *v.* Reigle, 11 Gratt. 697; Peshine *v.* Shepperson, 17 Gratt. 472; Benn *v.* Hatcher, 81 Va. 25; Virginia, etc., R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Ward *v.* White, 86 Va. 212, 9 S. E. 1021; Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757; Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890; Richmond R., etc., Co. *v.* Garthwright, 92 Va. 627, 24 S. E. 267; Daingerfield *v.* Thompson, 33 Gratt. 138; Sweeney *v.* Baker, 13 W. Va. 158.

While the right to set aside a verdict for excessive damages is now almost universally conceded, it is a right to be cautiously exercised by the trying court. The appellate court, of course, will not do so unless it can plainly see that injustice has been done. The cases on this subject are too familiar to require citation or comment. Alexandria, etc., R. Co. *v.* Faunce, 31 Gratt. 761.

Since it is the peculiar province of the jury to ascertain the amount of damages, it must be a strong case to

set aside a verdict for excessive damages. Nadenbousch *v.* Sharer, 4 W. Va. 203.

This court will not set aside an award of damages by a jury as excessive where it appears that no substantial injury has been inflicted upon the plaintiff, and the verdict of the jury is for a less amount than that fixed by any one of several witnesses who testified in favor of the plaintiff. New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

This court will not set aside the verdict of a jury on the ground that it is contrary to the evidence and excessive when it can neither say that the verdict was without evidence, nor that the evidence is insufficient to support it. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34.

"It is true the recovery is a large one; but it is not so disproportioned to the injury inflicted and the character of the offense as to "shock the understanding," or to induce the belief that the jury were influenced by improper motives; and when this can be affirmed of a verdict in a case of this sort, it would be an invasion of the province of the jury, and, therefore, an abuse of power on the part of the court, especially an appellate court, to set it aside." Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757.

Amount of defendant company's liability must depend on the circumstances, and be left largely to discretion of the jury, whose verdict will not be disturbed unless it evinces passion, prejudice, or corruption. Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757.

Mere Difference of Opinion between Court and Jury.—The assessment of damages is peculiarly the province of the jury, and where there is a motion to set aside a verdict, because of excessive or inadequate damages, the court must not encroach upon such province of the jury, save in strong cases of injustice. No mere difference of opinion, however decided, justifies an interference with the verdict for this cause, but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury. Battrell *v.* Ohio River R. Co., 34 W. Va. 232, 12 S. E. 699.

Where the question before the jury was as to the quantum of damages to which the plaintiff is entitled, and there is evidence tending to sustain the verdict found by the jury, although there is evidence strongly indicating that the damages assessed by the jury were excessive, the question is one of fact for the jury; and the court will not disturb the verdict, even though on the same testimony, it would have found differently from the jury. Southern Mut. Ins. Co. *v.* Trear, 29 Gratt. 255.

"Where a case depends upon the tendency and weight of evidence, and the jury and judge who tried the cause concur in the weight and influence to be given to the evidence, it would be an abuse to the appellate powers of this court to set aside a verdict and judgment, because the judges of this court, from the evidence as it is written down, would not have concurred in the verdict." The court in Benn *v.* Hatcher, 81 Va. 33, citing and approving Hill's Case, 2 Gratt. 595; Blosser *v.* Harshbarger, 21 Gratt. 214.

In a recent case (Southern Mut. Ins. Co. *v.* Trear, 29 Gratt. 255), when a similar question of excessive damages was raised, it was said: "The question before the jury upon the evidence was only as to the question of damages, and though the court, if on the jury, might have been for a much less amount of damages than was found by the jury, yet it was a question of fact for the jury, and there was evidence before them tending to show that the amount of damages actually sustained was at least equal to the amount found by the jury. Although there was also evidence before the jury, strongly tending to show that the building insured was actually of much less value than that

at which it was fixed by the agent of the defendant at the time of the insurance, and more than that at which it was estimated by the jury assessing the damage in the case, yet the verdict of the jury was legally warranted by the evidence, and can not therefore be set aside by the court upon the ground that it was contrary to the evidence." Southern Mut. Ins. Co. *v.* Klœber, 31 Gratt. 748.

When Court Will Interfere.—But a motion to set aside a verdict because contrary to the evidence should be granted where the damages allowed by the verdict are substantially in excess of the amount warranted by the evidence, although the motion does not in terms ask that the verdict be set aside because the damages allowed are too large. Rowland Lumber Co. *v.* Ross, 100 Va. 275, 40 S. E. 922.

The finding of a jury is seldom disturbed on account of amount, especially where the law sets up no measure or standard of value. But the finding of a jury is in no case, under the law of this state, beyond the healthful and salutary control of the courts. Strong as is the function of a jury as to damages, whether in cases purely sounding in damages for tort, or where the law fixes a standard, its power is not arbitrary and unlimited, and can not be allowed to work injustice and oppression. Norfolk, etc., R. Co. *v.* Nighbert, 46 W. Va. 202, 32 S. E. 1032.

And this court said in Unfried *v.* Railroad Co., 34 W. Va. 260, 12 S. E. 512, "that in an action for damages, where the verdict is so enormous (erroneous) as to clearly indicate prejudice, partiality, passion, or corruption in arriving at their conclusions, the defendant is entitled to a new trial." That was an action for personal injury, where the law set up no measure of damages. The authorities will show generally that if the verdict is so disproportionate to the injury as to suggest the inference that it is not the result of fair, calm, unbiased judgment of the jury, the verdict ought to be set aside as excessive. Ogg *v.* Murdoch, 25 W. Va. 139; Norfolk, etc., R. Co. *v.* Nighbert, 46 W. Va. 202, 32 S. E. 1032.

A verdict finding an amount of compensation in a proceeding by a railroad company to condemn land that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment, will be set aside. Norfolk, etc., R. Co. *v.* Nighbert, 46 W. Va. 202, 32 S. E. 1032.

Excessive damages alone ground of relief, as proving the arbitrators to have acted in some unjustifiable manner. Beverley *v.* Rennolds, Wythe 121.

b. In Actions for Personal Injuries.

There is no legal measure of damages in personal injury cases, and their estimation is peculiarly within the province of the jury, who are deemed especially competent to determine such matters. It is well settled that the court will not disturb the verdict and grant a new trial in such a case, unless the amount allowed is so great as to evince prejudice, partiality, or corruption on the part of the jury, or to show that they were misled by some mistaken view of the merits of the case. Farish *v.* Reigle, 11 Gratt. 697; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811; Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830; Virginia Mid. R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022; Boster *v.* Chesapeake, etc., Ry. Co., 36 W. Va. 318, 15 S. E. 158. See also, Vinal *v.* Core, 18 W. Va. 1; Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862; Norfolk R., etc., Co. *v.* Spratley, 103 Va. 379, 49 S. E. 502.

"In actions for personal injuries, and in cases generally where there is no fixed legal rule of compensation, the theory of the law is that the decision

of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. Unless the verdict finds an amount so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sustained, although it may materially differ from the judgment of the court. But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation as to induce the belief that the jury have not given the case a fair and dispassionate consideration, it will be set aside." Trice *v.* Chesapeake, etc., R. Co., 40 W. Va. 271, 21 S. E. 1022.

c. Submission of Controversy.

Where the case is submitted to the court, and the evidence as to the value of the property insured is conflicting, the appellate court can not interfere with the judgment of the court below on the ground that the judgment is excessive. Southern Mut. Ins. Co. *v.* Klœber, 31 Gratt. 739.

d. Death by Wrongful Act.

The action of the jury in assessing damages in case of the death of a person by the wrongful act, neglect, or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive, their determination of this question being absolute and conclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury. Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

e. Arguments of Counsel.

Upon the trial of an action for damages it is error for the court to permit the counsel for the plaintiff, over the the objection of the defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive. Ricketts *v.* Chesapeake, etc., R. Co., 33 W. Va. 433, 10 S. E. 801, 25 Am. St. Rep. 901.

f. Exceptions and Objections.

The established rule in this state is that if no objection appear by the bill of exceptions, taken to the overruling of a motion for a new trial, to have been made in the trial court to the excessiveness of damages, such objection can not afterwards be made in the appellate court. And the reason is that upon a motion to grant a new trial for this cause, the court may impose upon the successful party the alternate of remitting such portion of the damages as justice may require, or submitting to a new trial. 4 Min. Inst. 757, 872; Law *v.* Law, 2 Gratt. 366. Richmond, etc., R. Co. *v.* George, 88 Va. 229, 13 S E. 429.

"Upon the point of the refusal of the court to set aside the verdict, on the ground that the damages were excessive, it might be answered, that the objection in the record is aimed at the verdict as it was originally returned by the jury, and before the court had required a release of more than half of the amount thereof; and that as the plaintiff in error has not excepted to the judgment of the court for the $3,000, as he might have done, we do not think it would be proper for us to undertake to interfere with it. James River & Kanawha Co. *v.* Adams, 17 Gratt. 427; Preston *v.* Bowen, 6 Munf. 271; Field on Damages, § 882; Sedg. on the Measure of Damages, 660, note. But if we were disposed so to do, we have no means of ascertaining that it was excessive, for neither the facts nor the evidence is certified. Callaghan *v.* Kippers, 7 Leigh, 608." Moses *v.* Cromwell, 78 Va. 671.

4. Inadequate Damages.

At Common Law.—Smallness or inadequacy of damages seems not to have been ground for a new trial at common law, at least in actions of trespass, for the reason that actions of

trespass vi et armis were considered as being analogous to prosecutions for crime, as to which it is an admitted doctrine that, while a new trial may be granted upon the application of the accused, upon the ground that the punishment inflicted by the jury is too great, no such application is allowed on the part of the commonwealth because the penalty assessed by the jury is too small. Jackson *v.* Boast, 2 Va. Cas. 49; Rixey *v.* Ward, 3 Rand. 52; Humphreys *v.* West, 3 Rand. 516.

By statute a new trial may be granted as well where the damages awarded are too small as where they are excessive. Va. Code, 1904, § 3392; Moses *v.* Old Dominion, etc., Co., 82 Va. 19; Rixey *v.* Ward, 3 Rand. 55; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E 811; Watterson *v.* Moore, 23 W. Va. 404.

It will require a strong case to justify the court in setting aside a verdict as being inadequate. Ward *v.* White, 86 Va. 212, 9 S. E. 1021; Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791.

$1,375 for dangerously wounding a person, by reason of which he suffered much and was in bed for several months. No permanent injury. Held, not inadequate. Ward *v.* White, 86 Va. 212, 9 S. E. 1021.

Libel and Slander.—A new trial is authorized in an action of slander where the damages are manifestly too small. Rixey *v.* Ward, 3 Rand. 52.

A verdict for $5.00 was set aside in Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791, as being inadequate in an action for slander of a girl of unblemished reputation by false imputations upon her chastity.

B. ILLUSTRATIVE VERDICTS.

Injuries to Children.—A verdict for $5,000 against a city, for injuries to a child between eleven and twelve years old, sustained in consequence of the negligence of the city in not keeping its streets and sidewalks in a reasonably safe condition, where the following facts appeared was held not excessive: "Her injuries are shown to be of a permanent and grievous character. The breaking of her leg near the thigh in two places has shortened the limb an inch and a quarter or more, attended with the wasting away of the limb. There was a total paralysis of her lower limbs for several weeks, and a partial paralysis of those limbs and her lower organs, impairing her bodily functions, continuing when the trial was had, nearly six months after her injury, and there had been no improvement in her condition during the three months previous to the trial, as testified to by her attending physician. He was asked on the witness stand as to her prospects of recovery from this paralysis, and replied, 'Not very bright.'" Roanoke *v.* Shull, 97 Va. 419, 34 S. E. 34.

Age of Plaintiff.—In Bertha Zinc Co. *v.* Black, 88 Va. 303, 13 S. E. 452, the court reversed the judgment of the lower court in setting aside a verdict for $10,000 damages as excessive, where deceased came to his end through the negligence of the company, and left a wife and number of children. Deceased was old, infirm and a common laborer.

Duration of Injuries.—In Norfolk *v.* Johnakin, 94 Va. 285, 26 S. E. 830, a verdict of $5,000 was affirmed, where the evidence showed that the plaintiff (a young lady) was severely injured, by reason of which she was an invalid and cripple for two years; and during which time she suffered excruciating agony every day.

Permanent Injuries.—The court in Farish *v.* Reigle, 11 Gratt. 697, affirmed a judgment for $9,000 damages, where plaintiff had his head severely cut, leg broken, from which a stiff joint followed, which his physician testified would continue through life, and in consequence of his injuries he was confined in a house near the place where the accident occurred for six months,

and incurred doctor's bills to the amount of $280.

In an action against a city to recover for personal injuries resulting from a defective sidewalk, it appeared that the plaintiff's chin was cut by the fall so that it was necessary to sew it up, one rib was broken and the plaintiff suffered from roughened pleura likely attributable to the fall, and the evidence tends to show considerable hurt and likely permanent injuries. The court refused to set aside a verdict for $500 damages as excessive. Evans *v.* Huntington, 37 W. Va. 601, 16 S. E. 801.

Gross Negligence.—In Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811, the plaintiff, a mail clerk, got a verdict for $7,000 damages, for personal injuries received through the gross negligence of the railway company. Judgment affirmed.

Broken Leg.—A verdict for $2,500 as compensation for a broken leg and much consequent suffering will not be set aside as excessive, in the absence of any evidence that the jury were actuated by any improper motive, gross error, or misconception of the subject. Newport News, etc., R. Co. *v.* Bradford, 100 Va. 231, 40 S. E. 900, citing Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811.

In an action against a city for damages, caused by a defective road or street, the evidence shows that the plaintiff's leg was broken, and she was unable to walk in consequence thereof for four months, and suffered great pain, and was put to considerable expense in consequence of the injury, and the jury rendered a verdict for $1,841.67 damages. The court will not set aside the verdict on the ground that the damages are excessive. Sheff *v.* Huntington, 16 W. Va. 307.

Broken Thigh.—In Danville, etc., R. Co. *v.* Brown, 90 Va. 340, 18 S. E. 278, plaintiff recovered $7,500 damages, for a broken thigh, which also occasioned a consequent shortening of his leg.

Loss of Leg.—In Daingerfield *v.* Thompson, 33 Gratt. 136, the court affirmed a judgment for $8,000 given plaintiff for an injury sustained by him in his foot, which necessitated amputation of the leg below the knee joint; his health was greatly impaired, and business suffered by reason of his wound.

$5,500 damages not too much, where plaintiff had both legs and thighs broken, and one of the legs were so badly injured that it had to be amputated. Richmond, etc., R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361.

Injury to Foot.—$2,000 damages for a permanent injury to one's foot. Held, not excessive. Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21.

Loss of Foot.—A verdict of $5,000 for the loss of a foot to a young colored man, such as the plaintiff in this case, can not be said to be excessive. Southern R. Co. *v.* Oliver, 102 Va. 710, 47 S. E. 862.

Loss of Arm.—In Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226, the plaintiff, a young able-bodied man, who depended wholly on manual labor for a livelihood, was allowed $3,500 damages for the loss of an arm.

"To justify the granting of a new trial on the ground that the damages awarded are excessive, the verdict must be so out of the way as to evince passion, prejudice, partiality or corruption in the jury." The court in Benn *v.* Hatcher, 81 Va. 33. In Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226, where plaintiff sued for the loss of an arm and was given $3,500 damages, Riely, J., in delivering the opinion the court said, 'There is no legal measure of damages in a case of this kind, and their estimation is peculiarly within the province of the jury, who are deemed especially competent to determine such matters. It is well settled that the court will not disturb the verdict in such a case, unless the amount allowed is so great as to evince

prejudice, partiality, or corruption on the part of the jury, or that they were misled by some mistaken view of the case."

Fractured Skull.—Plaintiff's skull was negligently broken, a part of which was removed, leaving brain unprotected, his capacity for work impaired. Held, $2,500 damages not excessive. Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890.

Injuries to Face.—A verdict for $1,000 damages for throwing a man from a truck, cutting his face and bruising him. The plaintiff suffered no permanent injury. Affirmed. Richmond R., etc., Co. *v.* Garthright, 92 Va. 635, 24 S. E. 267.

Civil Damage Acts.—See the title INTOXICATING LIQUORS.

In an action under § 20 of the West Virginia Code, allowing any person to recover damages for the unlawful sale of intoxicating liquors injurious to the plaintiff's means of support, it appeared that the husband had become an habitual drunkard, squandered all of his property, and deserted his family, because of his intemperate habits, leaving the wife to support herself and children. The supreme court refused to set aside a verdict for $750 as excessive, it appearing that knowledge of the intemperate habits of the husband was brought home to the defendants. Mayer *v.* Frobe, 40 W. Va. 246, 22 S. E. 58.

Death by Wrongful Act.—In an action for death by wrongful act it was held that a verdict of $4,500 was not excessive. The court said: "A verdict of $4,500 will illy remunerate a widowed mother for the loss of a strong, healthy, industrious son of average intelligence, sixteen years of age, yet it is to be hoped that it may have the effect to either deter the defendant and other similar corporations from employing minors in dangerous occupations, or to cause their agents to be more vigilant in protecting such youthful employees from the culpable negligence of those having them in immediate charge, and to whom they owe the duty of obedience." Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83.

In an action by a husband against a corporation to recover for the wrongful death of his wife, the court refused to set aside a verdict for $5,000, where the following facts were shown: "She was about twenty-seven years old when she was killed, and was in good health. Her fitness to rear and manage her children was good. She was as healthy a woman as any in the neighborhood. The care she bestowed on her children was good, no finer or better mother in the neighborhood, or more estimable lady. The record shows she left two children motherless; a boy three years old and a little girl fourteen months old. How can we say that the jury have overestimated the loss of the care, intellectual culture and moral training of a good mother? What was her pecuniary value to these young children? Can we say they have been more than compensated for the loss of that nurture and training which only a mother can give? I can not say that under the circumstances, the jury have abused the large discretion given in the statute, or that their verdict shows any evidence of passion or prejudice." Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32.

Abutting Owners—Surface Waters.—In an action by an abutting owner against a railroad to recover damages for obstructing the flow of surface water, it was admissible to show in evidence that the surface water on the land of the plaintiff prior to the building of the road, escaped from it over what is now the right of way of the defendant in natural channels, and that its flow is now prevented by the failure of the defendant to construct in the channels the necessary culverts under its roadbed, and that consequently the land of the plaintiff is greatly damaged by the accumulation of the water into ponds. It was held, that a verdict for

$1000 was not excessive. Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

Ejection of Passengers.—In Norfolk, etc., R. Co. *v.* Anderson, 90 Va. 1, 17 S. E. 757, $2,000 damages was held not to be excessive, where plaintiff was maliciously, but not violently ejected from car. But in Norfolk, etc., R. Co. *v.* Neely, 91 Va. 539, 22 S. E. 367, the plaintiff was without violence or malice ejected from defendant's train. The jury thinking it a case for exemplary damages, found a verdict for $800, which the appellate court set aside, as excessive, holding that the plaintiff was entitled to compensatory damages only, in the absence of circumstances of aggravation.

In an action against a carrier for ejection of a passenger, for being ejected at a place at which there was no station, by reason of which such passenger had to walk nine miles up the track to a station, but no force or violence being used by the conductor in ejecting him, it was held, that a verdict for $500 damages was not so excessive as to warrant the belief that the jury must have been influenced by partiality, prejudice or passion. Boster *v.* Chesapeake, etc., R. Co., 36 W. Va. 318, 15 S. E. 158.

False Imprisonment.—In an action of trespass on a case for false imprisonment, the facts proved repel the presumption of malice, and there was no proof of an intent to injure and oppress the plaintiff, and the court held, that a verdict of $475 was excessive in that a part of such award must have been vindictive damages, when in such case the plaintiff was only entitled to compensatory damages. Ogg *v.* Murdock, 25 W. Va. 139.

Fires Set by Locomotives.—Verdict for $1,600 for damages caused by fires set from locomotive will not be set aside as excessive, where witnesses who examined the damages estimated it as more than twice that amount. Norfolk, etc., R. Co. *v.* Draper, 90 Va. 245, 17 S. E. 883.

Physicians and Surgeons.—This was an action at law, brough by the defendant in error, to recover damages of the plaintiff in error, who is a physician, for negligence and unskillfulness in the treatment of a sore on the inside of one of the cavities of the plaintiff's nose, whereby the septum of his nose was destroyed. Upon the trial the jury found a verdict for the plaintiff in the sum of $6,714.16, but the court being of opinion that the damages were excessive, required the plaintiff to release the sum of $3,714.16, and entered judgment for the sum of $3,000. Moses *v.* Cromwell, 78 Va. 671.

C. REMITTITUR.

See the title REMITTITUR.

VIII. Aggravation and Mitigation of Damages.

A. AGGRAVATION OF DAMAGES.

In General.—The plaintiff may lay before the jury what amounts to an aggravation of damages, provided such aggravation does not of itself furnish a cause of action, in which case it ought to be stated in the declaration. Faulkner *v.* Alderson, Gilmer 221; Brown *v.* May, 1 Munf. 288.

In an action for libel, the filing of pleas by the defendant, in an attempt to justify most of the libelous charges to be against the plaintiff, and alleging numerous facts, which if they had been proven to be true would have shown that the plaintiff was a man of discredited habits and character, and the entire failure to produce any evidence to sustain them, must properly be regarded by the jury as proving malice, and as an aggravation for damages. Sweeney *v.* Baker, 13 W. Va. 158. See the title LIBEL AND SLANDER.

In an action for false arrest and imprisonment, such circumstances of aggravation attendant upon the injury, as being confined in jail with other prisoners, will affect a quantam of dam-

ages. Nadenbousch *v.* Sharer, 4 W. Va. 203.

In action by husband for the negligent killing of his wife, evidence is admissible that after his marriage there was a marked change for the better in his habits and pecuniary condition, as affecting the quantum of damages. Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838. See the title DEATH BY WRONGFUL ACT.

B. MITIGATION OF DAMAGES.

In General.—The particular circumstances attending each case may be laid before the jury by the defendant in mitigation of his damages. Brown *v.* May, 1 Munf. 288.

After demurrer to evidence by defendant, trial court instructed the jury that they were not to inquire whether or not the plaintiff was entitled to any damages; that the demurrer withdrew that question from the jury; that the jury could only conditionally assess the damages sustained by plaintiff, and in so doing the jury should consider the evidence only as bearing on the measure of damages; and that defendant's counsel would be permitted to argue before the jury upon all the evidence in mitigation, but not in bar, of damages. Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251.

Where there is a breach of a contract and the party suing for damages has failed to do an act which he can do reasonably, and thus enhances the damages originating from such breach of contract, he is not precluded by his negligence from all recovery, but the increased damage caused by his negligence is to be excluded is assessing damages—his negligence goes in mitigation of damages. Hurxthal *v.* St. Lawrence Boom, etc., Co., 53 W. Va. 87, 44 S. E. 520.

Carriers of Passengers—Ejection.—In an action against a carrier for wrongfully refusing to allow the plaintiff to ride on a ticket sold him by the defendant company, the fact that the plaintiff did not walk home because he could borrow money from his brother to buy a ticket, can not be shown in mitigation of the damages. Scott *v.* Chesapeake, etc., R. Co., 43 W. Va. 484, 27 S. E. 211.

Trespass.—In a joint action of trespass against several defendants, it is competent to show a provocation received by only one of them. Davis *v.* Franke, 33 Gratt. 413.

On a joint plea of "not guilty," in trespass vi et armis against two defendants, for breaking the plaintiff's close and beating his slaves, the defendants ought not to be permitted to give in evidence, by way of mitigation of damages, a license from the plaintiff to one of them, to visit his negro quarters, and chastise any of his slaves who might be found acting improperly; the battery being committed by the other defendant; and no proof appearing that the slaves who were beaten had acted improperly. Brown *v.* May, 1 Munf. 288.

One trespass can not be set off in bar of another; but where the damage alleged by the plaintiff is caused in part by the wrongful act of the plaintiff, the defendant may by way of defense under the plea of not guilty prove such wrongful act of the plaintiff in mitigation of damages. Hargreaves *v.* Kimberly, 26 W. Va. 787, citing Knight *v.* Brown, 25 W. Va. 808.

Assault and Battery.—The authorities are generally agreed that in an action of trespass and assault and battery the defendant may under the general issue give in evidence matters which go merely to the quantum of damages by way of palliating the offense. Davis *v.* Franke, 33 Gratt. 413.

While it is true, that where the defendant in such action relies upon provocation as a defense, he is limited to such recent acts as will raise the presumption that the assault was committed in heat of blood, excited by the conduct or declarations of the plaintiff;

yet where the plaintiff makes the offensive acts or declarations committed or said by him, long anterior to the assault, a part of the res gestæ, by repeating or alluding to them at the time, in a manner which indicates a repetition, renewal of, or persistence in them, they are admissible in evidence on behalf of the defendant; and this is so, even where one of the acts of the plaintiff was a libel against the defendant, for the publication of which the defendant had already recovered damages. Davis *v.* Franke, 33 Gratt. 413.

In Rawling's Case, 1 Leigh 581, the general court while declaring that the rule in civil and criminal cases is the same, and that acts of provocation received so recently the blood has not had sufficient time to cool are only admissible in mitigation of damages, seemed to concede that where at the time of the assault allusion is made to the provocation previously given, the evidence is admissible as explanatory of the nature of the assault; provided the connection between it and the antecedent provocation plainly appears. Davis *v.* Franke, 33 Gratt. 413.

Death by Wrongful Act.

Fact That Plaintiff Brought on the Injury by His Misconduct.—In Matthews *v.* Warner, 29 Gratt. 570, 26 Am. Rep. 396, it was held that the jury might, in assessing the damages, take into consideration, the fact that plaintiff's deceased, in a way brought on his death, by cursing defendant repeatedly before the fatal shot.

Effect of Insurance Money Received by Deceased's Family.—In Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, 26 Am. Rep. 384, the court held, that evidence to the effect, that deceased at the time of his death held policies on his life to the amount of $5,000, for the benefit of his wife and children, and that since his death the amount of such policies had been paid over to his widow and children, was properly held inadmissible. The court, in passing on this question, said by Staples, J., "We think the court did not err in refusing to admit this evidence. It was clearly calculated to mislead the jury as to the issues they were to try. The mere fact that the family of the deceased received money from some other source would not justly influence the measure of compensation to be made by the defendant for injuries attributable to the misconduct of its employees and agents. The party effecting the insurance paid the full value for it, and there is no equity in the claim of the defendant to the benefit of a contract for which it gave no consideration. It is said that Lord Campbell, the author of the English act, was of opinion that the money received on a policy of insurance by the family of the deceased, might be taken into account is assessing the damages. In this country the courts have uniformly held the contrary; and this view is the more just and reasonable."

False Imprisonment.—In an action for false arrest and imprisonment, the fact that the plaintiff had the key to the jail and took charge of the other prisoners when the jailor was away, and took his meals at the table of the jailor's family, may be shown in mitigation of damages. Nadenbousch *v.* Sharer, 4 W. Va. 203.

Libel and Slander.—See the title LIBEL AND SLANDER.

Malicious Prosecution.—One of the principal items of damages on the compensatory principle in every action for malicious prosecution, is the injury to the plaintiff's reputation as a man of integrity and honesty by his being arrested and prosecuted for a felony. Therefore, in every such case his general bad character may be proven in mitigation of damages. Vinal *v.* Core, 18 W. Va. 1.

In actions for malicious prosecution, it is generally held that evidence of the bad character of the plaintiff is admissible for either of two purposes: First, in mitigation of damages; sec-

ond, in rebuttal of evidence showing want of probable cause. Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262.

The plaintiff's general bad character may be proven in an action for malicious prosecution in mitigation of damages; and it also enters as a fact or circumstance to be considered in determining whether there was or was not probable cause. Vinal *v.* Core, 18 W. Va. 1.

In an action for malicious prosecution if the plaintiff, though there was no probable cause for charging him with larceny, was nevertheless guilty of a gross fraud in appropriating the property of another to his own use, which property was in his custody, but to which he neither had a just claim nor believed he had a claim, such fraud should be considered as mitigating the damages, to which he may be entitled in an action for maliciously prosecuting him for stealing such property, and would render it improper for the jury in such a case to award him punitive damages. Vinal *v.* Core, 18 W. Va. 1.

Seduction.—It is not error, that, in an action by a father for seduction of his daughter, the court refuse to instruct the jury, that if, upon the whole evidence, it shall appear to them, that the father, in the intercourse between the defendant and his daughter (who was of full age), did not act with the caution of a man of ordinary prudence, they ought to find for the defendant; but do instruct the jury that, if the conduct of the plaintiff shall appear to have been indiscreet, that is a circumstance which should mitigate the damages. Parker *v.* Elliott, 6 Munf. 587.

C. FACTS OCCURRING AFTER COMMENCEMENT OF SUIT.

The general rule is that no evidence can be given of any fact having a tendency to aggravate or diminish the damages, which has occurred after the commencement of the suit. This rule would properly preclude evidence of the defendant's pecuniary condition at the time of trial, unless followed up by testimony connecting it with his previous circumstances; hence, there was no error in excluding such evidence from the jury. Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698.

The rule that nothing is admissible in aggravation of damages occurring after suit commenced, as laid down by Mr. Sedgwick (2 Sedg. Dam. 150), is subject to an exception that the nature of the defense at the trial may, in certain instances, aggravate the damages. 3 Suth. Dam. 320. Dent *v.* Pickens, 34 W. Va. 240, 12 S. E. 698.

D. DUTY TO MITIGATE LOSS.

When a contract is broken, it is the duty of the injured party to minimize the loss and injury, when it is practicable to do so by a reasonable outlay of money, but such outlay is to be allowed him as part of his damages. Griffith *v.* Blackwater Boom, etc., Co., 55 W. Va. 604, 48 S. E. 442; Hurxthal *v* St. Lawrence Boom Co., 53 W. Va. 87, 44 S. E. 520.

In an action by a buyer against a seller to recover for delay in delivering goods, in order to entitle a buyer to claim exceptional profits arising from a subsale, express notice of the amount of such profits must have been given to the seller at the time when the contract was made, under circumstances implying that he accepted the contract with the special condition attached to it. And, in order that the buyer may recover the full amount of damages, he must have acted throughout as a reasonable man of business, and done all in his power to mitigate the loss. Perry Tie, etc., Co. *v.* Rennolds, 100 Va. 264, 40 S. E. 919.

IX. Pleading and Practice.

A. THE DECLARATION.

1. Necessity of Alleging Damage.

a In General.

In actions which sound entirely in damages, it is absolutey necessary at

common law to lay them in the declaration; but in debt it is otherwise. The plaintiff ought to know what are the damages he has sustained, and if he lay none, he can not say that he has sustained any. If he recover more than is laid, he is not entitled to the excess, and in that case he can only help himself by releasing the excess. But where no damages are laid, the plaintiff can not remit so as to cure the error. Stephens *v.* White, 2 Wash. 203.

Evidence of lamages not laid in the declaration is incompetent. Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

The first assignment of error is that the circuit court erred in overruling the objection of the defendant company to a question asked T. E. Reeves, of the firm of Reeves & McNeil, plaintiffs, when on examination as a witness in his own behalf, and in permitting the witness to answer the question; the question being: "What extra expense, by failing to reach the market, were you put to?" To which the witness answered: "Commissions, $1 per head; my railroad fare from Lancaster to Philadelphia, and two or three days extra time." The damages it was sought to prove by the question and answer were not claimed in the declaration, therefore it was error to admit this evidence. Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

Declaration—Counts—Claim of Damages.—A declaration contains several counts, and no damages are claimed at the end of each count, but the entire declaration concludes: "In all to the damage of the plaintiff $500, and therefore they sue," this claim of damages must be regarded as on account of the wrongs named in each several count, and therefore a verdict and judgment may on such a declaration be rendered for damages. Postlewaite *v.* Wise, 17 W. Va. 2, cited and approved in Hoffman *v.* Dickinson, 31 W. Va. 142, 6 S. E. 53.

Breach of Contract.—"As the object of an action of assumpsit is to recover damages for the breach of the contract, it is essential for a plaintiff to allege in his declaration in such action, that the breach of the contract has resulted in his damages. See Stephens *v.* White, 2 Wash. 203. But it is not necessary to allege at the end of each count in such a declaration, that damages have been incurred by the failure of the plaintiff to perform his promise named in the count. A general allegation at the end of the declaration, that the plaintiffs have sustained damages by the failure of the defendant to perform his several promises named in the declaration to a certain amount, is sufficient. See Howard *v.* Wilmington & Sux. Railroad Co., Gill 344. But in this case the damages alleged at the close of the declaration apparently refer only to the failure of the defendant to perform the several promises named in the common counts, and do not seem to allude to the promises named in the first count. Without deciding that this is the necessary construction of this declaration, I will say, that it is much better for the declaration to lay damages at the close of each special count, or at the close of the declaration to so allege damages, as that it shall obviously refer to the breach of the promises in all the counts in the declaration named." James *v.* Adams, 16 W. Va. 245.

In debt on a bond, damages need not be laid in the declaration or found by the jury. Taylor *v.* M'Clean, 3 Call 557. See Woodson *v.* Johns, 3 Munf. 230.

In debt on a bond with collateral condition, the plaintiff can not recover any damages not demanded in the declaration, or in the assignment of breaches. Woodson *v.* Johns, 3 Munf. 230.

b. Cure by Verdict.

The omission to lay damages in the declaration, though in an action sound-

ing in damages, is cured, after verdict, by the statute of jeofails. Stephens *v.* White, 2 Wash. 203.

It was held in Kennedy *v.* Woods, 3 Bibb (Ky.) 323, citing Stephens *v.* White, 2 Wash. 203, that the omission to lay damages in the declaration, though in an action sounding altogether in damages, is cured after verdict. See the principal case cited in Hook *v.* Turnbul, 6 Call 85; Roderick *v.* Railroad Co., 7 W. Va. 58; Moss *v.* Moss, 4 Hen. & M. 293; Darby *v.* Henderson, 3 Munf. 115. The principal case is cited in Craghill *v.* Page, 2 Hen. & M. 446, to the point that it is not necessary to lay damages in the declaration in an action of debt.

After verdict, the damages having been left blank in the declaration, the court will inspect the writ and supply them from it. Digges *v.* Norris, 3 Hen. & M. 268; Hook *v.* Turnbull, 6 Call 85.

In Craghill *v.* Page, 2 Hen. & M. 446, which was an action of debt on a bond with a collateral condition, no damages were laid in the declaration; nevertheless the judgment was sustained.

2 General and Special Damage.

Under the common-law system of pleading, damages which do not necessarily flow from the act or omission complained or, must be specially pleaded, but damages which are the necessary and proximate result of such act or omission are termed general, and are legally imported, and may be recovered, although not specially claimed in the declaration. Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931; Cunningham *v.* Smith, 10 Gratt. 255, 60 Am. Dec. 333; Pegram *v.* Stortz, 31 W. Va. 220, 6 S. E. 485.

Loss of Customers.—In an action for libel, under § 2897 of the Code, where no special damage is claimed except from loss of customers, no proof can be received of the loss of any customers except those mentioned in the declaration. Where the supposed libel is the publication of a privileged communication, the question of malice should be submitted to the jury. Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358.

For Prematurely Filing Mechanic's Lien.—A subcontractor files a mechanic's lien before completion of the work, contrary to Virginia Code, § 2476. Held, he is liable to an action for damages for injury thereby done the contractor. In such action the declaration should charge some special damage to plaintiff, as the language of the alleged lien does not necessarily import injurious defamation; but it is not necessary to give the name of any one whose custom has been lost to the plaintiff, nor to state that the alleged lien has been ended by limitation or decree. Moore *v.* Rolin, 89 Va. 107, 15 S. E. 520.

A declaration, in an action for personal injuries, need not state the particular injury, for instance a broken leg; a general allegation that plaintiff was thereby "greatly injured, bruised, wounded and crippled" is enough. It is different though where the plaintiff seeks to recover special damages, consequent on the particular injury. Yeager *v.* Bluefield, 40 W. Va. 484, 21 S. E. 752.

Master and Servant.—In an action of trespass on the case by employee against employer for a wrongful discharge, declaration makes no averment of malice or of special damage beyond loss of employment and wages, evidence of special damage to character by reason of the discharge is irrelevant and inadmissible. Lee *v.* Hill, 84 Va. 919, 6 S. E. 473.

Fires Set by Locomotives.—Where the plaintiff, in his complaint, claims from the defendant damages for the destruction of 500 rails and about one mile of board fence, some wood upon his land, and a lot of growing timber, which, he alleges, was caused by the negligence of the defendant in permitting fire to emit from its locomotive and spread over his land, he will not

be permitted to prove general damages done to his farm, but he will be confined to the specific items of damage alleged in his complaint. Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 26.

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3. Aggravation and Mitigation of Damages.

Allegation of Alia Enormia.—When the act complained of is accompanied by circumstances of aggravation, they may be proved under the general allegation of alia enormia, without further specification, when they do not afford a substantial ground of action. Peshine *v.* Shepperson, 17 Gratt. 472.

If the declaration in trespass contains a clause of alia enormia, which is usual in trespass, it is sufficient to cover damages beyond the value of the goods. Vaughan *v.* Winckler, 4 Munf. 136.

In Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354, it is said: "There are no allegations in the declaration of such facts as would show that the alleged trespass was accompanied by circumstances of aggravation, nor is there the general allegation of alia enormia, under which circumstances of aggravation might be proved as they may when they do not afford a substantial ground of action, but are mere incidents of the trespass complained of. Faulkner *v.* Alderson, Gilmer 221; Peshine *v.* Shepperson, 17 Gratt. 472."

In an action under § 2898 of Virginia Code, to recover damages for a distrainer of property for rent not due, "the declaration alleges that the rent claimed to be due, and for which the distress warrant was taken out, was $400; that the property levied on was of the value of $975; that in fact there was no rent due; and that by reason of the taking of the property the plaintiff was obliged to incur, and did incur, great expense, and has been deprived of great gains in his business, and has suffered and sustained great and heavy losses therein. There are no allegations in the declaration of such facts as would show that the alleged trespass was accompanied by circumstances of aggravation, nor is there the general allegation of alia enormia, under which circumstances of aggravation might be proved as they may when they do not afford a substantial ground of action, but are mere incidents of the trespass complained of. Faulkner *v.* Alderson, Gilmer 221; Peshine *v.* Shepperson, 17 Gratt. 472. Even if it were true, as contended by counsel for defendant in error, that the warrant of distress, the writs of unlawful detainer, and the threats of breaking up his business, were parts of a scheme to drive the defendant out of business, the frame of the declaration would not allow such facts to be proved to, or be considered by, the jury." Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

Death by Wrongful Act.—In a declaration in an action for damages resulting from the death of a person by the wrongful act of another, it is not necessary to state every matter which may enhance the damages. Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

Cure by Verdict.—It seems that, in trespass vi et armis, a declaration charging by way of aggravation of damages, a special pecuniary loss, occasioned by the trespass, was good

after verdict, even before the acts of jeofails, which took effect January 1st, 1820. Dimmett *v.* Eskridge, 6 Munf. 308.

4. Pleading by Way of Recital.

It is a general rule of pleading that whatever facts are necessary to constitute the cause of action must be directly stated, and not by way of recital. Yet, when the participial form of verbs is used in stating such facts, instead of tenses conveying the sense of more positive statement, while such form of statement is not to be commended, still, it is plain that the facts are intended to be positively stated and alleged, such mode of allegation would not render the pleading bad on demurrer. Battrell *v.* Ohio River R. Co., 34 W. Va. 232, 12 S. E. 699.

The following declaration, in an action for damages to plaintiff as owner of a lot from the construction and operation by defendant of its railroad in an alley on which the lot abutted, was held not to be defective under the rule of pleading, forbidding the statement of facts by way of recital constituting the cause of action: "The plaintiff being then and there, and still being, owner in fee of the land in said alley, to the median line thereof, and the plaintiff, by reason of the acts and doings aforesaid of the defendant, being cut off and deprived of access to the back part of his said lot over and by means of said alley." Battrell *v.* Ohio River R. Co., 34 W. Va. 232, 12 S. E. 699.

Cure by Verdict.—The objection to the declaration in an action for damages, that it falls within the rule against pleading with a quod cum or by way of recital, is cured after verdict by the statute of jeofails, providing that no judgment shall be reversed for any defect, imperfection, or omission in pleading which might have been, but was not, taken advantage of by demurrer. Battrell *v.* Ohio River R. Co., 34 W. Va. 232, 12 S. E. 699.

5. Verdict in Excess of Amount Demanded.

a. In General.

Greater damages can not be awarded than are claimed in the declaration. Hook *v.* Turnbull, 6 Call 85; Pearpoint *v.* Henry, 2 Wash. 192; Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366; Cahill *v.* Pintony, 4 Munf. 371; Winslow *v.* Com., 2 Hen. & M. 459; Johnston *v.* Syme, 3 Call 523; Hook *v.* Turnbull, 6 Call 85; Peerce *v.* Athey, 4 W. Va. 22; Winslow *v.* Com., 2 Hen. & M. 459; Lewis *v.* Long, 3 Munf. 136. Cloud *v.* Campbell, 4 Munf. 214; Payne *v.* Ellzey, 2 Wash. 143.

"When the amount claimed in the declaration is sufficiently large to cover the amount found by the verdict, and this is true in the present case; if the judgment was for more damages than are stated in the declaration, or the writ, it would be erroneous, but not when it is for less. Moss *v.* Moss, 4 Hen. & M. 293; Stephens *v.* White, 2 Wash. 203; 2 Tucker's Com. 314. In these books and cases, the doctrine would seem to be settled." Roderick *v.* Railroad Co., 7 W. Va. 54.

Under no circumstance is a plaintiff entitled to recover a sum in excess of that alleged in his bill and the interest thereon. The averment of his demand is as essential as the proof of it, and both must concur to entitle him to relief. Enoch *v.* Mining, etc., Co., 23 W. Va. 314, citing Pusey *v.* Gardner, 21 W. Va. 469.

Where the amount of damages assessed by the jury is within the amounts laid in both the writ and the declaration, a motion in arrest of judgment is properly overruled. Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117.

Principal and Interest Together May Exceed Amount Claimed.—But this restriction is confined to the principal alone, and does not affect the interest that may be allowed thereon. Cahill *v.* Pintony, 4 Munf. 371; Georgia Home

Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

Where Damages Laid High Enough in Writ.—If the damages be laid high enough in the writ though the jury find more than are laid in the declaration, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. Palmer *v.* Mill, 3 Hen. & M. 502, following Hook *v.* Turnbull, 6 Call 85.

In Palmer *v.* Mill, 3 Hen. & M. 502, it was decided that the writ might be referred to for the purpose of amendment. But in actions sounding in damages, the jury can not find more damages than are laid in the declaration and writ. The rule is otherwise in actions of debt upon bonds with collateral condition. See Payne *v.* Ellzey, 2 Wash. 143; Johnston *v.* Meriwether, 3 Call 523; Winslow *v.* Com., 2 Hen. & M. 459; Cloud *v.* Campbell, 4 Munf. 214.

On this question, Palmer *v.* Mills, 3 Hen. & M. 502 is cited in footnote to Hook *v.* Turnbull, 6 Call 85. In Clarks *v.* Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696, it is said: "The fourth assignment of error is that the court erred in allowing plaintiff to amend his declaration by inserting again therein a claim of $1,000 damages, marked 'No. 1.' This claim had been by the court stricken from the declaration, and it was afterwards reinserted. It was only an amendment. It was properly in the declaration, and the court erroneously —it is said inadvertently—struck it out. But it is said its addition made the damages claimed sum up beyond the amount claimed in the ad damnum clause at the close of the declaration. I think this made no difference. The amount recovered was less than the amount claimed by writ or declaration. The specification of items of damages may exceed the sum named in the conclusion of the declaration. Tassey *v.* Church, 39 Am. Dec. 65; Merrill *v.* Curtis, 57 Me. 152; Palmer *v.* Mill, 3 Hen. & M. 502; 1 Bart Law Pr. 328; 4 Minor Inst. 1158."

b. In Debt upon Bond with Collateral Condition.

It has been long well settled, that in debt upon a bond, with collateral condition, damages may be assessed beyond those laid in the declaration, if the penalty is sufficient to cover them. Payne *v.* Ellzey, 2 Wash. 143; Johnston *v.* Meriwether, 3 Call 523; Peerce *v.* Athey, 4 W. Va. 22; Winslow *v.* Com., 2 Hen. & M. 459.

Tucker, J., in Winslow *v.* Commonwealth, 2 Hen. & M. 459, says: "In perusing the record, an objection occurred to me which was not noticed at the bar. The damages laid in the declaration are only 600l. The damages assessed in one of these suits are upwards of 900l. and in the other 1,900l. And I was at first inclined to think, that the same reason which restrains a plaintiff from recovering more damages than he demands in his declaration, in an action sounding merely in damages, would apply to these cases. But I find that this point occurred in Johnston *v.* Meriwether, 3 Call 523, and again in Payne *v.* Ellzey, 2 Wash. 143, and in both cases was disregarded. My doubts are consequently changed into submission. Yet, I can not help saying that such a practice has, in my opinion, a tendency to mislead a defendant, who may think it not worth while to defend a suit, where the damages are laid at 10l. only, but would, probably, be roused on receiving notice, that he might be subject to the payment of 2,000l."

c. In Detinue.

In detinue the jury may exceed the prices of the slaves laid in the declaration. Biggers *v.* Alderson, 1 Hen. & M. 54.

d. In Actions of Covenant.

In the action of covenant, a verdict for a larger sum than the damages laid in the declaration, or stated in the writ, must be set aside, and a new trial

awarded. Cloud *v.* Campbell, 4 Munf. 214.

e. In Actions for Death.

In an action by the personal representative of a licensee of a footpath, against the owner of the lands, for causing the death of such licensee, by carelessly and negligently undermining said footpath, the measure of damages is such sum as to the jury may seem fair and just under all the circumstances of the case, not exceeding the amount claimed in the declaration. Norfolk, etc., R. Co. *v.* DeBoard, 91 Va. 700, 22 S. E. 514.

f. Remittitur.

See generally, the title REMITTITUR.

If the jury find a verdict for a larger amount than is claimed in the declaration, the plaintiff may release so much of the amount that is in excess of that claimed by him in his declaration, and take judgment for the remainder, and unless he does so a new trial should be awarded. Cahill *v.* Pintony, 4 Munf. 371; Hook *v.* Turnbull, 6 Call 85; Tennant *v.* Gray, 5 Munf. 494.

The court reversing the judgment for such error, will not direct a new trial, if the relator will release the excess of damages recovered beyond the just amount, but upon such release of the excess, will direct judgment to be entered for the just amount of damages. Gibson *v.* Stewart, 11 Leigh 600.

After proof of the delivery of the goods to the defendant, and that they were then, February, 1865, of the value of $335, and the nondelivery thereof to the plaintiff and the admission by the defendant that the goods had been lost by it, the jury rendered a verdict for $534, in January, 1874, on which a judgment was entered; but immediately upon the discovery (during the same term) that the verdict allowed a greater sum than the damages claimed in the declaration, the excess was released by the plaintiff. Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

g. Cure by Verdict.

In debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of nulla bona on a fi. fa. sued out by the relator, where the relator in the declaration shows and claims the precise amount he is entitled to recover by reason of the wrong complained of, a verdict and judgment for more than the claim in the declaration warrants, are erroneous; and the error is not cured by the verdict, under the statute of jeofails. Gibson *v.* Stewart, 11 Leigh 600.

h. New Trials.

A new trial will not be granted after verdict, because the amount of damages assessed by the verdict exceeds the amount claimed in the writ, but not the amount laid in the declaration. Roderick *v.* Railroad Co., 7 W. Va. 54.

"A new trial will not be granted after verdict, because the amount of damages assessed by the jury exceeds the amount laid in the declaration. Roderick *v.* Railroad Co., 7 W. Va. 54; Moss *v.* Moss, 4 Hen. & M. 293. Here the amount of the verdict is within the amounts laid in both writ and declaration." Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117.

B. PLEA OF GENERAL ISSUE.

It is a well-settled rule that where a party can not take advantage of special matter bearing upon the measure of damages, by pleading, he may give it in evidence under the general issue. Lincoln *v.* Chrisman, 10 Leigh 338, citing McNutt *v.* Young, 8 Leigh 542 as authority.

In an action of trespass on the case for assault and battery, the defendant, under the general issue, may give in evidence matters which merely go to the quantum of damages, by way of palliating the offense. Davis *v.* Franke, 33 Gratt. 413.

Though in an action sounding in damages there is an order at rules for an entry of damages, yet a plea of the

general issue, or other issuable plea, filed in term annuls that order, and the jury is properly sworn to try the issue, and not to inquire of damages. Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190.

C. ACTIONS.

1. Splitting Causes of Action.

a. In General.

"The law seems to be well settled that when a person has a cause of action which he may assert by an action ex contractu for the direct damages or ex delicto for both direct and indirect damages, if he selects the former, he waives the latter, including all claim for indirect damages. Both actions are regarded as for the same wrong of which he can have but a single satisfaction, though it in nowise compensate him for the damages sustained." Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

b. Breach of Contract.

It is an ancient and firmly established rule of law that only one action can be maintained for the breach of an entire contract. 2 Sedg. on Dam. (8th Ed.), § 642; 1 Suth. on Dam. (2d Ed.), § 108. Hancock *v.* White Hall Co., 102 Va. 239, 46 S. E. 288.

It is not essential that all the injurious effects which arise from a breach of contract should have been manifested and suffered before suit. The actual effects down to the time of trial are provable, and those which may ensue can be taken into account where they are imminent and reasonably certain. 1 Suth. on Dam., §§ 110, 113. Hancock *v.* White Hall Co., 102 Va. 239, 46 S. E. 288.

"So of any act done or default made which is a breach of any stipulation in a contract. It is a single and entire cause of action, embracing all ensuing consequences for which compensation is allowed; and however multifarious may be the stipulation in it, any act which amounts to a total breach constitutes but a single cause of action; unless, perhaps, when the stipulations are so distinct and relate to subjects so disconnected as to have no relation or unity but such as results from being made at the same time, or contained in one instrument. Nor can an entire claim be severed by partial assignments so as to become the foundation of several suits instead of one." 1 Suth. on Dam., § 113. Hancock *v.* White Hall Co., 102 Va. 239, 46 S. E. 288.

"Where the wrongful act of the defendant is of such a nature as to constitute an entire breach of the contract, compensation therefor may be recovered at once for the whole loss, though the consequence be a continuing one, if the future damage resulting therefrom can be ascertained with certainty. Sutherland on Dam., § 121; Sedwick on Dam., § 90; Remelee *v.* Hall, 31 Vermont 582; James *v.* Allen Co., 44 O. St. 226. In the case at bar the future damage accruing to the plaintiff each succeeding month, is easily and certainly determined by simply subtracting one ascertained sum from another, and reducing each of the several sums thus obtained to its present value by well-settled rules prepared for the purpose." James *v.* Kibler, 94 Va. 165, 26 S. E. 417.

Where an injunction bond is made payable to the state, suits may be prosecuted from time to time thereon for the benefit of the person injured by the breach of the condition thereof, until damages are recovered in the aggregate equal to the penalty of the bond. State *v.* Hall, 40 W. Va. 455, 21 S. E. 760.

A covenant to maintain and repair dams to supply water for a mill. One breach of it will not be a total breach during its whole term and abrogate the contract and entitle the covenantee to recover permanent damages, past and future, in one action. Hurxthal *v.* St. Lawrence Boom Co., 53 W. Va. 87, 44 S. E. 520.

A contract by a lessor to build and equip by a given date a warehouse, which the lessee agrees to lease for a period of two years, with the privilege of extending the lease three years longer, is an entire contract, and the lessee can maintain but one action for the breach of the lessor's covenants to complete by a given time and equip in a specified manner. If action be brought by the lessee before the termination of the lease, he may recover therein not only the damages actually sustained down to the trial, but those to ensue thereafter if they are imminent and reasonably certain. Hancock *v.* White Hall Co., 102 Va. 239, 46 S. E. 288.

c. Injury to Property.

(1) Where Injury Is Permanent.

Where it is proven that the cause of the injury to the property in question, is of a permanent nature, and the damage is permanent, then the rule is that all damages, both past and prospective, may be recovered in one suit. Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121; Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 453; Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87.

Prospective damages are, as a general rule, recoverable, when the cause of action is complete, and the prospective damages are reasonably certain. James *v.* Kibler, 94 Va. 165, 26 S. E. 417; Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121; Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 453; Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521.

Successive Action for the Consequences of the Same Injury.—"It seems to me that in all those cases, where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed, that the defendant would remove it, rather than suffer at once the entire damage, which it might inflict, if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues." The court, in Hargreaves *v.* Kimberly, 26 W. Va. 799, quoted and approved in Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401, 404; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521.

In Smith *v.* Point Pleasant, etc., R. Co., 23 W. Va. 451, Green, J., said: "Where the damage is of a permanent character and affects the value of the estate, a recovery may be had at law of the entire damages in one action; but where the extent of the wrong may be apportioned from time to time, separate actions should be brought to recover the damages sustained." Hargreaves *v.* Kimberly, 26 W. Va. 787.

When, in a suit for damages resulting from a wrongful act, must there be a recovery in one suit for all damages past and prospective, and when must the recovery be limited to damages prior to the suit, leaving future damages for future suits, as future damages occur? The question usually comes up in one of three forms: In considering the measure of damages, in considering whether the action is barred by limitation, and in considering whether it is barred by a former recovery. Now, when the case is one of such nature as to enable the party in one suit to recover future as well as past damages, there the statute runs from the original beginning of the nuisance; but, where there can only be recovery for past damages, the statute does not run from the institution of

the nuisance, but from the injury, when it occurs or recurs as its consequence. Where the nuisance is permanent, so that it will continue unless labor be applied to change it, and it necessarily injures the plaintiff, there must be a recovery in one suit for all damages, and none other can be afterwards brought, and recovery of damages will give the defendant right to continue his nuisance without further claim from the individual; but, where it is otherwise, there can not be recovery for future damages, but only from time to time as they occur, and one recovery does not justify the perpetuation of the nuisance, but there may be recovery after recovery, as long as continued. This doctrine is well settled and is recognized by this court in Hargreaves *v.* Kimberly, 26 W. Va. 787; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521; Rogers *v.* Coal River Boom, etc., Co., 39 W. Va. 272, 19 S. E. 401; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

(2) Where Injury Is Temporary.

But where the cause of the injury to the property is not of a permanent nature, but only of a temporary character, the rule is that only such damages may be recovered as have actually accrued, at the date of the institution of the action, and subsequent actions must be maintained to recover any future damage. Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121; Rogers *v.* Coal River, etc., Co., 39 W. Va. 272, 19 S. E. 401; Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87.

Where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance and not permanent in its character but of such a character that it may be supposed, that the defendant would remove it rather than suffer at once the entire damage, which it might inflict if permanent, then the entire damage can not be recovered in a single action; but actions may be maintained from time to time, as long as the cause of the injury continues. Hargreaves *v.* Kimberly, 26 W. Va. 787.

Our cases hold that if the cause of injury is in nature permanent, and a recovery for such injury would confer license on the defendant to continue it, entire damages may be recovered in a single action; but where the cause of injury is not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once a heavy recovery for entire permanent and lasting damage, which the injury might inflict if permanent, the entire damages including future damages can not be recovered in a single action, but actions may be maintained repeatedly as long as the cause of injury continues to inflict damages. Watts *v.* Norfolk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521; Henry *v.* Ohio River R. Co., 40 W. Va. 237, 21 S. E. 863; Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87; Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400; Hargreaves *v.* Kimberly, 26 W. Va. 787; Hurxthal *v.* St. Lawrence Boom Co., 53 W. Va. 97, 44 S. E. 520.

Where one grants to a railroad company a strip of land for its use in the construction of its railroad, as to the residue of the tract, a recovery of damages for all time to come can not be had in a single action where a fill or bar is made in a stream by blasting and throwing into it rock and other refuse material in the work of construction of such railroad, which fill is not necessary for the construction and maintenance of the railroad, and which entails injury to a mill situate on such residue; but actions may be maintained from time to time as long as the cause of the injury continues. Watts *v.* Nor-

folk, etc., R. Co., 39 W. Va. 196, 19 S. E. 521, citing Hargreaves *v.* Kimberly, 26 W. Va. 787.

In an action by E. against H.'s executor to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream or which H. had built a dam in 1848, in the county of Louisa, E. having sued H. in his lifetime for damages to his lands from the erection of the dam, and a judgment in that case having been rendered in 1859 in favor of H., in this second suit E. can only recover for damages occasioned by the continuance of the dam subsequently. Ellis *v.* Harris, 32 Gratt. 684.

2. Motions.

See the title MOTIONS.

Damages for an injury resulting from a breach of contract, recoverable only in an action "sounding in damages," can in no sense be considered money due upon contract, and hence. a motion under § 3211 of the Code, can not be maintained to recover damages for a breach of contract. Wilson *v.* Dawson, 96 Va. 687, 32 S. E. 461.

D. INSTRUCTIONS.

1. Where Evidence Is Conflicting.

Where the evidence is conflicting the court, upon request, should give instructions which correctly propound the law according to the different views which the jury may take of the evidence. Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

2. Must Be Confined to Evidence.

An instruction asked for, if based upon the evidence in the case, and correctly directs the jury how to estimate the damages, should be given. James *v.* Kibler, 94 Va. 165, 26 S. E. 417.

Passenger afflicted with rheumatism was thrown from his seat by a collision of trains, and his thigh bone broken. In action for damages company's counsel asked that the jury be instructed that, though they believed the plaintiff was injured as complained of, yet he can not recover if they believed that he was in such an infirm state as would have prevented a prudent man from taking the risk of travel, and but for which state he would not have received the injury. Held, the instruction was properly refused, because inconsistent with both the evidence and the law. "Obviously there was no connection, and in the nature of things could not have been, between the physicial condition of the plaintiff and the injuries produced by the collision of the train upon which he was traveling when injured. As well might it be contended that a passenger suffering with a bronchial trouble, which renders travel on his part imprudent, and whose leg is broken in a railroad accident, can not recover damages for his injury until he has first formally satisfied the jury that the injury was not caused by the condition of his throat or lungs; yet such, in substance, is the contention in error." Shenandoah Valley R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796.

In an action to recover for loss of profits in business, where the plea is not guilty, an instruction which assumes that there has been such loss, or which is ambiguous on this point, should not be given. Fishburne *v.* Engledove, 91 Va. 548, 22 S. E. 354.

3. Repetition of Instructions.

In an action to recover damages for personal injuries it is not error to refuse a correct instruction where another is given in lieu thereof, which correctly propounds the law and covers the point contained in the one refused. Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

X. Evidence.

See the title EXEMPLARY DAMAGES.

A. DOMESTIC RELATIONS OF PLAINTIFF.

In an action for personal injury, evidence that the plaintiff is a married man with young children is irrelevant and incompetent and it is error to ad-

mit it. Sesler *v.* Coal Co., 51 W. Va. 318, 41 S. E. 216, citing Moore *v.* Huntington, 31 W. Va. 842, 8 S. E. 512.

In an action against a city to recover damages for injuries sustained by the plaintiff in consequence of a defective sidewalk, evidence that the plaintiff is a widow and has six children is immaterial and irrelevant to the issue, and should be rejected, but the court will refuse to reverse a judgment for this cause, if it does not appear that the verdict was in excess of what the other evidence in the case warranted. Moore *v* Huntington, 31 W. Va. 842, 8 S. E. 512.

B. FAMILY DEPENDENT ON PLAINTIFF FOR SUPPORT.

Family dependent on him for support may be taken into consideration where he is permanently injured, or has died from his injuries. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

"All the cases agree that where the deceased has left a widow and children it is proper for the jury, in assessing the damages, to estimate the value of the support and maintenance properly derived from the deceased, the amount realized by him from his usual occupation, as also the loss of his care, nurture and instruction." Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

C PAIN AND MENTAL ANGUISH.

It is not necessary to make specific proof of pain and mental anguish; these elements of damage are sufficiently shown by the evidence which discloses the nature, character, and extent of the injuries, and from such evidence the jury may infer pain and mental anguish. Norfolk, etc., R. Co. *v.* Marpole, 97 Va. 594, 34 S. E. 462.

A jury may infer mental anguish from serious bodily harm, causing great physical pain and suffering, without other proof on the subject. Southern Bell Telephone, etc., Co. *v.* Clements, 98 Va. 1, 34 S. E. 951.

DAMAGES CLAIMED.—Code of West Virginia, ch. 50, § 10, provides that "a justice shall have jurisdiction of actions for trespass on real estate, or damages to the same, or to rights pertaining thereto, if the **damages claimed** do not exceed three hundred dollars, and the cause of action arose in his country." It was held, that **damages claimed,** meant the amount claimed in the summons, and not the damage shown by the testimony. Stewart *v.* Baltimore, etc., R. Co., 33 W. Va. 88, 10 S. E. 27. See also, State *v.* Lambert, 24 W. Va. 399. And see the title JUSTICES OF THE PEACE.

Damages for a Wrong.

See the title DAMAGES, ante, p. 162.

DAMAGING.—See APPROPRIATE, vol. 1, p. 685.

Damnum Absque Injuria.

See the titles ACTIONS, vol. 1, p. 131; DAMAGES, ante, p. 162.

Dams.

See the titles MILLS AND MILLDAMS; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

DANGEROUS.—See NEGLIGENT.

DANGEROUS EXPOSURE.—See Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 580.

DANGEROUS MACHINERY.—Upon the question of the meaning of **dangerous machinery,** within the rule governing a landowner's duty to a child trespasser, the court, in Ritz *v.* Wheeling, 45 W. Va. 262, 31 S. E. 997, said: "Whether the distinction between **dangerous machinery** and other means of injury be clear or not, several courts and text writers have made it. Railroad cars held not such **dangerous machines.** Barney *v.* Railroad Co., 126 Mo. 372, 28 S. W. 1096; Catlett *v.* Railroad Co., 57 Ark. 461, 21 S. W. 1062. Cars are attractive to children, but the law does not require a guard to keep children from standing cars. Railroad Co. *v.* McLaughlin, 47 Ill. 265. Now, I do not suppose this reservoir of the city would come under the head of **dangerous machinery.** If so, what structure or establishment might not? At any rate, if that is **dangerous machinery,** hundreds of necessary things would fall under this head of liability not heretofore regarded as dangerous and attractive to children, and greatly endanger the maintenance of many things necessary, in life and business, and be an enormous burden to guard and watch with never sleeping eyes. Strange to me the idea that such a reservoir can be made to come under this rule. And I say that the reservoir is not dangerous in that sense." See also, the title NEGLIGENCE.

Dangerous Weapons.

See the title WEAPONS.

Darrein Continuance.

See generally, the title PLEADING. See also, the title DETINUE AND REPLEVIN.

DATE.—See the titles ACTIONS, vol. 1, p. 133; BILL OF PARTICULARS, vol. 2, p. 380; COMMITMENTS AND PRELIMINARY EXAMINATION OF ACCUSED, vol. 3, p. 3; DEEDS; EXECUTIONS; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES; MARSHALING ASSETS AND SECURITIES; PAROL EVIDENCE; RECORDING ACTS; RELATION. And see DAY.

A writ otherwise regular is not absolutely null and void, because its **date** is blank. Ambler *v.* Leach, 15 W. Va. 677. See also, the titles PLEADING; SUMMONS AND PROCESS.

DAY.—See the titles BANKS AND BANKING, vol. 2, p. 259; RELATION; TIME.

As a general rule, the law does not regard fractions of a **day;** but this rule is departed from in many cases where the purposes of justice require it. Courts would be very slow to decide that a man by a fiction of law is to be considered a felon before the conviction has actually taken place. Neale *v.* Utz, 75 Va. 480. See the title TIME.

In Gibson *v.* Com., 2 Va. Cas. 121, it is said: "On the question, whether the court should have passed sentence after 12 o'clock on Saturday night, some of the judges were inclined to think that the judicial **day** extended to the dawn of the next morning, but no opinion was given on it, because a majority of the judges were of opinion that it did not sufficiently appear by the record that it was past midnight; that fact being merely alleged by the prisoner, and it not being admitted by the court, nor proved to it by evidence."

Day of Date.—In Straughan *v.* Hallwood, 30 W. Va. 274, 4 S. E. 400, it is said:

"The counsel for the appellant, the plaintiff below, in his argument, seems to regard it as perfectly clear that the ninety days named in this contract must, as a legal proposition, run from March 1, 1886. He says: 'This contract having declared the ninety days should run from the date of the signing and sealing thereof, and having made that date the first of March, the ninety days must run from that time, no matter when the contract actually took effect,' to sustain which proposition he refers only to 2 Pars. Cont. (6th Ed.), § 664. I have examined this authority, and it is not to my mind so clear that it sustained the proposition laid down by appellant's counsel. He says 'that if the contract refers to **the day of the date**, or the **date**, and expresses any **date**, this **day**, and not the actual making, is taken.' Parsons refers in a note to Styles *v.* Wardle, 4 Barn. & C. 908, and Co. Litt. 46b, as sustaining the proposition he lays down; and also to Armit *v.* Breame, 2 Ld. Raym. 1082. These authorities sustain the proposition laid down by Parsons, but they go no further than he has gone; and there is a great difference between the phrases **the day of the date**, or the **date**, and the phrase used in this agreement of compromise, 'the **date** of the signing and sealing of this agreement.' I am not now prepared to say that this does not mean 'the **day** of the actual signing and sealing of this agreement,' though the agreement does conclude." See generally, the title PAYMENT.

Days of Grace.

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

Dead Bodies.

See the titles CEMETERIES, vol. 2, p. 731; CORONERS, vol. 3, p. 508.

Deaf and Dumb Persons.

See the titles CONTRACTS, vol. 3, p. 333; DEEDS.

DEALINGS.—Virginia Code, 1849, ch. 149, § 5, provides that an action by one partner against his copartner for a settlement of partnership accounts, may be brought until the expiration of five years, from a cessation of the **dealings** in which they are interested together, but not after. It was held that these words, cessation of the **dealings**, did not refer to the cessation of the active operations of the partnership, but embraced also any act done after its dissolution in winding it up. Foster *v.* Rison, 17 Gratt. 321. In Smith *v.* Zumbro, 41 W. Va. 635, 24 S. E. 657, the court said: "Now, when we come to inquire what is meant by a 'cessation of the **dealings**,' we find the question has been passed upon in this state in the case of Sandy *v.* Randall, 20 W. Va. 247, in which Snyder, J., delivering the opinion of the court, says: "The courts of Virginia, in construing a statute identical with this, have decided that the word **dealings** embraces any act done after the dissolution of the partnership, in winding it up,—such as the collection or payment of debts due to or by the firm. Foster *v.* Rison, 17 Gratt. 321. This we regard as the correct interpretation, and the necessary conclusion from it is that, in order to subject the suit to the bar of the statute, it must not only appear that there has been a dissolution of the partnership more than five years before the institution of the suit, but that there were no valid claims of debit or credit, against or in favor of the firm, paid or received or outstanding, within that time.'" See also, Sandy *v.* Randall, 20 W. Va. 247. And see the titles LIMITATION OF ACTIONS; PARTNERSHIP.

Death.

As to evidence of death, see the titles DEEDS; PRESUMPTIONS AND BURDEN OF PROOF. As to action for wrongful death, see the title DEATH BY WRONGFUL ACT.

DEATH BY WRONGFUL ACT.

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I. Right to Recover.

A. AT COMMON LAW.

Under the common-law rule, all personal actions died with the person, in accordance with the maxim, "Actio personalis moritur cum persona." And at common law there was no civil remedy against one who through negligence, by wrongful act or default robbed another of his life. Va. Code, 1887, § 2903; W. Va. Code, 1899, ch. 103, § 5. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

The supreme court of the United States, also, maintains that in the absence of statute a suit can not be brought in the admiralty courts of the United States, to recover damages for the death of a human being. The Harrisonburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140.

B. STATUTORY RIGHT.

1. In General.

The Virginia Code provides that whenever the death of a person shall be caused by the wrongful act, neglect or default "of another person or corporation, or of any ship or vessel," and the act, neglect or default is such as would (if death had not ensued) have entitled the party to maintain an action, "or to proceed in rem against said ship or vessel, or in personam against the owners thereof, or those having control of her," and to recover damages in respect thereof then, and in every such case the person who, or corporation "or ship or vessel" which, would have been liable if death had not ensued, shall be liable to an action for damages, or, "if a ship or vessel to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam," notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amounted in law to a felony. Va. Code, 1887, § 2903. See further provisions, regarding the right, which follow the above section. The West Virginia enactment, W. Va. Code, 1899, ch. 103,

§ 5, is similar in its provisions, with the exception of the above quoted clauses which are omitted from the West Virginia statute, having been inserted in the Virginia Code by the revisors in 1887.

2. Character and Construction of Statutes.

Statutes for death by wrongful act are regarded as remedial in character, and are liberally construed to promote the objects the legislature manifestly had in view. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431; Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838.

3. Nature of the Right.

New Action Given, Not a Survival of the Old One.—The right of action for death by wrongful act is an entirely new right created by the statute, and not a survival of the right which the injured person had and for which he was entitled to maintain an action had he survived. And this is true even though the new statutory right is founded upon a wrong already actionable by existing law in favor of an injured person for his damages. It was not intended to be, and is not a derivative right of action. Some differences which distinguish the two rights are summed up by the Virginia court in Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269. See also, Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 Sup. Ct. 533.

4. Object of Statutes.

The primary object of the statutes allowing an action to recover damages for death caused by the wrongful act of another was to compensate the family of the deceased and was not in the interest of his general estate. Richmond, etc., R. Co. *v.* Martin, 102 Va. 201, 45 S. E. 894.

These statutes are regarded as compensatory rather than penal,—and are as a general rule enforcible, through comity, in jurisdictions other than where the right accrued under the statute. Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

5. Conflict of Laws—Law Governing the Right to Sue.

The right to sue accrues, if at all, by reason of the statute of the locus delicti, and in general no one can take advantage of the right conferred by that law save the person to whom that law gives it. Thus, in Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, a citizen and resident of the state of Virginia, was killed by the alleged negligence of a railroad company while he, the deceased, was employed in their service, in the state of West Virginia. Action was instituted in the circuit court of the city of Richmond, by his personal representative, who was appointed in Louisa county, Virginia, the decedent's county of residence. Several objections were raised by the counsel for the defendant railroad company in their endeavor to thwart the plaintiff in maintaining his action in Virginia. The supreme court held, however, that it was right and proper for suit to be instituted and maintained in Virginia. Nevertheless, the court decided that the rights of the parties were to be determined by the statute of West Virginia, lex loci delicti, as the liability for the tort first became fixed in that state.

And it is held by the supreme court of the United States that, wherever, by the common law or the statute law of a state a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action prosecuted in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties. Dennick *v.* Cent. R. Co., 103 U. S. 11, 26 L. Ed. 439. And in Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102, a case going up from the Western district of Virginia, it was held, that where the administrator and defendant are citi-

zens of different states, the action may be brought in the federal courts, though the deceased was a citizen of the same state with the defendant, where his widow and children still resided. And when the statute of a state gives a remedy for the death of a person caused by the wrongful act, neglect, or default of another, and provides that the action shall be brought by the personal representative of such deceased person, the personal representative appointed in a state other than that wherein the death occurred, may bring such action in the courts of the state in which he was so appointed.

II. Beneficiary.

Under the Virginia statute the damages are given first to the husband or wife, parent or child, but if neither of these is alive, the action may then be maintained, and the damages will be assets to be disposed of according to law. In this respect the Virginia statute differs from that of all the other states. Va. Code, 1887, § 2903.

As to showing the condition and state of dependency of those who will be beneficiaries in order to increase the damages assessed, see post, "Evidence," IV, G.

III. Compromises.

By express provision of the Va. Code, 1887, § 2905, the personal representative of the deceased may compromise any claim to damages arising under this provision. This provision as to compromise is omitted from the West Virginia Code, 1899. After a compromise by a personal representative the question arose in Powell *v.* Powell, 84 Va. 415, 4 S. E. 744, being raised by the father of the decedent, as to how the amount thus obtained by the compromise should be distributed by the personal representative. The father of the decedent claimed to be entitled as distributee, to one-half of the sum thus paid, after payment of costs and attorney's fees, which claim was denied by the administratrix. The contention made by the administratrix was, that in the language of the statute no money was "recovered" of the company; that is to say, there was no form of judgment in an action at law against the company. The court held that it was manifest that the term was not used in the statute in this restricted and technical sense, but in the more comprehensive sense of "receive." In other words, it embraces all moneys received by the plaintiff on account of the action or claim. The court further declared that as there were no descendants of the deceased, the fund should go in equal proportion to the decedent's widow and his father. That is, after paying the costs and attorney's fees it was to be distributed according to the statute of distribution.

Consent of Parties Entitled to Sum Recovered.—It is important to observe that the statute, Va. Code, 1887, § 2905, provides that the personal representative may make such compromise, with the consent of the persons who would be entitled to the damages recovered in an action therefor brought by such representative under § 2903; or, if any such persons are incapable, from any cause, of giving consent, the personal representative may make the compromise, with the approval of the judge of the circuit court of the county or the circuit or the corporation court of the corporation wherein such an action is allowed by the law to be brought.

Such approval may be applied for by the personal representative, on petition to such judge, in term time or vacation, stating the compromise, the terms thereof, and reasons therefor, and convening the parties in interest. Va. Code, 1887, § 2905.

The right of a representative of a deceased person to compromise a cause of action for the death of the latter without the consent of the next of kin or the probate court is upheld in Foot *v.* Great Northern R. Co. (Minn.),

52 L. R. A. 354, although the action is brought for the benefit of the next of kin. See post, "Distribution," VI.

IV. The Action.

A. FORM OF ACTION.

Where a statute gives a right of action without prescribing the form, the action is to be adapted to the nature of the case, and moulded according to the distinctions of the common law. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608.

Mr. Minor, 4 Min. Inst. (3d Ed.) 456, says, that the remedy under § 2902 of the Virginia Code, 1887, as in other cases at common law, where the injury results directly from the force applied by the wrongdoer, is trespass vi et armis; otherwise, by trespass on the case; the object of either action being to recover damages in some degree proportioned to the injury.

As the Virginia statute (Va. Code, 1887, § 2901), now permits trespass on the case, wherever trespass vi et armis would lie, case may be maintained whether the force be direct and immediate, or indirect and consequential. See Barton's Law Prac., p. 417.

B. LIMITATION.

See the title LIMITATION OF ACTIONS.

In General.—The statutes in both Virginia and West Virginia giving the right are explicit as to the time within which such action may be instituted. As prescribed in Virginia the action must be brought by the personal representative of the deceased within one year after the death of such person, thus making the maximum limit of the time within which suit may be instituted, either by the injured person during his life for the recovery of damages for his own benefit, on account of the loss and injuries sustained by him, or his personal representative after his decease, for damages to be distributed among beneficiaries as provided by statute, to two years. Va. Code, 1887, § 2903. See also, Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

In West Virginia the action which may be maintained by the personal representative is limited to two years after the death of the intestate. W. Va. Code, 1899, ch. 108, p. 774, § 6.

Construing this section of the West Virginia Code, the court, in Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431, said: "Chapter 103 of the Code (§§ 5, 6, p. 725, Ed. 1891) is the West Virginia Lord Campbell's act, creating a cause of action where none existed at common law for wrongfully causing the death of a person; and the proviso that any such action shall be commenced within two years after the death of such deceased person is an essential restraining element of the right of action given." See also, Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

Prior to Death of Injured Person.—"The statute makes no reference, either impliedly or otherwise, to the bar of the statute of limitations prior to the death of the injured person. His condition, mental or physical, or obstructions by the wrongdoer, might prevent his bringing suit within the year, and yet the fact that he survived for more than a year is claimed to bar the suit of the plaintiff. There is no such provision in the statute. 8 Am. 2 Eng. Ency. Law (2d Ed.), p. 877. While the real cause of action is the negligent injury, it is not consummated until it result in death, and then the action accrues to the administrator, and not until then. To hold otherwise is to make two statutes of limitation, both of which would be bars affecting the cause of action, one beginning to run at the inception of the cause of action, and the other beginning to run at its consummation, so that if the cause of action was not consummated within a year it would be barred by the first, and if consummated within the year it would have double the time to run under the second. In the absence of

express provision to the contrary, this would be an unreasonable construction of the law. It would be far more reasonable to apply the old common-law rule of a year and a day, on the presumption, made legally conclusive, that, if the person injured did not die within such limit, the injury received could not be the proximate cause of death, on account of there being so many intervening causes. But this limitation is held not to apply in such cases. Railroad Co. *v.* Clarke, 152 U. S. 230, 14 Sup. Ct. 579. The reasoning in that case is applicable here: 'The statute in express words gives the personal representative two years in which to sue. He can not sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin can not accrue until the person injured dies. Until the death of the person the "new grievance" upon which the action is formed does not exist. To say, therefore, that where the person injured dies one year and two days after being injured no action can be maintained by the personal representative is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury and where it does not occur until after the expiration of one year and a day.' Justice Harlan's opinion, 152 U. S. 238, 14 Sup. Ct. 580." Quoted by Dent, J., in Hoover *v.* Chesapeake, etc., R. Co., 46 W. Va. 268, 33 S. E. 224.

C. ABATEMENT AND REVIVAL.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

1. Upon Death of Plaintiff.

When the Party Injured Sues and Dies.—Where an action is brought by the party injured, and he dies pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative, and the declaration or other pleadings shall be amended so as to conform to an action under Va. Code, 1887, §§ 2902-2903, and the case proceeded with as if the action had been brought under those sections. Va. Code, 1887, § 2906.

This provision in case of the death of the party injured after suit instituted seems not to be provided for by the West Virginia Code. In Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 Sup. Ct. Rep. 533, which was an action begun by a party injured by the defendant, and the latter had a verdict and judgment in the trial court. The plaintiff sued out a writ of error to the federal supreme court, and, pending the hearing on this writ the plaintiff died and his personal representative sought to revive the suit, in his name as his administrator. The action was under the West Virginia statute which provides for a wrongful death, but contains nothing with reference to the survival of the action for personal injury. On motion by the defendant to dismiss the writ of error because it was abated by the death of the plaintiff, it was held that the motion should be sustained; that the right of action which the deceased had did not survive under the statute. See also, Cunningham *v.* Sayre, 21 W. Va. 440; Curry *v.* Mannington, 23 W. Va. 14.

Section 2906 of the Virginia Code, 1887, originally read: "Where an action is brought by a party injured for damage caused by a wrongful act, neglect, or default of any person or corporation, and the party injured dies pending the action, 'and his death was caused by such wrongful act, neglect, or default,' the action shall not abate by reason of his death, but his death being suggested, it may be revived in the name of his personal representative, 'and the declaration and other pleadings shall be amended so as to conform to an action under §§ 2902, 2903, and the case proceeded with as if the action had been brought under the said section.'"

By the acts of 1893-94, p. 83, the stat-

ute was amended and the above single quoted portion of the original act omitted from the act as it now appears. The effect of these omissions has not as yet been construed by the court of appeals. By some of the ablest legal minds in the state the amendment is viewed with apprehension, as containing far-reaching and radical changes. For discussion as to the effect of this amendment, see 1 Va. Law Reg. 694; 2 Va. Law Reg. 27. In Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269, the amendment was presented to the court for construction, but the court refused to pass upon its effect, as the plaintiff's right of action had arisen prior to its passage, and was not within its purview, therefore the construction was not necessary to the decision. See Poll. Suppl., (1900) § 2906.

2. Upon Death of Defendant.

In Virginia an action does not abate by the death of the defendant or dissolution of the corporation when a corporation is the defendant. Va. Code, 1887, § 2906; Poll. Suppl., 1900, § 2906. This provision seems to be omitted from the West Virginia Code.

D. GROUNDS OF THE ACTION.

1. In General.

The statutes of Virginia and West Virginia which give this right of action for the benefit of the estate or relatives of the person who has been injured by the wrongful act, neglect or default of another, such injuries resulting in the death of the person, expressly provide that such action must be brought by the personal representative of the deceased, but can only be maintained in such case when the deceased could have sued had death not ensued. See Va. Code, 1887, § 2902; W. Va. Code, 1899, ch. 103, § 5. Thus, while the right to maintain an action is a new one created by statute, yet the basis of the grievance rests in fact upon the foundation of the old structure, which would have arisen but for death intervening. And though evidence as to damage suffered, the elements of the damage and limit are altered in many respects, yet, the merits of the complaint are substantially the same as would have been presented had the party injured, survived his injuries, and instituted suit for recovery.

In Dimmey *v.* Railroad Co., 27 W. Va. 32 (1885), the defense took a very peculiar turn in attempting to show that the plaintiff could not maintain his cause of action. The facts of the case were, in brief, that a Mrs. Dimmey was a passenger upon a horse railway car. As alleged the horses ran away by reason of the carelessness of the driver. Mrs. Dimmey believing danger to be impending, thought to avert it by escaping from the car, so jumped from the window, and was killed. Her husband, as her administrator, brought an action on the case under the statute to recover damages for her negligent killing. At the time this action was brought a married woman was in most respects under the disabilities of the common law. Being a feme covert she could not at this time have maintained an action alone in her own name, but must have joined her husband with her. The West Virginia statute allowing an action to be brought for the wrongful or negligent killing of another, enacted in West Virginia by the acts of 1863-64, p. 113, W. Va. Code, 1900, ch. 103, §§ 5, 6, 7, provides, as before stated, that, "whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof," etc. The contention made by the defendant was, that the statute gave the right to the representative to bring the action only where the person who was killed could himself, alone, have maintained an action for damages for injuries in case he had survived; therefore, as the wife, who was under the common-law disabilities, could not, had she survived, alone have

maintained an action to recover damages for injuries sustained, her personal representative was not entitled under the statute to maintain such action, because such case was not within the purview of the statute. In answering this defense the court said: "But for the fact that a married woman at common law in an action where she was the meritorious cause of the action, was under disability, and the fruits of the action would go to her husband, she might have sued alone, I am not prepared to say, that under our statute she could sue alone for an injury to herself, nor do I think it necessary to decide in this case whether she could or not; but she could certainly have joined with her husband and brought an action for the cause set out in the declaration, if death had not ensued upon the injury. But a single case so far as I know, holds that under such circumstances where death ensued, the administrator of the wife could not maintain the action. That case is Linch *v.* Davis, 12 How. Pr. 323. It has not been followed in New York, and to my mind its reasoning is very unsatisfactory. We have cited a number of pertinent authorities, which hold, that the action may be maintained. It would be strange indeed if the legislature intended, that for every death by the wrongful act, neglect or default of the person or corporation an action might be maintained except for the killing of married women. The object of the statute was in part at least for the protection of human life, and it would be a reproach to the legislature, to suppose, that no one would be held to answer in damages for the killing of married women, but should be held to answer for the killing of every other person. We are asked to so construe this statute, because, it is insisted had death not ensued, the married woman could not alone sue for the injury. The statute does not say that only the party injured can sue. The language is, where the wrongful act, neglect or default 'is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof,' etc. The declaration is good and the demurrer was properly overruled." The force of this opinion, is, therefore, to declare that though the disabilities of a married woman prevail, yet under the West Virginia Code of 1881, ch. 103, sec. 6, the administrator of a married woman, who is killed by the negligence of a corporation, may maintain an action for causing her death.

2. Recovery Based on Breach of Duty, General or Special, Whether Created by Contract, or Imposed by Law.

a. Wrongful Act, Neglect of Default in General.

The Codes of both Virginia and West Virginia provide that an action may be maintained whenever the death of a person shall be caused by the wrongful act, neglect or default of another (and in Virginia by a corporation, ship or vessel), and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof. Va. Code, 1887, § 2902; W. Va. Code, 1899, ch. 103, § 5.

b. Recovery Based on Breach of Master's Duty to Servant.

See the titles FELLOW SERVANTS; MASTER AND SERVANT; RAILROADS.

c. Negligence.

See generally, the titles CARRIERS, vol. 2, p. 671; FELLOW SERVANTS; MASTER AND SERVANT; NEGLIGENCE.

(1) In General.

Where the negligence of a person or corporation is the efficient and proximate cause of an injury resulting in the death of a person, such negligence is a ground for recovery under the statute. Standard Oil Co. *v.* Wakefield, 102 Va. 824, 47 S. E. 830; Green *v.* Southern

R. Co., 102 Va. 791, 47 S. E. 819; Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582; Moon *v.* Richmond, etc., R. Co., 78 Va. 745; Norfolk, etc., R. Co. *v.* Houchins, 95 Va. 398, 28 S. E. 578; Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707; Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429; Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475; Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Virginia, etc., R. Co. *v.* Barksdale, 82 Va. 330; Virginia, etc., R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21; Clark *v.* Richmond, etc., R. Co., 78 Va. 709; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Rudd *v.* Richmond, etc., R. Co., 80 Va. 546; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570.

Brakeman Injured in Coupling Cars.—A brakeman was ordered by a conductor to make a coupling to a car over the ends whereof lumber projected. In obeying the order the brakeman, who knew the danger, was caught between the lumber and the next car; seeing which, the conductor signaled the engineer to "jar ahead quickly;" which was done, causing the brakeman to fall; and the coupling having been made, the wheels passed over and killed him. Upon these facts the court held, that the death was caused by the negligence of the defendant's conductor, therefore the plaintiff was entitled to recover. Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582.

Where at the trial it appeared that a brakeman, a minor, on his first trip, was coupling freight cars by the conductor's order, the latter being so situated that he could not see the opening between the cars, nor the brakeman, so as to give the proper signal to slow up, and thus the brakeman was killed by the cars coming together with great force, it was held, that the death was caused by the conductor's negligence, and the defendant company was liable. Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707.

Employee Injured by Tongs Catching in Cogwheel.—Where an employer leaves a rapidly revolving cogwheel unprotected, so that tongs carrying large masses of iron are liable to be caught and taken into it and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been warned by a skilled workman to encase it, the employer will be held liable for an injury to an employee resulting from the tongs catching in the cogs. Richlands Iron Co. *v.* Elkins, 90 Va. 249, 17 S. E. 890.

Injury Due to Negligence in Maintaining Deadlock.—In Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475, an action for damages for death by defendant's negligence, a train of six cars was run along a coal wharf, upon a wooden structure, twenty-five feet high and three hundred feet long. At the end there was only a log chained to the wharf. The chain gave way and let the cars pass over the end, killing the plaintiff's intestate, who was a brakeman. The defendant had ordered timbers four years before to build a deadlock, but it was not built. The court held from these facts that the killing was due to the negligence of the defendant company, therefore, it was liable in damages for such death. See Richmond, etc., R. Co. *v.* Tribble, 97 Va. 495, 24 S. E. 278, where the defects in the machinery were held to be the secondary cause, and the negligence of the intestate, fellow brakeman, or engineer the approximate cause.

Death Resulting from Colliding Trains.—In Norfolk, etc., R. Co. *v.* Houchins, 95 Va. 398, 28 S. E. 578, a

brakeman on a freight train, was killed in a collision on the defendant's railroad. The collision was attributed to the negligence of the conductor of the train on which Houchins was engaged, in ordering the train to proceed before another train which he had been ordered to await, had passed. It was held that in absence of proof of negligence on the company's part in employing an incompetent conductor, or failure to perform any of the nonassignable duties the company was not responsible.

Death Resulting from Defective Bumpers and Ladder.—In Richmond, etc., R. Co. *v.* George, 88 Va. 223, 13 S. E. 429, a brakeman in attempting, on a dark night, to climb down a ladder on the front of a freight car next to the engine, was crushed by the engine suddenly coming back upon him while feeling with his foot for the bottom rung of the ladder which was missing, a fact of which he was ignorant. The bumper on the car was broken, which made it possible for the engine and car to come close together and cause the injury. It was held, that it was the company's duty to furnish proper cars, and to keep them in good order; and that no negligence could be imputed by the plaintiff in this case, because the train having been made up in the night, under the supervision of the regular inspector, the plaintiff had had no opportunity to discover the defect. Held, that the defective condition of the car was the proximate cause of the injury, and the defendant was liable.

A was a conductor of a freight train running from G to R. A car was taken into the train during the night at the station of X, the handle of the ladder whereof had been broken off long enough for the fracture to appear weather worn. Next morning at station Y, A, attempting to descend this ladder, face towards it, caught at, and would have caught the handle had it been in its place, but fell and was killed. There was a conflict in the evidence as to whether A was drunk, and negligent or otherwise. In a suit by his personal representative for damages, the defendant demurred to the evidence. Held, that the defendant was guilty of negligence in permitting the car ladder to remain out of order, which negligence caused A's death, and rendered defendant liable for damages, and under the rule governing demurrers to evidence, A contributed in no way to the accident by his own misconduct. Richmond, etc., R. Co. *v.* Moore, 78 Va. 93.

Death from Accident Due to Removal of False Work Supporting Bridge in Course of Construction.—In Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, a railroad company entered into a contract with the Phœnix Bridge Company, by which the latter undertook to put in a new bridge in the place of an old one. The substitution of a new bridge for an old one without interrupting traffic upon the road, must be done with caution, and by skillful and capable mechanics, but when reasonable care is exercised it is not necessarily attended with any particular danger, and is not considered an intrinsically hazardous undertaking. The evidence showed that the Phœnix Bridge Company did an extensive business in the construction of bridges and was considered careful, reliable and competent. The contract between it and the railway company contained the stipulations and conditions which had been suggested by experience as tending to promote the safety of those exposed to the risks incident to the construction of a bridge under such circumstances. An accident occurred when the bridge was approaching completion. One span was finished, and another had progressed so far that, in the opinion of the bridge company, it was safe to remove all of the false work which had supported the bridge while the work was being done upon it. Under these circumstances a train approached at the stipulated rate of

speed, passed over the completed span in safety, and crushed through the other, killing the fireman. His administrator brought suit against the railroad company and recovered judgment in the lower court. On appeal the court held that the railroad company had carefully guarded, as far as human foresight could do against the dangers incident to the work. If the bridge company had complied strictly with its contract, the accident would not have occurred. It was due to the removal of the false work before a sufficient number of rivets had been put into the new bridge to sustain the train that undertook to pass over it; the railroad company was not responsible for the negligence of the Phœnix Bridge Company; it was responsible only for its own negligence and that of its agents and employees, as the bridge company was an independent contractor. See also, editorial note, 5 Va. Law Reg. 633; Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163.

Death Due to Negligence in Permitting Gas to Escape.—If, owing to a negligent failure properly to maintain gas mains, illuminating gas escapes into an abandoned sewer, and thence, through a private connecting pipe, into a private building, killing the occupant, the negligence in permitting the gas to escape is the proximate cause of the death, unless there was some other superseding or responsible cause intervening between such negligence and the resulting death. To be a superseding cause, whether intelligent or not, it must so entirely supersede the defendant's negligence that it alone, without the defendant's negligence contributing thereto in the slightest degree, produces the injury. To be a responsible cause it must be the culpable act of a human being who is legally responsible for his act. Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482. See post, "Contributory Negligence of Deceased as a Defense," IV, F, 3, b.

(2) Onus Probandi.

See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

The onus probandi is upon the plaintiff. At least a reasonable presumption of negligence must be raised by the plaintiff. But when a passenger is injured, or damage befalls a passenger, due to the breaking down or overturning of a train, or the falling through of a bridge, the breaking of some part of the vehicle or apparatus, as a wheel or axle, or by any other accident occurring on the road, there is a prima facie presumption that it occurred by the negligence of the carrier, and the onus is shifted to the carrier to rebut the presumption thus created. Moreover, it rests upon the defendant to show contributory negligence on the plaintiff's part, where the defendant desires to defend on the grounds that the contributory negligence of the plaintiff was the proximate cause of the injury. Chesapeake, etc., R. Co. *v.* Lee, 84 Va. 642, 5 S. E. 579; Baltimore, etc., R. Co. *v.* McKenzie, 81 Va. 71; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Brewing Co. *v.* Doyle, 102 Va. 402, 46 S. E. 390; Southern R. Co. *v.* Hall, 102 Va. 135, 45 S. E. 867; Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 571; Sheff *v.* Huntington, 16 W. Va. 307.

In an action to recover for a negligent injury the burden of proof is on the plaintiff to establish the negligence of the defendant by affirmative evidence which shows more than a mere probability of a negligent act. The proof need not be direct and positive by an eyewitness, but it must be such as to satisfy reasonable and well balanced minds that it resulted from the negligence of the defendant. If the injury resulted from one or the other of two causes, for only one of which the defendant is responsible, or if it is just

as probable that it was caused by the one as the other, in either event the plaintiff must fail. Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 46 S. E. 390.

Where damages are claimed for injuries inflicted through the alleged negligence of the defendant, the burden of showing negligence by a preponderance of the evidence is on the plaintiff, and if the injury may have resulted from one of two causes, for one of which the defendant is responsible but not for the other, the plaintiff can not recover; neither can he recover if it is just as probable that the damage was caused by the one as by the other. Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. 627.

d. Recovery Based on Breach of Duty to Persons, Other than Employees, by Railroad Companies.

See generally, the title RAILROADS; STREET RAILROADS; TRESPASS.

(1) Trespassers.

General Statement of Principles Involving Reciprocal Rights and Duties.—The negligent killing of helpless trespassers on its tracks by its employees is one of the risks that a railroad company assumes in accepting the donation of its franchises from the public, and in any undertaking to operate a road through an inhabited country. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. Rep. 240. See also, the title CROSSINGS, ante, pp. 122, 128, et seq.

But a railroad company does not owe to a trespasser on its track the duty of foresight but only the duty of ordinary care. Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229. If those running a railroad train discover a trespasser in imminent danger on the track, they must use all reasonable exertions to avoid inflicting injury, or otherwise the company will be responsible; but, if they do not omit any duty after becoming aware of his danger, the company will not be responsible for his injury. Thus, if an apparently capable person, and one apparently in possession of his faculties is seen walking on a railroad track, the servants of the company running the train having given such signal as is required, have the right to act on the presumption that the person will step aside in time to remove himself from danger. Raines *v.* Chesapeake, etc., R. Co., 39 W. Va. 50, 19 S. E. 565; Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174; Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518. See also, Spicer *v.* C. & O. R. Co., 34 W. Va. 514, 12 S. E. 553; R. Co. *v.* Sherman, 30 Gratt. 602; R. Co. *v.* Harman, 83 Va. 554, 8 S. E. 251.

Duty in Paying Heed to Signals of Person on Track.—But in Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773, it is held, that where an engineer, violating a rule of the company that "any object waived violently by any person on the track signifies danger, and is a signal to stop," pays no heed to a person running along the track for eighty yards, and waiving his hat and making every effort to stop the train, and does not apply the brakes till, when within sixty yards of him, and too late to avoid an accident, he discovers a person lying on the track, he will be held negligent and the company liable for the death of the trespasser on the track, killed by the train. It seems that it may not willfully injure him, but the company is not obliged to take precautions to prevent injury until it has such notice or belief of his danger as will put a prudent man on the alert. A recovery may be had for the death of a trespasser killed while sitting on the railroad track though he was guilty of contributory negligence, if those in charge of the train could, after discovering his peril, by proper diligence, have avoided the accident. See post, "Contributory Negligence of Deceased as a Defense," IV, F, 3, b.

Therefore, it is not error to charge, in an action for death of a trespasser on a railroad track, that though he was guilty of contributory negligence, recovery could be had for his death, if, after his peril was dicovered by those in charge of the train the injury "could have been prevented," as, after discovery of the trespasser's peril those in charge of a train are to use the same care to avoid injuring him as in case of one rightfully on the track. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773; Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229.

Duty to Keep Proper Lookout for Trespassers.—If the employees of the company fail to keep a proper lookout consistent with their other duties, for helpless trespassers on the track, whereby such helpless trespasser is negligently killed, such failure is a proximate cause of such negligence and the company will be liable therefor, notwithstanding the prior negligence with which such helpless trespasser may be on the track. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240; Spicer *v.* C. & O. R. Co., 34 W. Va. 514, 12 S. E. 553; Huff *v.* C. & O. R. Co., 48 W. Va. 45, 35 S. E. 866.

Involving the question as to what constitutes negligence in keeping a proper lookout for which there is an ensuing liability when death is the result, the West Virginia reports furnish two cases founded upon almost identical sets of facts, yet the decisions in the two cases appear to be inconsistent, but upon close scrutiny the discrimination as made by the court seems logical, consistent and justifiable.

In Gunn v. Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, two little boys about five and six years of age, were killed by the train on the Ohio River Railroad. They were killed on a little trestle over a small stream while sitting on the guide rail. The engineer could see the track for one-half mile or more, as it was straight. He said that he saw nothing till within forty or fifty feet of the trestle, when he caught glimpses of something between some willows near the trestle (he could not say what), when he sounded the whistle and it moved and he saw that it was children. He said that they were not on the track before to be seen. However, they were on the track when killed and had been on there at least fifteen minutes. The fireman had not looked for one quarter of a mile till he got within forty or fifty feet of the trestle, when he saw them. The engineer might have looked, but failed to see. The court held, that whether the engineer did see the children or not, he could have done so by reasonable diligence, and should have done so, as all of the facts and circumstances showed that there was no obstruction to prevent them from being seen, or any excuse for such failure on the part of the engineer or fireman, and therefore the company was held liable.

In the other case, Couch v. Chesapeake, etc., R. Co., 45 W. Va. 51, 30 S. E. 147, a little child two years old was killed while sitting on the end of a cross-tie. It was impossible to say when the little child got on the cross-tie. It had walked, as shown by its tracks, 180 feet along a ditch, 2 feet deep, and climbed on the embankment of the roadbed, 2 feet high; the dress of the child was brown, about the color of the sand and gravel of the roadbed; the engineer first saw the object when 200 yards from it, and even then thought it was a chicken, when later it turned its head and he saw it was a child,—too late to stop the train, of engine and thirty cars, to save it. Furthermore, the rail made a glare before the train in the bright sunshine and hindered his sight. Upon these facts the court held the company was not liable, as from the evidence it was not found as a fact how long the child had been upon the track, nor could it be

inferred that it was on there long enough where it could be seen to say that the engineer could have seen it. Judge Brannon delivered the opinion in both cases.

In the Couch Case four judges sat, Judge English concurring with Brannon, J., Judge Dent delivering a dissenting opinion which was concurred in by McWhorter, J.

In the Couch Case which was decided last, the Gunn Case was cited as authority by the defense to govern the court. In his opinion Brannon, J., made the following comparison of and discrimination between the cases: "I do not consider the Gunn Case, 42 W. Va. 676, 26 S. E. 546, as controlling this case. In that case it was settled that two children, five and six years old, and more easily seen than this small child, were sitting on a trestle, plain to be seen, at the time they were killed, and had been for 15 minutes before; whereas it is impossible to say when this little child got upon the end of the cross-tie. It had walked, as shown by its tracks, 180 feet along the ditch, 2 feet deep, and climbed up the embankment of the roadbed, 2 feet high; and why may we not say, from these known, fixed facts, that the engineer did not probably see it until within 200 yards of it? In the Gunn Case, whether the engineer did see the children or not, he could have done so, by reasonable diligence, and should have done so, and therefore the company was liable; but in this case no evidence tells us when the child got upon the cross-ties, so as to be seen. Then how can we say that the engineer could have seen it? He likely could not have seen it in the ditch, 2 feet deep; and it might have been in the act of crawling up the roadbed, hidden by the ties, until the train was within 200 yards, so that until then it could not have been seen. Thus, we can not convict the company till we can say either that the engineer did see the child or could have done so.".

Duty to Reduce Speed on Citing Object on Track.—Yet a company is not obliged to reduce the speed of its trains, or stop them when an object is seen on the track at a point where it has the exclusive right of way, which it has no reason to believe is, but which by possibility may be, a human being in peril, in order to ascertain what it is. Thus, as held in Teel *v.* O. River R. Co., 49 W. Va. 85, 38 S. E. 518, a railroad engineer who discovers trespassers on right of way of his train is not bound to stop his train unless he is aware that such trespasser is in such a helpless condition that he can not protect himself by avoiding the train, but the engineer's duty towards such trespasser is to give the alarm signal necessary to warn a person of sound mind and of a good hearing in time to allow such person to vacate the right of way. See also, Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229.

And though the object be between the rails, and the engineer of the train observe it in ample time to reduce the speed of the train or stop it, and neither blows the whistle, rings the bell nor slackens the speed of the train until too late to avoid a collision and such collision occurs resulting in the death of the human being, the company is not liable if the engineer and those in charge of the train have no reason to believe, and do not in fact, believe that the object is animate until within a very short distance of it, and then used all the means within their power to avoid such collision, without avail. Thus, in Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698, the deceased at the time of his death was seen on the end of the cross-tie some forty or fifty yards north of the point where he was killed. When seen by the engineer in charge of the train that killed him, he was lying on the railroad in a shallow cut, about twenty-five feet from its mouth, between the cross-ties, with his head on or against

the rail and his feet towards the east rail, and was apparently asleep when the train emerged from the cut. The engineer saw an object on the track but thought it was a shadow or bush cut from the right of way; he gave the usual station blow for the next station near at hand, and blew for the crossing just below, but neither rang the bell, blew the whistle, nor abated the rate of speed at which he was running when he first discovered the object on the track. When nearly to the object he discovered that it was a boy, and did all in his power to stop the train and save his life, but without avail. The company was held not liable. See also, Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229; Teel *v.* O. River R. Co., 49 W. Va. 85, 38 S. E. 518.

Duty of Trespasser to Keep a Lookout.—But if a trespasser is not helpless the duty of keeping a lookout devolves upon him as well as the trainmen, and, if an accident happens by reason of their mutual negligence no recovery can be had. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240; Spicer *v.* Chesapeake, etc., R. Co., 34 W. Va. 514, 12 S. E. 553; Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866.

A person using the railroad as a footpath for his own convenience, elsewhere than at a lawful crossing, and injured by a train while so doing, can not recover damages of the railroad company, unless it be guilty of wanton and gross negligence. Huff *v.* Chesapeake, etc., R. Co., 48 W. Va. 45, 35 S. E. 866; Spicer *v.* Railroad Co., 34 W. Va. 514, 12 S. E. 553; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602.

In Tyler, Receiver *v.* Kelly, 89 Va. 282, 15 S. E. 509, the plaintiff's intestate was subject to epileptic fits, and attempted to cross the railroad at a point beyond a street crossing, where there was a ditch four feet deep, and where crossing was forbidden. In so doing he was seized with a fit and fell on the track and was killed by a freight train backing slowly with the bell ringing. It was held that the deceased was guilty of contributory negligence, and was also a trespasser, and there could be no recovery.

(2) Licensees.

Statement and Application of Principles.—There is a wide difference between the obligation which one owes to a mere licensee and the duty which the same corporation owes to one who comes upon its premises by an invitation either express or implied. In the case of mere licensees, it is generally admitted that the party comes at his own risk and enjoys the license subject to its concomitant risks or perils and that in such case no duty is imposed upon the owner or occupant to keep his premises in safe and suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee. On the other hand the law imposes an obligation on the owner or occupant to provide for the security against accident and injury, of those he has invited or induced to come upon his premises, by such adaptation and preparation of his place for their reception and use as would naturally lead them to suppose that they might properly and safely enter thereon. Accordingly, it has been generally held, that where the owner or occupant, either directly or by implication, induces persons to enter thereon and pass over his premises, he thereby assumes an obligation that they are in safe condition, suitable for such use, and for a breach of this obligation he is liable to damages to a person injured thereby; consequently if death be the result his personal representative could recover under Va. Code, §§ 2902-2906. Thus, in Nichols *v.* W. O. & W. R. Co., 83 Va. 99, 5 S. E. 171, it was the invariable custom of the agent at the depot to part freight cars immediately after they were left or placed on the switch, at a

point nearly opposite the depot, for the purpose of affording a passage to the patrons and employees of the road, and it specially appeared that it had been done in this instance, when the accident occurred, although it would seem that, from lack of assistance, the opening left was scarcely as wide as usual. At no time was anything said or done by the defendant's agents or employees to convey to the public the idea that they should not cross the track at these openings. On the morning of the accident there was standing on the switch two or more cars west of the road, and five cars east of the road. These five cars had been parted on the preceding day by the company's agent a distance of eighteen inches or more about midway the path and the steps at the southeast corner of the platform of the passenger depot for the express purpose of allowing people to pass over the track. This was the condition of the cars when the intestate was killed while in the act of passing over the track, being caught between the cars, and killed by the sudden and rapid backing of the engine which drove the cars together. Under such circumstances there was nothing to indicate to the deceased that the cars were about to be moved, and he had the right to suppose that he could effect his passage in safety. Consequently his personal representative was entitled to recover damages for his death. See also, Va. Midland R. R. Co. *v.* White, 84 Va. 498, 5 S. E. 573. And see the title CROSSINGS, ante, pp. 122, 129, et seq.

And the fact that pedestrians are accustomed to travel on a railroad at a particular place, makes it the duty of such railroad company to exercise greater caution and prudence in the operation of its road at that place. Thus, if it permit a train of its cars to be moved at a particular place where pedestrians are accustomed to travel, without having some of its servants in position to give warning of its approach, and to control its movements, these facts are of themselves acts of negligence. Nuzum *v.* Pittsburgh, etc., R. Co., 30 W. Va. 228, 4 S. E. 242.

But if the pedestrians knew of obstructions to view in the direction from which the train approached, but neither looked nor listened, and paid no attention to exclamations of others which he would have heard had he not been engrossed in other matters, he would under the circumstances be guilty of such contributory negligence as to preclude a recovery against the railroad company for his death. Southern R. Co. *v.* Bruce, 97 Va. 92, 33 S. E. 548. See post, "Passengers," IV, D, 2, d, (3), (c). And see the title CARRIERS, vol. 2, p. 671.

(3) Travelers at Crossings.

(a) At Public Highway.

Mutual Rights and Duties.—See the title CROSSINGS, ante, pp. 122, 127, et seq.

Duty of Railroad Companies at Crossings.—See the title CROSSINGS, ante, pp. 122, 127, et seq.

Care Exercisable by Traveler.—See the title CROSSINGS, ante, pp 123, 135, et seq.

Failure to Look.—In New York, Philadelphia, etc., R. Co. *v.* Kellam, 83 Va. 851, 3 S. E. 703, an intestate in his carriage, with top up, approached defendant's railroad crossing, slowing his horse to a walk when near it. At that point the track was straight. At twenty-five yards from it, and up to it, he had a view of it for a mile, and until the horse was on the track he did not look out for the train. Then he attempted to hurry his horse across in front of the train, but failed and was killed. The testimony as to the whistle was conflicting. The intestate was guilty of contributory negligence. And an instruction to that effect was not improper.

Crossing the Track Having the Ears Muffled.—And in Norfolk, etc., R. Co. *v.* Stone, 88 Va. 310, 13 S. E. 432, a boy

thirteen years old,—acquainted with the railroad crossing at which, by reason of a deep cut the train was not visible until one was on the track,—though just informed at the post office that the train was late and might reach the crossing about when he did, yet drove upon the crossing with his ears wrapped up with a comfort on account of the cold. This was such contributory negligence as to bar a recovery of damages for his death, though the train was running more rapidly than usual and no signal was given of its approach.

View Obstructed.—But in Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7, the plaintiff's intestate, while driving on a dark night, approached a railway where the highway crossed it obliquely, and where the view was obstructed by the woods, until within thirty feet of the track. The horse had been driven some forty miles, and was moving slowly along the highway while intestate was looking out for the crossing and listening for trains. Upon these facts it was held, that the intestate was not guilty of contributory negligence as a matter of law.

Collision between Engine and Bicycle.—In the case of a collision at a crossing between an engine and a bicycle resulting in death of the rider of the latter, the question of his contributory negligence is for the jury, though it appears that he was riding about as fast as an ordinary horse trots, and that he did not stop as he approached the crossing; no one having testified whether he did or did not look or listen, the approach along the highway for a distance of 300 feet from the crossing being through a cut with sides from 10 to 15 feet high, so that one had to be within 25 feet of the crossing to see an engine 21 feet from the crossing, no notice having been given of the approaching engine, though an electric gong was fixed on the track to ring while the train was within 300 yards of the crossing, and persons who were within a few feet of the crossing having testified that they did not hear the engine until it struck the deceased. Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901.

(b) At Intersecting Streets.

In General.—The people of a city and vehicles have the same right to pass along an intersecting street as a car has to go across it. The car has a right to cross, and must cross the street; and vehicles and foot passengers have a right to cross, and must cross the track. Neither has a superior right to the other. The right of each must be exercised with due regard to the other; and the right of each must be exercised in a reasonable and careful manner, so as not to unreasonably abridge or interfere with the right of the other. Richmond, etc., Elec. Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267; Bass *v.* Norfolk, etc., R. Co., 100 Va. 1, 40 S. E. 100, 7 Va. L. Reg. 636.

Negligence of the Company in Backing upon Crossing over Frequented Streets.—Where a train is backed from a crossing or frequented street, the company must keep a lookout on the leading car. But a traveler approaching the crossing must vigilantly use his eyes and ears and look in every direction and make sure the crossing is safe. Failure to do so is contributory negligence, except where a view of the track is obstructed, or where the party injured is a passenger going to or from the train, or where the direct act of the company's agent induced the traveler to cross without precaution; or where the company, after discovering his negligence, fails to use due care to avert its consequences. Thus, in Marks *v.* Petersburg R. Co., 88 Va. 1, 13 S. E. 299, the plaintiff's intestate, a one-eyed woman, fifty-three years old, had reached within four feet of the railroad track at a crossing over a frequented street and stepped on the walk-way to wait until the freight train had passed. It passed her but

stopped before its rear car had gotten half-way across the street which was less than sixty feet wide. A brakeman at the switch fifteen feet distant signalled the engineer with voice and hand to back. The train moved slowly back having no outlook on the leading car. In the meantime the woman remained on the walk-way between the brakeman and train in unobstructed view of both, and when the train had reached within two or three steps of her, she started across the track, was run over and killed. The court held that the company was guilty of negligence but that the intestate's own negligence was the proximate cause of the injury and therefore the plaintiff could not recover.

Standing Near Track, Not Heeding the Bell or Whistle.—In Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386, it appeared that the deceased, on the night of the accident left a restaurant within ten feet of the track and went to a point on or near the track, and stood there, talking, when struck by the train; that the night was dark but the locality was well lighted; that the track was straight, with nothing to obstruct its view; that the train being backed up at a speed not more than five miles an hour, and the engine bell was and had been ringing when he was struck and injured. These facts were held to show such contributory negligence as to bar recovery, even though defendant was guilty of negligence in the management of its train and in failure to guard the crossing as required by a city ordinance.

(c) Passengers.

Statement of Principles Involving Duties.—The general duty of a common carrier, whether it be a railroad or other person, corporation or company, doing business as a common carrier, towards passengers is variously stated. The common mode of stating it is that, a common carrier owes to its passengers to protect them from injury and provide for their safety "as far as human foresight and care will go." In Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, a father went to a station on the defendant's road accompanied by his wife and children. He purchased of the depot agent two whole tickets and two half tickets for himself and family. Of the five children, two were under five years of age; the other three were over that age, but under twelve. The father with his wife and children approached the train, and by a violent and sudden jerk the train started backwards, the steps of the caboose striking the deceased, who was standing on the end of the ties, and throwing him under the wheels of the train, inflicting injuries from which he died the same day. The jury found that the child was not guilty of negligence; that the parents' negligence could not be imputed to the child. The defense urged among other points that the father of the child at the time of the accident, was endeavoring to take it on the train without paying fare, and that the liability of the company could not be determined by the law relating to carriers of passengers. This point was not sustained. The purchase of a ticket, before entering a railroad train, is not necessary to constitute a person a passenger, nor is there any evidence in the case tending to show that the father was attempting to defraud the company, or was not acting in good faith. The deceased was found to be a passenger, and as such was entitled to the utmost degree of diligence and care on the part of the company in looking out for his safety. This duty not having been performed by the company and there being no negligence on the part of the deceased, the personal representative was entitled to recover damages for his wrongful death due to the negligence of the company.

And in Richmond R., etc., Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267, it was held, that the people of a city have the same right to pass along an

intersecting street, on foot or in vehicles, as a street car has to go across; and it is gross negligence in a street railway company to so overcrowd and load down its cars with passengers, beyond any reasonable or proper limit, as not to be able to stop them readily as they approach intersecting streets, if necessity requires it. And if, from such crowding and consequent inability to stop, a collision occurs, resulting in injury to a passenger, the company is liable for such injury. See Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; S. V. R. R. Co. *v.* Moose, 83 Va. 827, 3 S. E. 796; Farish *v.* Reigle, 11 Gratt. 697; Baltimore, etc., R. R. Co. *v.* Wightman, 29 Gratt. 431; Norfolk, etc., R. R. Co. *v.* Ferguson, 79 Va. 241; Chesapeake, etc., R. Co. *v.* Clowes, 93 Va. 189, 24 S. E. 832; Va. Central R. R. Co. *v.* Sanger, 15 Gratt. 230; Carrico *v.* W. Va. Central, etc., R. Co., 39 W. Va. 86, 19 S. E. 571; Alexandria, etc., R. Co. *v.* Herndon, 87 Va. 193, 12 S. E. 289; Richmond City R. Co. *v.* Scott, 86 Va. 902, 11 S. E. 404.

For exceptions to the general rule made by law, contract or the peculiar circumstances of the case, and the effect of a passenger's contributory negligence in barring a recovery, see the titles CARRIERS, vol. 2, p. 671; NEGLIGENCE.

E. DECLARATION.

See generally, the titles PARTIES; PLEADING.

1. Parties.

The right of action for injuries resulting in death is wholly a statutory right, and as a rule, such action must be brought in the name of the person or persons to whom the right is given by the statutes of the state where the injury occurs. In both Virginia and West Virginia it is expressly provided that the action shall be brought by and in the name of the personal representative of the deceased person. Va. Code, 1887, § 2903; W. Va. Code, 1899, ch. 103, § 6. And under the Virginia statute, in an action by the administrator for the homicide of the intestate, the real beneficiaries need not be made parties and named in the declaration. Harper *v.* Norfolk, etc., R. Co., 36 Fed. Rep. 102.

2. Sufficiency.

It is requisite that the circumstances constituting the neglect of duty, default or negligence on the part of the defendant shall be stated with sufficient fullness to enable the defendant to learn from the declaration the ground on which the plaintiff intends to proceed. Jones *v.* O. D. C. M., 82 Va. 148.

Thus, a declaration alleging that defendant's train, starting from a station, negligently ran over deceased, sitting on the track, he being in plain view of those in charge of the engine from the time they left the station, is not demurrable on the grounds of insufficiency of the charge. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475.

And, a declaration for negligent killing which charges, in effect, that the deceased, while on the track of the defendant, was carelessly and negligently pushing against, and struck by, a locomotive engine and cars belonging to the defendant, and in the control, custody and management of its employees, and thereby received injuries from which he died, is sufficient. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240. See Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251; Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602.

So, a declaration which substantially avers that it was the duty of a railroad company to have and maintain safe, sound, and suitable brakes for the cars on which the intestate was assigned to duty; that the company was guilty of negligence in suffering the brakes to the cars on which the intestate was

employed at the time of his death to become so worn and broken as to be incapable of stopping the train as quickly as otherwise it would have done, and that the intestate's death resulted directly from this negligence on the part of the defendant company, is sufficient in law. Beard *v.* Chesapeake, etc., R. Co., 90 Va. 351, 18 S. E. 559. The facts in the case of Clark *v.* Richmond, etc., R. Co., 78 Va. 709, is compared with and distinguished from Beard *v.* Chesapeake, etc., R. Co., 90 Va. 351, 18 S. E. 559, and the court decided that the facts were dissimilar in the two cases except that in both cases the death was caused by collision with an overhead bridge.

Where an engineer with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman, and by his mismanagement a brakeman is killed, the declaration is sufficient if it details the facts of such killing, and alleges that at the time thereof the engine was under the management of such fireman, and notifies the company that it will have to defend for failure to keep a competent engineer. Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884.

3. Allegations.

a. In General.

Nothing will be presumed after verdict but what must have been necessarily proved from the matter stated in the declaration, and therefore, the total want of an averment of a fact, which constitutes the gist of the action, will not be cured after verdict by the act of jeofails. Chichester *v.* Vass, 1 Call 83; Smith *v.* Walker, 1 Wash. 135.

b. Averment of Incorporation.

In an action against a railroad company, it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will ex officio take notice of the fact. Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602.

c. Averring for Whose Benefit Suit Prosecuted.

In an action under the Virginia Code of 1887, §§ 2902-6, to recover for a death by wrongful or negligent act, it is not necessary to aver in the declaration for whose benefit the suit was prosecuted. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394; Matthews *v.* Warner, 29 Gratt. 570. Construing this section in Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, the court assigned among others, the following reasons for this conclusion: Under the Virginia statute the damages are given first to the husband or wife, parent or child, but if neither of these is alive, the action then may be maintained, and the damages will be assets to be disposed of according to law. As the damages are not for the exclusive benefit of the family of the deceased it would seem not to be essential that the declaration shall allege that there is a family or that the action is prosecuted for their benefit. It is very true, that the fact that the deceased left a widow and children dependent upon him for support, will, as a general rule, very materially affect the amount of recovery. There is, however, no rule of law which compels a party to state in his declaration every matter which may enhance the damages. If the declaration ought to state that the deceased left a family for whose benefit the suit was prosecuted, it should go further and state the condition and circumstances of the individual members of the family. And if there is no family, it should state whether there are other relatives of the deceased, their circumstances and conditions; also the number and claims of creditors, the age, the mental and physical powers and capacity of the deceased, his avocation and value to his family. All these bear directly upon the question

of damages, and all may be the subject of investigation by the jury. Can any good reason be given for not stating them in the declaration, if it be necessary to apprise the defendant of any matter which may materially affect the amount of recovery. But the statute was designed, however, to give to the personal representative a right of action wherever the deceased would have had it had he lived. The declaration must, therefore, always state such facts as will show a good cause of action on the part of the deceased himself. And this would seem to be the only test prescribed by statute. The defendant knows that the damages are primarily for the benefit of the family, for so the law declares, and he can very rarely be surprised by the evidence on this point. The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. If it were required to be made merely because it has a natural bearing upon the question of damages, it would be difficult to assign a limit to allegations of that character. The object of the court is to promote the object of the statute, and by simplifying all the proceedings and pleadings this object is more surely accomplished.

See also, Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102, in which it is held, that where the administrator and defendant are citizens of different states the beneficiaries need not be named in the declaration.

But in West Virginia, in the case of Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376, it was held, to be necessary to aver in the declaration that the deceased had a widow or next of kin and to designate them by name, and to aver that the damages claimed were for the aid of and sustained by such widow or next of kin. This decision, however, seems to have depended on the peculiar wording of the statute as it was originally adopted, and as it stood when the case cited arose. The statute as it then read, expressly provided that the amount recovered should be for the "exclusive benefit of the widow and next of kin of such deceased," etc. In rendering the opinion, the court dwelt upon and called special attention to the named beneficiaries, and said that it was manifest that the widow and next of kin constitute the very pith and essence of the action, and if there were none, no such action would lie.

The statute has been amended, acts, 1882, ch. 105, and now provides that the amount recovered shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. See W. Va. Code, 1899, ch. 103, § 6. This amendment produced a material change, and under the terms of the statute as now in force, it is not necessary that the declaration should aver who the beneficiaries or recipients of the amount to be recovered will be. Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, citing Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431. See Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248; Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578; Couch *v.* Chesapeake, etc., R. Co., 45 W. Va. 55, 30 S. E. 147; Mahany *v.* Kephart, 15 W. Va. 622.

d. Alleging Absence of Contributory Negligence.

It is not necessary for the plaintiff to allege in his declaration or to prove the existence of due care and caution on his part to entitle him to recover. This comes as a matter of defense, to be proved by the defendant at the trial, unless the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances, or appears upon the face of the declaration. Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 514; Norfolk, etc., R. Co. *v.* Gilman, 88 Va. 239, 13 S. E. 475. See

Dun *v.* Seaboard, etc., R. Co., 78 Va. 645.

That Deceased Left a Family.—The statute expressly provides that the damages assessed by the jury, shall be distributed among the beneficiaries in such proportion as they, the jury, shall direct. But if they have for any reason failed to make a direction, then the damages awarded shall go according to the statute of distributions. Va. Code, 1887, § 2904. And as the damages are not for the exclusive benefit of the family of the deceased it is not essential that the declaration shall allege that the deceased left a family. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

4 Surplusage.

In an action under W. Va. Code, 1887, ch. 103, to recover damages for causing the death of a party, the declaration is not demurrable simply because it names the widow and children of the decedent, and avers that the damages claimed by the plaintiff accrued to them, as such parts of the declaration will be treated as surplusage. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

F. DEFENSES.

1. In General.

The defenses to actions resulting in death are largely the same as in actions for personal injuries Regarding these defenses, see the titles DAMAGES, ante, p. 162; FELLOW SERVANTS; MASTER AND SERVANT; NEGLIGENCE.

2. Action Barred by Lapse of Statutory Period.

See the title LIMITATION OF ACTIONS.

A time limit within which the right of action must be enforced by the personal representative is prescribed by the statutes of Virginia and West Virginia which create the right. The general rule is, that where a new statutory right is given which was unknown at common law, and in the same statute a period of limitation is prescribed within which the right must be enforced, then the limitation is regarded as affecting the right as well as the remedy. When the limit prescribed expires the right to institute an action is at the same time extinguished. Such limitation "is an essential restraining element of the right of action given." In Virginia the limit to the action is one year after the death of the injured person; the West Virginia statute extends the period to two years after such death. Va. Code, 1887, § 2903; W. Va. Code, 1899, ch. 103, § 6; Lambert *v.* Ensign Mfg., Co., 42 W. Va. 813, 26 S. E. 431. See also, Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

When Availed of by Demurrer.—And while the general rule, which is well settled, is, that the statute of limitations must be specially pleaded, and can not be set up under the general issue or by demurrer, yet, by way of exception, when the right and not merely the remedy is affected by the expiration of the prescribed period, as in the action for death by wrongful act, the limitation may be availed of by demurrer if it appear upon the face of the declaration. Stilwell *v.* Leavy (Ky.), 1 S. W. 590; Rucker *v.* Dailey (Tex.), 1 S. W. 316; Cameron *v.* City of San Francisco (Cal.), 9 Pac. 430; Jean *v.* Hennessy (Iowa), 28 N. W. 645; Paine *v.* Comstock (Wis.), 14 N. W. 910; Township of Clay *v.* District, etc., (Iowa), 28 N. W. 449; Funk *v.* Davis (Ind.), 2 N. E. 739; Walker *v.* Fleming (Kan.), 14 Pac. 470; Heffernan *v.* Howell (Mo.), 2 S. W. 470; Bank *v.* Winslow, 30 Fed. 488.

3. Wrongful Act or Neglect.

a. In General.

In Part Due to Misconduct of Deceased.—Where the facts showed that the deceased was shot and killed by the defendant under circumstances which, if not such as the law declared to be murder in the second degree, or,

at the very least, voluntary manslaughter, yet constituted a wrongful act on the part of the defendant, it was held, that although the wrongful act of the defendant caused the death, yet it was no defense that the death was the result of the misconduct on the part of the deceased. Matthews *v.* Warner, 29 Gratt. 570.

Failure of Injured Person to Keep Proper Lookout.—A person, sound of body and mind, who deliberately sits down on the right of way of a train and goes to sleep, or becomes so mentally absorbed as not to keep a proper lookout for such train, is guilty of gross negligence; and if he thereby fails to hear the alarm given by the approaching train, and his death follows, the railroad company can not be held liable therefor. Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518. See the title NEGLIGENCE.

Where Party Injured Could Have Averted the Accident.—An employee can not recover from his employer for injuries received by reason of an accident which could have been averted by the employee's proper and prudent discharge of his duties; nor can his personal representative, in such case, if death ensue, maintain an action for damages by reason thereof. Seldombridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293.

Choosing the Dangerous Method of Doing Work.—Where a brakeman who knew that couplings were mismatched, placed a pin in a moving car, and remained between the two cars to shake the pin into position, when he might safely have made the coupling by placing the pin in the standing car, and letting it be shaken into position by the concussion, it was held, that he was guilty of negligence. Norfolk, etc., R. Co. *v.* McDonald, 88 Va. 352, 13 S. E. 706.

b. Contributory Negligence of Deceased as a Defense.

See the titles MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

In General.—Contributory negligence consists in such acts or omissions of the plaintiff, amounting to want of ordinary care, as co-operating with negligent acts of the defendant, are the proximate cause of the injury. Richmond, etc., R. Co. *v.* Pickleseimer, 85 Va. 798, 10 S. E. 44.

And the rule may be stated generally that compensation can not be recovered for an injury done by the defendant's negligence, where the party injured by his own ordinary negligence, contributed to cause the injury, so that but for such contribution the injury would not have happened, except when the direct cause of the injury is the defendant's omission, after becoming aware of the plaintiff's negligence, to use proper care to prevent the consequences of such negligence. Rudd *v.* Richmond, etc., R. Co., 80 Va. 546; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Richmond, etc., R. Co. *v.* Tribble, 97 Va. 495, 24 S. E. 278; Baltimore, etc., R. Co. *v.* Whittington, 30 Gratt. 805; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229; Va. Midland R. Co. *v.* Boswell, 82 Va. 932, 7 S. E. 383; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Humphreys *v.* Newport News, etc., Co., 33 W. Va. 135, 10 S. E. 39; Fisher *v.* West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578; Beall *v.* Pittsburg, etc., R. Co., 38 W. Va. 525, 18 S. E. 729.

Injury Occurring While on Track.—In Farley *v.* Richmond, etc., R. Co., 81 Va. 783, the plaintiff's intestate was discovered on defendant's railroad track, at a distance of 150 yards, by the engineer of a freight train, which was running at an allowable speed of thirty-five miles an hour and the engineer did all that was possible to be done to stop the train but was unable to stop it in time to prevent collision with the intestate, who was thereby

knocked off the track and killed. Upon these and other facts appearing at the trial it was held that the plaintiff, upon his own showing was guilty of contributory negligence, therefore was not entitled to recover compensation had he survived his injuries, consequently the personal representative could not maintain an action after his death to recover damages against the defendant.

Fireman Struck by Bridge.—In Sheeler *v.* Chesapeake, etc., R. Co., 81 Va. 188, the facts were that on defendant's railroad there was a bridge with sides five feet high. The top was one foot higher than the cab floor, and within thirteen and one-half inches of passing engines, making it unsafe for one to be on the outside of an engine while passing the bridge. The bridge was properly built with respect to safety of persons on passing engines, and projected no nearer passing engines than other bridges on that and other roads. Sheeler, a fireman on the train, well knew this bridge, having passed over it on engines daily for months. Whilst the engine was running at the rate of eighteen miles an hour Sheeler without orders and in violation of the rules, opened the ash pan by means whereof fire fell out and set ablazing some greased woolen ravellings on box of a driving-wheel of engine. The fire could not be extinguished without stopping the train, and it was sufficient to extinguish it at the next stopping place. But without orders, and unnecessarily he got down on the side of the engine and tender, with his right foot on the step of the engine and left on step of the tender, clasping with his right hand the hand-holder on engine and holding in his left hand a small hose attached to a spigot on tender, swung body out and forward in a stooping posture, and with his left arm resting under the side of the engine was attempting to extinguish the blaze, when he was struck by the upright side of the bridge and was killed. Upon these facts the court held that Sheeler and not the defendant company was guilty of negligence, but for which the injury would not have occurred, and hence he was not entitled to recover, therefore his personal representative could not do so. See Clark *v.* Richmond, etc., R. Co., 78 Va. 709; Richmond, etc., R. Co. *v.* Tribble, 97 Va. 495, 24 S. E. 278; Teel *v* O. River R. Co., 49 W. Va. 85, 38 S. E. 518; Tucker *v.* Norfolk, etc., R. Co., 92 Va. 549, 24 S. E. 229; Va. Midland R. Co. *v.* Boswell, 82 Va. 932, 7 S. E. 383; Rudd *v.* Railway Co., 80 Va. 546; Nash *v.* Richmond, etc., R. Co., 82 Va. 55.

Violation of Rules.—One of the rules of a railroad company read as follows: "They (the brakemen) are charged with the management of the brakes, and the proper display and use of the signals. They must examine and know for themselves that the brakes, ladders, running boards, steps, etc., which they are to use, are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using." In a given case it was held, that if a brakeman, knowing of this rule, also knowing that the nut on the top of the standard of the brake, used to hold the brake wheel on, was off, but without putting it in proper condition himself, or reporting it to the proper parties, used it unnecessarily to check the speed of the train, by which use the brake wheel came off, throwing him on to the track, whereby he was injured, such brakeman was guilty of contributory negligence, at least; and in such case no recovery could be had against the railroad company. Beall *v.* Pittsburg, etc., R. Co., 38 W. Va. 525, 18 S. E. 729.

Disobedience of Orders.—In a given case it was shown that the "frog" used by the defendant company was dangerous, and could have been made safe by blocking; that it was a standard frog, the same used everywhere by the company. The plaintiff's intestate

had been for some time employed in the same yard, over the same frog, and was familiar with its character. On the night of the accident the yard master ordered him to uncouple the cars, which were standing still, and then ride them back on the switch, but, instead of obeying orders he signalled the engineer to back, and stepping between the moving cars to uncouple them, got his foot caught in the frog and was killed. Held, that the employee's disobedience of orders was contributory negligence and the proximate cause of the injury, and his administrator could not recover. Richmond, etc., R. Co. *v.* Risdon, 87 Va. 335, 12 S. E. 786.

Jumping to Escape Injury.—But where a collision is caused by the negligence of the conductor in failing to notice the signals displayed at a station, or by the negligence of the operator at the station in displaying improper signals, and by reason thereof a car collides with another standing on the track, where it had a right to be, with forty or fifty of the railroad section hands on board, and one of them jumps from the car to the ground to avoid the effects of the collision, and in so doing receives an injury which results in his death, he can not be considered as being guilty of contributory negligence, and the company is liable for the damage thus sustained. Haney *v.* Pittsburg, etc., R. Co., 38 W. Va. 570, 18 S. E. 748.

Must Be the Proximate Cause.—Where the contributory negligence of the plaintiff is relied upon as a defense, such contributory negligence must be the proximate cause of the injury, or it will be no defense. Nash *v.* Richmond, etc., Co., 82 Va. 55. See the title NEGLIGENCE.

In order to debar a plaintiff from recovery of damages for an injury from negligence it must be shown that his negligence was the proximate cause of the injury. When both parties are chargeable with negligence, the plaintiff can not recover if his negligence contributed in any degree to his injury; but, if it did not contribute to it in any degree, he may recover, his negligence not then being contributory, because not the proximate cause of the injury, but only remote from it, or collateral to it; and the defendant's negligence is in such case the proximate cause of the injury. Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571.

If the direct cause is defendant's omission, after knowing plaintiff's negligence, to use proper care to prevent its consequences, a recovery may be had. Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Virginia, etc., R. Co. *v.* Barksdale, 82 Va. 330; Virginia, etc., R. Co. *v.* White, 84 Va. 498, 5 S. E. 573; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21; Rudd *v.* Richmond, etc., R. Co., 80 Va. 546; Matthews *v.* Warner, 29 Gratt. 570; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570; Washington *v.* Baltimore, etc., R. Co., 17 W. Va. 190.

Though the negligence of the plaintiff be in character contributory, yet, if his injury would have occurred from the defendant's negligence just the same if the plaintiff had been in no wise negligent, the plaintiff is not prevented by his negligence from recovery. Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571.

Although the deceased may have been guilty of negligence, and that negligence may in fact have contributed to the injury, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have prevented the injury, the action may be maintained. Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238.

Although a person injured be chargeable with negligence contributing to the injury, yet if the defendant know of the danger to such person arising from his negligence, and can by ordinary

care avoid the injury, but does not, he is liable for his negligence, nothwithstanding the negligence of the other. Carrico *v.* West Virginia, etc., R. Co., 39 W. Va. 86, 19 S. E. 571; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Question of Fact for Jury.—Contributory negligence is a question for the jury. Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482. See the title QUESTIONS OF LAW AND FACT.

Although deceased, who was asphyxiated by illuminating gas, may have known that gas had been escaping in other parts of the house than the room occupied by her, and that such gas was dangerous to human life, yet if efforts had been made to remedy the trouble, and there is evidence tending to show that no gas had escaped in the room occupied by her, and that on the night of the asphyxiation no gas was escaping as late as midnight, the question whether or not she was guilty of contributory negligence in occupying her room on that night, or in not taking other precautions for her safety, is one for the jury. Her failure to do so was not contributory negligence as a matter of law. Richmond *v.* Gay, 103 Va. 320, 49 S. E. 482.

c. Imputed Negligence.

Where by a railroad's negligence a child of tender age and non sui juris is injured, the contributory negligence of its parents is not imputable to the child, whether the action for damages is brought by the child itself or by its personal representative; and the company is liable. Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454; Railroad Co. *v.* Ormsby, 27 Gratt. 455; Trumbo *v.* City St. Car Co., 89 Va. 780, 17 S. E. 124.

In an action for the benefit of a father to recover damages for the death of his infant child occasioned by the wrongful act of another, there can be no recovery where it appears that the negligence of the father, or of the custodian of the infant to whom the father entrusted it, proximately contributed to the result. The doctrine of imputed negligence has no application to such a case. Richmond, etc., R. Co. *v.* Martin, 102 Va. 201, 45 S. E. 894.

In West Virginia it is held, that if the child is alive, and sues for damages, the negligence of the father is not imputable to it; but where it is dead, and the father is the sole beneficiary, his negligence prevents recovery. Gunn *v.* Railroad Co., 42 W. Va. 676, 26 S. E. 546; Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240; Richmond, etc., R. Co. *v.* Martin, 102 Va. 201, 45 S. E. 894.

d. Concurrent Negligence.

Where by the concurrent negligence of a carrier and third person, a passenger is injured, the negligence of the former can not be attributed to the passenger so as to prevent him from recovering damages of the third person. New York, etc., R. Co. *v.* Cooper, 85 Va. 939, 9 S. E. 321. And where the negligence or carelessness of a passenger concurs with that of the carrier, causing injury to the passenger, the carrier is not liable by default. Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

4. Accident Causing Injury Was a Risk Incident to Employment.

See the titles FELLOW SERVANTS; MASTER AND SERVANT.

5. Act of God.

The universal rule is that a member of society is responsible only for his own wrong, negligence or omissions which cause injury to others. But where peculiar relations have been created by contract, or imposed by law, causing special duties and obligations, this rule is altered and varied according to the existing relation, increasing in many instances the degree of care to be exercised. However, whether the duties are the ordinary ones imposed on all members of society, as such, in equal degree, or those arising by reason of

the existence of peculiar relations, the general rule is, that a person or corporation is excused from all liability for injuries resulting from accidents due to the act of God,—this being an absolute defense when established. Thus, where by the bursting of a water spout water accumulated at a fill in a railroad track in larger quantities than could be carried off by the stone culvert built there thirty-five years before, and which had always been regarded as safe, causing a washout and break in the track, into which, during a dark and stormy night, the engine and some of the cars of a passenger train precipitated, without any negligence on the part of the carrier, and thereby a passenger came to his death, the carrier was held not liable for the injury. Norfolk, etc., R. Co. *v.* Marshall, 90 Va. 836, 20 S. E. 823.

In an action against railroad company for alleged negligent killing of plaintiff's intestate, an engineman in discharge of his duty, it was proved that the defendant exercised not only ordinary but extraordinary care to maintain a safe roadbed at the place of accident, the place having been twice inspected that morning, and found safe, but a sudden fall of rain softened the already saturated earth, and the engine sank, turned over, and killed the intestate. Held, that defendant was not liable, as the sudden rain, rendering the roadbed unsafe, was an unavoidable occurrence. Binns *v.* Richmond, etc., R. Co., 88 Va. 891, 14 S. E. 701.

This ground of defense arises more frequently where the relation of carrier and passenger, master and servant exists, therefore, for fuller discussion of the instances of its application, extent and effect, reference is made to the titles CARRIERS, vol. 2, p. 671; FELLOW SERVANTS; MASTER AND SERVANT.

6. Accident Causing Injury Due to Act of Fellow Servant.

See the title FELLOW SERVANTS.

7. Suicide.

Where a collision occurs between two railroad trains, and a person is so injured thereby that he subsequently becomes deranged and commits suicide, the proximate cause of his death will be held to be his own act, and an action can not be maintained against the compay for negligently causing his death. Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 1070 (arose under Va. Statutes, §§ 2902-6). See the title SUICIDE.

8. Action Barred by Previous Recovery.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

A recovery in Virginia will be a complete bar to another action, here or elsewhere, for the same wrong. This principle was laid down in Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838, where the plaintiff's intestate was killed in West Virginia by the alleged negligent acts of the defendant. The plaintiff, who was the administrator of the deceased, was appointed in Virginia, and the suit was, also, instituted in a Virginia court. In arguendo, the court said: "The plaintiff in this action is the dulty-appointed administrator of the deceased, and is, therefore, entitled to sue, for the statute of West Virginia does not say that suit shall be brought only by a personal representative appointed there. And as the rights of the parties are determined by the statute of that state, a recovery in this action would be to the same uses as would be a recovery in West Virginia. It would seem, therefore, to follow that a recovery in this action would be a complete bar to another action, here or elsewhere, for the same wrong; for it is not to be presumed that the rule of comity upon which a statute of one state is enforced in another, would be so far disregarded by the courts of the former state as not to give full force and effect to the proceedings in the latter state wherein a recovery is obtained." Consequently a

prior recovery would be an absolute defense when interposed in such action.

9. Injuries Due to the Wrongful Act, Neglect or Default of Independent Contractor.

As defined, an independent contractor is one who renders services in the course of the occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job. The rule respondeat superior applies only to cases where the relation of master and servant exists, and does not apply as between an employer and the servants of an independent contractor. Thus, a railroad company employed, for an agreed price, a skillful contractor to repair, according to specifications and with privilege reserved of supervision by its engineer, a bridge in such a manner that the passing of its trains should not be prevented, but they were not to pass except upon signal from the contractor's foreman. On the day of the accident, upon such signal, a train was proceeding across the bridge, when the engine broke down one of the spans, and falling, killed the plaintiff's intestate, who was a servant of the contractor and engaged at the time in working on the bridge. The railroad company was held not liable for the injury. Bibb *v.* Norfolk, etc., R. Co., 87 Va. 711, 14 S. E. 163, and cases cited.

But the established rule is that one can not escape liability for neglect of a duty imposed upon him by law, by delegating that duty to an independent contractor. This principle was strikingly enforced in Richmond, etc., R. Co. *v.* Moore, 94 Va. 493, 27 S. E. 70. In this case, the facts were, that a street railway company advertised a balloon ascension at a park owned by it, inviting the public to visit the premises and witness the ascension. A visitor received injuries, resulting in his death shortly afterwards, by the falling of a pole used in preparing for the ascension, the falling of the pole being due to the negligence of an independent contractor. The court held, that it was immaterial whether the person making the ascent was an independent contractor or not, as the gist of the action was the negligent failure of the defendant company to use proper care to protect the visitor from a danger on its premises while there at defendant's invitation; and one who invites another expressly or impliedly to come upon his premises must use ordinary care and prudence to render the premises reasonably safe for the visit.

In this case, therefore, as the duty was imposed by law, the defense that the duty had been delegated to an independent contractor was not admissible.

But the case of Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, seems to make an exception to this rule. The facts were, in brief, that the railroad company entered into a contract with the Phœnix Bridge Company, by which the latter undertook to put in a new bridge in the place of an old one. The substitution was to be made without interrupting traffic upon the road. The evidence showed that the bridge company did an extensive business in the construction of bridges and was considered careful, reliable and competent. Upon the occasion of the accident the bridge was approaching completion, one span finished, and another had progressed so far, that in the opinion of the bridge company, it was safe to remove the whole of the false work which had supported the bridge while the work was being done upon it. Under these circumstances, a train approached at the stipulated rate of speed not exceeding four miles per hour, passed over the completed span in safety and crushed through the other, killing the fireman. His administrator brought suit. It was held that the bridge company was an independent contractor; that it was the duty of the railroad company to provide suitable

and safe appliances, machinery and roadbeds for its employees, and this duty was not assignable; that the company was not an insurer of the safety of its employees, but only bound to use ordinary care for their safety, and the degree of care to be exercised in a particular case to be ascertained by the general usage of the business; that the company was not liable for the negligence of the bridge company, an independent contractor in the faulty construction of the bridge, the accident being due to the bridge company's negligence; that it is the general custom of railroads to let such contracts to independent contractors, and the railroad company used due care in the selection of a reliable contractor, and exercised no supervision over the manner of doing the work, and, by its contract guarded as far as possible against the dangers incident to the work.

10. Possession, Control and Operation of Road Surrendered by Deed to Trustees.

But a railroad company, chartered under the laws of Virginia, can not, by the voluntary surrender of the possession, control and operation of its road, by deed of trust, to trustees of its own selection, shift the responsibilities imposed upon it by law, nor relieve itself from liability for wrongs or injuries subsequently done to persons or to property in the negligent operation of its road. Such defense will not be sustained. Naglee *v.* Alexandria, etc., R. Co., 83 Va. 707, 3 S. E. 369; Acker *v.* Alexandria, etc., R. Co., 84 Va. 648, 5 S. E. 688.

11. Corporation.

See the titles CORPORATIONS, vol. 3, p. 510; MUNICIPAL CORPORATIONS.

a. Municipal Corporation.

In its governmental capacity, a municipality is strictly a branch of the state government, within the extent of its limitations both as to territory and power to grant it. And in the discharge of their duty, governmental and discretionary, its officers are public officers, for whose acts the municipality is in no wise liable. Thus, a town is not liable for damages for the death of a person caused by the burning of its jail while such person is confined therein by town authority for violation of its ordinances, though such fire is attributed to the wrongful act or negligence of the officers or agents of the town. Brown *v.* Guyandotte, 34 W. Va. 299, 12 S. E. 707.

That a municipal corporation is not liable for failure to exercise its governmental or discretionary powers; or for the default of its officers and servants in the administration of its governmental functions; but is liable where such defaults are in the performance of duties which are not governmental in their nature, is well settled. In connection with its governmental capacity there is one notable exception; it is liable for its negligence in caring for its streets and bridges. The ground of its liability arises out of neglect of the corporation to perform its duty with respect to the condition of the streets. It is not an insurer of the condition of its streets, nor of the safety of travel therein. The care required is only a reasonable care, so that if the streets are in reasonably safe condition for travel in the ordinary modes, by night and by day, the city is not liable, though some slight defect in the streets be the cause of the injury. Nor, if reasonable care has been used, does liability attach to the city, whatever be the condition of the streets. The liability in any case must, therefore, be determined by its particular circumstances. As a general rule if the defence that the defendant is a municipal corporation is presented and established, and further that the injuries were due to some act in connection with its governmental function, not within the exception to its liability regarding streets and bridges, such defense will be an absolute bar to recov-

cry. Orme *v.* Richmond, 79 Va. 86; Jones *v.* Williamsburg, 97 Va. 722, 34 S. E. 883; Richmond *v.* Long, 17 Gratt. 375; Harman *v.* Lynchburg, 33 Gratt. 37; Duncan *v.* Lynchburg (Va.), 34 S. E. 964; Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447; Thomas *v.* Grafton, 34 W. Va. 282, 12 S. E. 478; Mendel *v.* Wheeling, 28 W. Va. 233; Charleston *v.* Beller, 45 W. Va. 44, 30 S. E. 152; Bartlett *v.* Clarksburg, 45 W. Va. 393, 31 S. E. 918; Wood *v.* City of Hinton (W. Va.), 3 Mun. Corp. Cas. 547; Barnes *v.* District of Columbia, 91 U. S. 440.

b. Public Corporation—Not Municipal.

As corporations of this character have functions which are governmental and public only, the general rule is that they are not liable for the torts of their servants. Thus, in Maia *v.* Eastern State Hospital, 97 Va. 507, 34 S. E. 617, it was held, that no recovery could be had against a lunatic asylum maintained by the state, for the death of an inmate, due to the negligence of its agents in putting him to work in the excavation of an embankment, without providing supports to prevent the earth from falling in upon him. The court declared that the defendant was a public corporation, and in arguendo, said: "The directors in this case clearly had no right to pay damages for the grievance complained of out of any funds under their control. These were appropriated by the state to pay the expense of caring for and maintaining the inmates of the hospital, and not for paying damages resulting from the negligent management of those in charge of it. If such damages were chargeable on the funds or property under the control of the directors, their payment might prevent the accomplishment of the very object for which the money was appropriated. The taxpayers might thus become insurers against the negligence of public officials, instead of being contributors for the support and maintenance of a great public charity. That an unfortunate inmate of a hospital should suffer from the negligence or misconduct of the persons administering the powers of the corporation, or their agents or employees, it is indeed a hardship, but we do not think that this hardship should be remedied by giving damages to such a one or his representatives at the expense of the inmates of the hospital or taxpayers of the state. For such negligence he should be left to his remedy against those by whose negligence he was injured." Judge Harrison rendered a dissenting opinion. See also, Sayre *v.* Northwestern Turnpike Road, 10 Leigh 454. Compare the principle declared in Eastern Lunatic Asylum *v.* Garrett, 27 Gratt. 163; Trevitt *v.* Prison Ass'n, 98 Va. 332, 36 S. E. 373, 6 Va. L. Leg. 148.

12. Contract of Exemption.

Where an action was instituted to recover damages for death by wrongful act, claimed to have been caused by the negligence of the defendant corporation, it was held, that a contract whereby the defendant stipulated for his exemption from liability for consequences of his own negligence, was against public policy and void. This was so, independently of the Virginia Statute, § 1296. Johnson *v.* Richmond, etc., R. Co., 86 Va. 975, 11 S. E. 829. See the title CARRIERS, vol. 2, p. 671.

G. EVIDENCE.

See generally, the title EVIDENCE.

1. Onus.

See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

In General.—In an action to recover damages for death occasioned by the wrongful neglect of defendant, the burden is on the plaintiff to prove by affirmative evidence that the defendant was negligent, and that its negligence was the proximate cause of the injury complained of. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

Right to Maintain Action under Foreign Statute.—It seems that where the

declaration in an action for death by wrongful act avers that the evidence shows that the alleged cause of action arose in another state, it is incumbent upon the plaintiff to allege and prove it was his right to maintain this action under some statute of the foreign state because, in the absence of evidence to the contrary, it will be presumed that the common law obtains in that state, and at common law a personal action died with the person. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296, citing Nelson *v.* Chesapeake, etc., R. Co., 88 Va. 971, 14 S. E. 838; Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Casual Connection between Injury and Breach of Duty.—A railway company on a dark night failed to blow a whistle, as required by statute, at a crossing and ran over the intestate, who was slowly driving across the track and listening for the train. The court held, that the duty of showing a casual connection between the breach of duty and injury, in that the evidence must tend to establish such a relation between them as, according to ordinary experience warrants a conclusion that the injury would not have happened had not the negligence occurred, was complied with. Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7. See also, Atlantic, etc., R. Co. *v.* Reiger, 95 Va. 418, 28 S. E. 590.

2. Weight and Sufficiency.

In Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707, the evidence showed that the brakeman, a minor, on his first trip, was coupling freight cars by the conductor's orders and the latter was so situated that he could not see the opening between the cars, nor the brakeman so as to give the proper signal to slow up, and thus the brakeman was killed by the cars coming together with great force. The evidence was sufficient to show that death was caused by the conductor's negligence; the company was therefore liable.

But in Rudd *v.* Richmond, etc., R. Co., 80 Va. 546, a boy of twelve years of age was sent by his parents to mind the cows in a field along the railroad; he went to sleep on the track; and was run over by a freight train, which was 375 yards long, and killed. The train was running down grade without steam. When the boy was struck he was lying 226 yards from a public crossing, was 892 yards from a curve from which the boy was visible. The boy had been repeatedly found sitting, lying down and asleep on the track, and had oftentimes been warned as to his danger. When the engineer saw the boy on the track, he made, in vain, every effort to stop the train, by reversing the engine, etc. On demurrer to the evidence, the lower court decided for the defendant company. On appeal the supreme court, Fauntleroy, J., delivering the opinion, held, that the plaintiff's evidence was insufficient to warrant a verdict in his favor; and further, that compensation can not be recovered for injuries done by the defendant's mere negligence, where the plaintiff by his own ordinary negligence contributed to cause the injury, so that but for such contribution, the injury would not have happened, except when the direct cause of the injury is the defendant's omission (after becoming aware of plaintiff's negligence) to use proper care to prevent the consequence of such negligence. See in this connection, Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; Richmond, etc., R. Co. *v.* Moore, 78 Va. 93.

In Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406, it was held, that where the plaintiff's testator who was able to both see and hear, walked on to a railroad crossing immediately in front of a rapidly moving train, which could be seen for one thousand feet before it reached the crossing, and was struck and killed, and the evidence failed to show any defect in the cross-

ing which contributed to the injury, a verdict for the plaintiff was not warranted.

3. Admissibility.

a. Opinions of Witnesses.

See generally, the title EXPERT AND OPINION EVIDENCE.

Dangerous Condition of Locality.—In an action for personal injuries witnesses can not be allowed to express their opinions, as to whether the locality at which the injury was inflicted was dangerous or not. Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424.

As to Facts in the Province of the Jury.—So a question asked a witness, in an action for killing one walking on a railroad, as to whether there was enough in deceased's appearance to indicate to the engineer that he was in possession of his faculties is inadmissible as asking for the witnesses' opinion on a fact which it is in the province of the jury to determine from the facts testified to. Tyler *v.* Sites, 90 Va. 539, 19 S. E. 174.

b. Evidence Relating to the Physical Condition of the Place Where the Accident Occurred.

But testimony of witnesses relating to the physical condition of the place and its surroundings where the accident occurred was proper evidence to go to the jury. Bias *v.* Chesapeake, etc., R. Co., 46 W. Va. 349, 33 S. E. 240.

c. Evidence Affecting the Quantum of Damages.

See post, "Measure and Elements of Damages," IV, I.

4. Relevancy.

As a general rule it is error for a court to exclude the material and relevant evidence of the plaintiff, though it considers no case of negligence made out, unless the defendant admits the truth of the propositions sought to be established by that evidence. Thus, in Roberts *v.* Alexandria R. Co., 83 Va. 312, 2 S. E. 518, the evidence was that the decedent was killed by the railroad train of the defendant company. That he was killed at a public crossing while driving along in the usual way in his carriage, going to his dwelling, which was close by; the said crossing being situated on his farm; that no regular train was due at that point at or about that time. That the train was an irregular train, composed of an engine and tender and one car,—an officer's car. That, being thus irregular, and running on no established schedule as to time, it was speeding over the track at a most extraordinary rate,—fifty or sixty miles an hour by estimate,—twice as fast as any regular train usually ran. Flying along at this rate, it observed no precautions at or near this crossing, —neither whistled nor rung the bell, as was customary—but whistled, when three-quarters of a mile off, at another whistle-post in a cut; and, although there was a whistle-post for Roberts' crossing (the place of the accident), the train ran by it without a signal. That the carriage in which the deceased was riding was broken into small pieces, both horses killed outright, as was the deceased, and the train ran on for two hundred and fifty or three hundred yards before it was stopped. This evidence was excluded from the consideration of the jury, in the trial court, not because it was incompetent or irrelevant, for it was obviously and unquestionably neither. Applying the principle laid down, the ruling of the lower court in excluding the evidence was held erroneous.

H. INSTRUCTIONS.

See generally, the title INSTRUCTIONS.

Assuming That Plaintiff Was on or near Track When Hit by Train.—Giving an instruction assuming that plaintiff was standing on or near the track when hit by defendant's train is not prejudicial error where the uncontradicted evidence showed that he was either standing on or near the track when struck, or had stooped down

to light a match. Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386.

Hypothetical Instruction Directing Verdict.—When contributory negligence is relied on in defense of an action for wrongful injury or death, a hypothetical instruction directing a finding in favor of plaintiff, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous. Nor can such error be cured by other instructions given in behalf of either party. McCreery *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327.

Thus in an action against a railroad company by an administrator for damages for the death of his intestate, a conductor, while in charge of one of defendant's trains, it is error to refuse to instruct the jury that, if they find from the evidence in the case that the accident resulting in the death of the conductor could have been averted by the proper discharge on his part of the duties of his employment, then the plaintiff can not recover in the action, and they should find a verdict for the defendant, there being evidence tending to support the facts on which it is based; and this notwithstanding an instruction has been given at the instance of the plaintiff in the case that the jury must find for the plaintiff under certain circumstances set out, "unless they find from the evidence that the accident could have been averted by the decedent if he had properly performed the duties of his employment, and that he was himself guilty of negligence directly contributing to the injury." McCreery *v.* Ohio River R. Co., 43 W. Va. 110, 27 S. E. 327.

When contributory negligence is relied on in defense of an action for wrongful injury or death, a hypothetical instruction directing a finding in favor of the plaintiff, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous, nor can such error be cured by other instructions given in behalf of either party. McVey *v.* St. Clair Co., 49 W. Va. 412, 38 S. E. 648; McCreery *v.* Railroad Co., 43 W. Va. 110, 27 S. E. 327.

Instructions Respecting Liability Where the Injury Could Have Been Prevented after Discovery, or by Ordinary Care Could Have Been Discovered.—Where there was no evidence that defendant knew plaintiff was on the track before he was run over, and it was shown that he was a young man in possession of all his faculties, it was not error to refuse to charge that the defendant was liable, if it could have avoided the injury after it discovered, or could have discovered by the use of ordinary care, the peril of plaintiff. Rangeley *v.* Southern R. Co., 95 Va. 715, 30 S. E. 386; Kimball *v.* Friend, 95 Va. 125, 27 S. E. 901; Marks *v.* Railway Co., 88 Va. 1, 13 S. E. 299.

But an instruction that, if deceased was a trespasser on defendant's track, and negligently placed himself in position to be struck by its train, recovery could not be had for his death, unless the accident was caused by defendant's wilful negligence, is properly refused, no reference being made in it to the evidence that, before the accident, the engineer became aware of the dangerous position of deceased. Seaboard, etc., R. Co. *v.* Joyner, 92 Va. 354, 23 S. E. 773.

Nevertheless, the rule is, that a railroad company is not liable for the killing by a train of a person who negligently went on the track in front of the train, when the employees in charge exercised proper care and diligence to stop the train after they saw, and should have seen, his peril, and an instruction making an exemption from liability depend on whether or not it was then "impossible to stop the train" states an incorrect rule and is erroneous. Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406.

Boiler Explosion—Instruction Respecting Company's and Deceased Engineer's Knowledge of Defect.—An instruction that, if a locomotive engine is in defective, and dangerous condition, and the defendant company knew it, and by conduct, actions, or words lulls its engineer into a feeling of security, whereby he is killed, the company is liable, is erroneous, because it omits altogether the element of the engineer's ignorance of the defective and dangerous condition of the locomotive. McKelvey *v.* Chesapeake, etc., R. Co., 35 W. Va. 500, 14 S. E. 261.

At the trial of an action to recover damages for the negligent killing of the plaintiff's intestate, after the defendant's demurrer to the evidence has been joined in by the plaintiff, it was not improper for the trial court to instruct the jury that, if the plaintiff was entitled at all, she was entitled to the full amount which they might lawfully give, if there had been no demurrer to the evidence; and that they ought, in its opinion, to find the full amount claimed in the declaration, that amount not exceeding the amount the law allows to be recovered. Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707.

In an action brought under the statute to recover damages for causing the death of a parent by the negligence of a railroad company, it is a proper instruction that the jury, in estimating the pecuniary injury, may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father. Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248.

I. MEASURE AND ELEMENTS OF DAMAGES.

See the title DAMAGES, ante, p. 162.

1. Punitive Damages.

Punitive or exemplary damages may be awarded in an action for death by wrongful act. Matthews *v.* Warner, 29 Gratt. 570.

Commenting upon authorities which had been cited as opposing the allowance of punitive damages, the court, in Matthews *v.* Warner, 29 Gratt. 570, said: "But these decisions, many of which were strongly relied on by the learned counsel of the appellant, are made under statutes which, either in terms or by fair construction, forbid the recovery of punitive and exemplary damages. Such decisions can only be authority when we find the statutes upon which they are founded of like character with ours. The Virginia statute differs most materially from the English statute and those of the states (as nearly all are) modelled upon the English statute, in this most important particular. In the section which defines the character of the damages recoverable under these statutes, the English statute declares that 'in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whose benefit such action shall be brought.'

"The statute of New York, and of all the other states, modelled upon the English statute, are found to be in the following terms, or those of like import; 'The jury may give such damages as they may deem fair and just compensation (not exceeding a specified sum), with reference to the pecuniary injuries resulting from such death to the parent or next of kin,' etc., etc. In our statute, instead of these words, or words of like import, being employed, it is declared that 'the jury in any such action may award such damages as to it may seem fair and just,' etc. Certainly, in the Virginia statute, there are no words of limitation as in the English statute, and those modelled thereon confining the jury in the assessment of damages to merely pecuniary injury; but, by the very terms of the statute, the damages are such 'as to

the jury may seem fair and just.' We are bound to presume that the legislature which enacted this law was familiar with the English statute, and those of the other states of the Union, and of the English and American decisions under them. And it is a most significant fact, that with the English and American statutes before them, and familiar with the decisions under them, the legislature, after following the English statute and the New York statute up to the point where the measure of damages in the one case is declared to be 'proportioned to the injury,' and in the other 'with reference to the pecuniary injuries resulting from such death,' at that point, discarded these terms, and in lieu thereof adopted the language, 'such damages as to the jury may seem fair and just.' It is impossible to conceive that the omission of such language, and the adoption of other terms meaning the very reverse, could have been accidental. We must conclude that it was done with a design, and that design plainly, by all the recognized rules of construction, was to declare that in an action for the death of a party caused by the wrongful act, neglect or default of any person or corporation, such damages may be recovered 'as to the jury may seem fair and just.'"

It seems manifest that the legislature intended, as in Kentucky, Iowa, Connecticut, and California (which states are exceptional to the English statute), to allow the jury in such cases to award punitive and exemplary damages.

Judge Staples concurred with the opinion except as to the point of the jury's power under the statute to award punitive damages. Upon a view of the whole statute he was inclined to think that the object of the statute was to give compensation to the family of the deceased, and not to punish the defendant, which belongs rather to the criminal law. While the jury, in estimating the compensation or damages, may give a solatium as it is termed, they have no right to go beyond and assess damages by way of punishment. His opinion, however, was not decided, and he preferred not to express any,—more especially as the question was not fairly presented by the record.

This question arose again, in Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394, where the railroad was sued by the administrator of Noell to recover damages for the death of Noell, which occurred by what is known as the "Narrow Passage Bridge Disaster," in Shenandoah county, Va. Noell was an unmarried young man, whose father was dead, and who lived and cared for his mother, At the trial, on motion of the plaintiff, the circuit court instructed the jury as follows: "If the jury believe from the evidence that such prudence, foresight, and skill (as that required of railroad companies by the law) were not used by the company in respect to 'Narrow Passage Bridge,' by the breaking of which Charles L. Noell was killed, they shall find for the plaintiff, and assess the damages for such killing at such sum as they shall deem fair and just under all the circumstances of the case, such damages not to exceed $10,000." See also, Norfolk, etc., R. Co. *v.* DeBoard, 91 Va. 700, 22 S. E. 514.

This case cites and affirms the doctrine laid down in Matthews *v.* Warner, 29 Gratt. 570, that the jury in assessing damages in such cases are not confined to the pecuniary injuries resulting from such death. The court's view was that there was no doubt that the intention of the legislature, by this enactment, Va. Code, 1887, §§ 2902-2906, differing so essentially from the English and American statutes, was to cut the Gordian knot of the decisions which tied the jury down to a mere pecuniary consideration of the loss suffered by the survivors of the deceased; and to declare, in effect, that where any person's "death is caused by the wrongful act, negligence, or default of any

person or corporation," even if such person be one whose life conferred no pecuniary benefit; if such person be an aged or infirm father, or husband, or an invalid wife, or an afflicted child (often dearer to its parents because it is afflicted), the death of such a person, so caused, should be the subject for recovery of damages. It follows that there may be no pecuniary loss in such cases, and the jury not being confined by the statute (as already construed in Matthews *v.* Warner) to mere pecuniary loss to the survivors for whose benefit the action may be brought, it follows, that mental suffering and anguish, want of comfort and solace, may be taken into consideration in the computation of damages sustained in the particular case. In other words, it is plain that under our statute, the jury is not confined to mere pecuniary loss, but "may award such damages as to them may seem fair and just," according to the facts and circumstances of each case.

2. Solatium for Wounded Feelings.

In ascertaining the damages to be recovered by a wife for the wrongful death of her husband, the jury may consider the suffering and mental anguish of the wife occasioned by his death. Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 395.

The jury may also consider and give compensation for the loss of decedent's care, attachment and society to his family. Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850; Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394.

It is left a query in Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431, whether in an action for the death of a husband, the jury, in ascertaining the damages, are limited to the pecuniary loss sustained by the family of the deceased, or whether they may consider the physical pain of the deceased, or the mental suffering of the surviving family, or the loss to them of the parent's moral and intellectual training.

3. Matters Relating to Beneficiaries.

a. Physical Condition Consequent upon Death of Injured Party.

In Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525, it was held, that special damages, because of the physical condition of the mother of the deceased caused by his death, can be recovered, although no such damages were claimed in the declaration.

But damages for an attack of bronchitis, claimed to have been caused by the nervous condition following the death of a son in a railway accident are not recoverable in a suit by the son's administrator for wrongful death, since there is no necessary or probable connection between negligence which results in the death of the son, and the consequent nervous condition of the mother. See Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 631, 34 S. E. 525; Fowlkes *v.* Southern R. Co., 96 Va. 742, 32 S. E. 464.

b. Insurance Left by Deceased.

The quantum is not, however, to be affected by the fact that the deceased had his life insured for the benefit of his wife and children, and that since his death the amounts called for by such policies have been paid over to his widow and children. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

c. Change in Habits and Pecuniary Condition Subsequent to Marriage to Deceased.

As affecting the quantum of damages where the husband sues for the killing of his wife, evidence is admissible to show that after the marriage

there was a marked change for the better in his habits and pecuniary condition. Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838.

"The fact that the plaintiff (McConnell) was benefit d, morally and pecuniarily, by his married condition, is admissible as evidence to show a loss or damage to him by the negligent killing of the faithful, prayerful, industrious, and thrifty wife of his bosom. The law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case." Simmons *v.* McConnell, 86 Va. 497, 10 S. E. 838.

d. Relationship and Dependent Condition.

The relationship and dependent condition of the parties, the capacity and ability of the deceased, and, indeed, all of the surrounding circumstances and conditions of the parties are considered to enable the jury properly to estimate the loss sustained and to fix the measure of damages. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 443.

In Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376, a mother brought an action for damages under ch. 98, acts, 1863, to recover for the negligent killing of her son, and on the trial evidence was offered by the mother to prove her maintenance by the decedent in his lifetime, and also what it would cost to support her since his death. Upon objection being taken, the court ruled that, as it was shown that the decedent was the son of the plaintiff, lived with and supported her, and that he was only twenty-three years of age and unmarried, that it might be fairly implied that the plaintiff was next of kin to decedent, and that the testimony was properly admitted.

e. Number and Ages of Children.

When the action is brought by the widow, as administratrix, for the death of her husband, who left surviving children, it is competent for her to show the number of children and their respective ages, and such testimony may be considered by the jury in determining the measure of damages. Baltimore, etc., R. Co. *v.* Sherman, 30 Gratt. 602.

4. Matters Relating to Deceased.

a. Age, Habits and Capacity of Deceased.

In ascertaining the damages to be recovered by a beneficiary for the wrongful death of one upon whom the beneficiary is dependent, the jury may consider the age, business, physical and mental capacity, experience, habits, energy and perseverance of the deceased during what would probably have been his lifetime and the lifetime of the beneficiary if he had not been killed. Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 395; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 443; Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

"All these are elements of pecuniary success—component parts of that pecuniary capital, of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful acts of the defendants deprived them." Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 443.

b. Health.

In ascertaining the damages, the jury may consider the health of the deceased. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 443.

c. Duration of Life.

(1) In General.

In ascertaining the damages the jury may consider the probable duration of the life of the deceased. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 395; Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 443.

(2) Of Beneficiary's Life.

In ascertaining the damages for the

death of a son, upon whom the mother was dependent, it was held, that the jury might consider what would probably have been the lifetime of the beneficiary if the son had not been killed. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 395.

(3) How Shown.

Directly or Indirectly.—In an action to recover damages for death occasioned by the wrongful act or neglect of the defendant, it is not essential to introduce mortality tables to show the probable duration of life of the deceased. The probable earnings of the deceased, considering his age, business capacity, experience, habits, health, energy, etc., may be shown either directly, or indirectly. Norfolk, etc., R. Co. *v.* Phillips, 100 Va. 362, 41 S. E. 726.

Scientific Tables.—But it is permissible to introduce scientific tables to determine his expectancy. Norfolk, etc., R. Co. *v.* Cheatwood, 103 Va. 356, 49 S. E. 489; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394.

d. Mental Anguish of Deceased.

In ascertaining the damages to be recovered by a wife for the wrongful death of her husband, the jury may consider, among the surrounding circumstances in evidence, the mental and physical anguish of the deceased. Chesapeake, etc., R. Co. *v.* Rogers, 100 Va. 324, 41 S. E. 732. See also, Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

e. Misconduct or Neglect of Deceased.

The defense that the death was the result of the misconduct or neglect of the deceased may be considered as a circumstance affecting the quantum of damages. Matthews *v.* Warner, 29 Gratt. 570.

f. Salary Earned.

Evidence of the amount of salary or wages received annually by the deceased from his employment may be admitted for the consideration of the jury in assessing the damages. Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 431.

5. Award of Damages.

a. The Maximum Award.

The statutes of both Virginia and West Virginia fix the maximum amount of damages at $10,000. Va. Code (1887), § 2903; W. Va. Code (1899), ch. 103, par. 5; Portsmouth St. R. Co. *v.* Peed, 102 Va. 662, 47 S. E. 850. Within the statute as to the amount and species of injury sustained the matter is to be submitted to the sound sense and justice of the jury, and in assessing the damages, they are not confined to the mere pecuniary loss and injury, but may give such damages as to them "may seem fair and just." Searle *v.* Kanawha, etc., R. Co., 32 W. Va. 370, 9 S. E. 248; Matthews *v.* Warner, 29 Gratt. 570.

b. When Excessive.

It may be laid down as a general rule, that a verdict of a jury will not be reversed on appeal on the ground that the damages awarded were excessive, unless the damages are so large as, under the circumstances, to shock the sense of justice, or to indicate that they were the result of passion or prejudice on the part of the jury. Dimmey *v.* Railroad Co., 27 W. Va. 32, in which a verdict for $5,000 was held not to be excessive; Bertha Zinc Co. *v.* Black, 88 Va. 303, 13 S. E. 452; See Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512; Norfolk, etc., R. Co. *v.* Burge, 84 Va. 63, 4 S. E. 21; Richmond, etc., Elec. Co. *v.* Garthright, 92 Va. 627, 24 S. E. 267; Norfolk, etc., R. Co. *v.* Shott, 92 Va. 34, 22 S. E. 811; Borland *v.* Barrett, 76 Va. 128; Farish *v.* Reigle, 11 Gratt. 697.

In Bertha Zinc Co. *v.* Black, 88 Va. 303, 13 S. E. 452, a case in which the death of the plaintiff's intestate was shown to have been caused by the grossest negligence on the defendant's part, the supreme court of appeals held

that it was error to set aside a verdict of $10,000, as excessive.

The verdict of a jury in an action for death from wrongful act can not be set aside for excessiveness in an amount under $10,000, their assessment being final, unless the verdict be the result of passion, prejudice, partiality, or corruption on the part of the jury. Thomas *v.* Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217.

c. Review.

The action of the jury in assessing damages in case of the death of a person by the wrongful act, neglect or default of another is not reviewable, as no damages allowed by the jury within the limit fixed by the statute can be deemed excessive, their determination of this question being absolute and conclusive as to what damages are fair and just, unless the verdict evinces passion, prejudice, partiality, or corruption on the part of the jury. Turner *v.* Norfolk, etc., R. Co., 40 W. Va. 675, 22 S. E. 83; Unfried *v.* Baltimore, etc., R. Co., 34 W. Va. 260, 12 S. E. 512.

J. VERDICT.

Where plaintiff's intestate, who was able to both see and hear, walked onto a railroad crossing immediately in front of a rapidly moving train, which could be seen for 1000 feet before it reached the crossing, and was struck and killed, and the evidence failed to show any defect in the crossing which contributed to the injury, a verdict for the plaintiff was held not to be warranted. Baltimore, etc., R. Co. *v.* Few, 94 Va. 82, 26 S. E. 406.

But where no inspection was made of a coupling pin that had probably been partially broken by a collision between defendant's engine and tender with a train of cars, and a few days afterwards the plaintiff's intestate, a fireman, was killed by reason of the breaking of the coupling pin, the court held, that a verdict that defendant was guilty of negligence was warranted by the evidence. Norfolk, etc., R. Co. *v.* Nunnally, 88 Va. 546, 14 S. E. 367.

Yet proofs of the failure of a railroad company to give the crossing signals required by statute, causing injury to the plaintiff, are not of themselves sufficient to support a verdict against the company. However, such verdict will not be disturbed where the evidence fails to show that the injury would have been inflicted, but for the failure of the company to give such signal. Simmons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7.

K. COSTS.

Section 2904 of the Virginia Code, 1887, expressly provides that the amount recovered shall be distributed after payment of costs and reasonable attorneys' fees. Such payment of costs and attorneys' fees must also be made before distribution of the funds recovered where the personal representative has compromised the claim. Powell *v.* Powell, 84 Va. 415, 4 S. E. 744. See generally, the title COSTS, vol. 3, p. 604.

V. Subjection of Recovery to Decedent's Debts.

The statute expressly provides that the jury may direct the distribution, and if they do not, then it shall go according to the statute of distributions, and be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law. Va. Code, 1887, § 2904; W. Va. Code, 1899, ch. 103, § 6; Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

VI. Distribution.

A. WHEN AMOUNT RECOVERED BY JUDGMENT.

Section 2903, Va. Code, 1887, provides that the jury may award such damages as to it may seem fair and just, not ex-

ceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent or child of the deceased.

The W. Va. Code, 1899, ch. 103, § 6, provides, that the amount recovered shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate.

And the courts of the state where the action is brought can compel distribution of the amount received, in the manner prescribed by such statute. Dennick *v.* Central R. Co., 103 U. S. 11, 26 Law Ed. 439.

"The manner in which the damages are to be distributed is no concern of the defendant, and not under the control of the plaintiff. It is a question for the jury exclusively, not involved in the issue." Staples, J., in Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. 441, quoted and approved in Norfolk, etc., R. Co. *v.* Stevens, 97 Va. 634, 34 S. E. 525.

If there is no wife, husband, parent or child, then it shall be assets in the hands of the personal representative, to be disposed of according to law.

Section 2904 provides that if the jury have not directed the manner in which the amount recovered shall go, then it shall go according to the statute of distributions.

If the jury fail to direct how the damages shall be distributed, the administrator after having paid all attorneys' fees and costs shall distribute it according to the statute of distribution. Powell *v.* Powell, 84 Va. 415, 4 S. E. 744.

B. WHEN CLAIM COMPROMISED.

If in pursuance of the privilege given by Va. Code, 1887, § 2905, the personal representative complies with the conditions, and compromises the claim, the money is to be distributed after paying costs and attorneys' fees, according to the statute of distributions, just as where a verdict is rendered for the plaintiff, and the jury fail to direct how the damages awarded shall be distributed. Powell *v.* Powell, 84 Va. 415, 4 S. E. 744.

The West Virginia statute omits this provision as to compromises.

VII. New Trials.

See generally, the title NEW TRIALS.

Section 2903, Va. Code, 1887, expressly provides that nothing in such section shall be construed to deprive the court of the power to grant new trials, as in other cases.

De Bene Esse.

See the title DEPOSITIONS.

De Bonis Non.

See the title EXECUTORS AND ADMINISTRATORS.

DEBT.—See the title HOMESTEAD EXEMPTIONS. And see CREDITOR, vol. 3, p. 780; DUE; INDEBTEDNESS.

A **debt** is an obligation of the debtor which the creditor retains the right to enforce. Rowe *v.* Marchant, 86 Va. 187, 9 S. E. 995, dissenting opinion.

In Spilman *v.* Parkersburg, 35 W. Va. 605, 14 S. E. 282, it is said: "Blackstone (vol. 3, p. 154) says: 'The legal acceptation of **debt** is a sum of money due by certain and express agreement.' This is given in connection with his treatment of the action of **debt.** In the constitution it means any **debt** created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose, when the given limit of indebtedness has been reached. It may be a **debt** payable in the future as well as one payable pres-

ently; one payable upon some contingency, such as the delivery of property, as well as for property already delivered. When the contingency happens, the **debt** becomes fixed; it exists." See also, the title MUNICIPAL CORPORATIONS.

Neglect.—A claim arising out of the official neglect of the county clerk, has been held not to be a **debt** within the meaning of the statute authorizing an attachment for **debt.** Dunlop *v.* Keith, 1 Leigh 430, 19 Am. Dec. 755.

Debt Contracted.—The homestead exemption does not protect against a demand for damages for breach of promise to marry, which is not a **debt contracted,** but a quasi tort. Burton *v.* Mill, 78 Va. 468. See also, the title HOMESTEAD EXEMPTIONS.

Fine.—In Whiteacre *v.* Rector, 29 Gratt. 715, it is said: "A **fine** imposed by statute for the violation of a law can not, in any just sense, be designated as a **debt contracted.** The ordinary meaning of the word **debt** is a sum of money due to another by contract; and a **'debt contracted'** necessarily means that a debtor has come under a voluntary obligation to a creditor. The relation of debtor and creditor implies, as of course, that the one has given credit to the other in a contract. It would be a solecism and absurd to say that a **fine** imposed as a punishment for a penal offense was a **debt contracted.**"

In Clarke *v.* Tyler, 30 Gratt. 139, it is said: "If the provision of the act had been that these coupons should be receivable 'for all taxes and **debts** due the state,' there might be some room for doubt whether **fines** were embraced; for although **fines** are recoverable by action of **debt,** and in a certain sense a **fine** is a **debt** due the state, yet it might be said with much force, if not conclusively, that the word **debt** refers to matters of contract, and that, therefore, a **fine** is not embraced in the meaning of the statute in the word **debt.** But the words dues and demands are added."

Legacy.—In Yates *v.* Salle, Wythe 170, it is said: "A **legacy** is not a **debt** of the testator. It is, with respect to him, a beneficence, to exaction of which from him the law did not entitle the legatary. The testator might have revoked it which he could not have done, if a **legacy** were synonymous with a **debt.** Besides, the right of the legatary, before the testator's death, is not perfect. The testator then was not a debtor whilst he lived; and with his existence his power to become a debitor ceased. A **legacy** is not the **debt** of an executor. A **debt** originates ex contractu, which doth not exist between him and the legatary, the executor, by wasting the testator's goods, may be responsible indeed for the value of them, to an unsatisfied legatary; but here the **legacy** is not, but reparation for maladministration in his office, is the thing demanded from the executor, the right to demand it originating ex malificio, although the **legacy** is the measure of that reparation."

A testator by a codicil to his will declares: "I herein mention a **debt,** of $600 I owe to the Presbyterian church of Charlottesville, Va., and I wish it duly paid, without interest, out of my estate, to that church after my sister's death." The codicil is dated November 7, 1884. The sister died in 1896, and a suit was brought by one member of the church suing on behalf of himself and four hundred other members in 1898. There was no proof of the existence of such a **debt** except the statement of the codicil, and no evidence was offered against it. Held, though a church can not take as legatee under a will, this is not a **legacy,** but a **debt,** and the codicil alone is sufficient proof of its existence. Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64.

Taxes.—See generally, the title TAXATION.

In Hinchman *v.* Morris, 29 W. Va. 673, 2 S. E. 870, it is said: "**Taxes,** whether

state, county, or municipal, are charges imposed directly or indirectly by the legislative power of a state upon persons or property, to raise money for public purposes. See Bleecker *v.* Ballou, 3 Wend. 263. In its essential characteristic it is not a **debt.** It is not founded on contract, as is a **debt,** but operates in invitum. The difference between any tax proper and a **debt** is very marked. They differ entirely in their mode of collection and enforcement. See City of Camden *v.* Allen, 26 N. J. Law 398; Peirce *v.* City of Boston, 3 Metc. 520. In the absence of statutory provision, **taxes** do not bear interest. Shaw *v.* Peckett, 26 Vt. 482. Their assessment upon land does not create a **debt** against the owner, and therefore it can not, when laid by a municipal corporation, be garnished, attached, or seized in execution at the suit of a creditor of the municipal corporation. Egerton *v.* Third Municipality, 1 La. Ann. 435. Nor is it a judgment or contract which may be set off against the claim of a creditor of a city. Pierce *v.* City of Boston, 3 Metc. 520. Unless the statute, expressly or by fair implication, authorizes a suit to be brought to collect a **tax,** it can not be collected in that manner. Board of Education *v.* Old Dominion I. M. & M. Co., 18 W. Va. 441. A statute abolishing imprisonment for **debt** does not prevent imprisonment for the nonpayment of taxes. Appleton *v.* Hopkins, 5 Gray 530. It is true there are some decisions where it has been held that the imposition of a **tax** created a legal obligation to pay on which the law raised an assumpsit which might be sued on, notwithstanding the law gave another specific remedy. See Dugan *v.* Baltimore, 1 Gill & J. 499; Baltimore *v.* Howard, 6 Har. & J. 383; State *v.* Steamship Co., 13 La. Ann. 497; Dunlap *v.* County, 15 Ill. 9; Ryan *v.* County, 14 Ill. 83. But, as was well said in Board of Education *v.* Old Dominion I. M. & M. Co., 18 W. Va. 445: 'These decisions are against both reason and the decided weight of authority.' It is not true that the imposition of a **tax** creates a legal obligation to pay. The above cases are overthrown, expressly or necessarily, in the following cases among others: City of Camden *v.* Allen, 26 N. J. Law 399; Shaw *v.* Peckett, 26 Vt. 482; McInerny *v.* Reed, 23 Iowa, 410; Crapo *v.* Stetson, 8 Metc. 394; Packard *v.* Tisdale, 50 Me. 376; City of Carondelet *v.* Picot, 38 Mo. 125; Alexander *v.* Helber, 35 Mo. 334; Cooper *v.* Savannah, 4 Ga. 68; Heine *v.* Levee Comm'rs, 19 Wall. 659."

Taxes are not **debts.** State *v.* Baltimore, etc., R. Co., 41 W. Va. 81, 23 S. E. 677.

Debts of Record.—In Ratcliffe *v.* Anderson, 31 Gratt. 105, it is said: "Blackstone in his commentaries divides contracts of **debt** into three classes—**debts of record, debts** by special, and **debts** by simple contract. 'A **debt of record** (he says) is a sum of money which appears to be due by the evidence of a court of record. Thus, where any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature. 1 Chitty's Black., book 2 (marg.), page 455. See also, opinion of Spencer, J., 7 Johns. R. 489, 490."

Schools.—In Davis *v.* Board of Education, 38 W. Va. 382, 18 S. E. 588, it is said: "Chapter 45, § 45, Code, provides that no board of education shall incur any **debt** to be paid out of the school money of any subsequent year, and shall not contract for or expend in any year more than the aggregate amount of the quota of the general school fund, and the amount collected from the district levies of that year, together with the balance in the sheriff's hands from the preceding year, and such arrearages of taxes as may be due the district. * * * The naming a sum in a contract for building a schoolhouse, payable in future,

may be, in a sense, called a **debt**; but if not payable out of the school money of subsequent years, in terms, or it will not exceed the money of the then fiscal year, it is not a **debt** forbidden by the section." See generally, the title SCHOOLS.

Debtor in the Sense of Garnishee.—See Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 460, 44 S. E. 300.

Debtor and Creditor.

See the titles ACCORD AND SATISFACTION, vol. 1, p. 81; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, p. 799; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232; COMPROMISE, vol. 3, p. 37; CREDITORS' SUITS, vol. 3, p. 780; FRAUDULENT AND VOLUNTARY CONVEYANCES; PAYMENT.

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CROSS REFERENCES.

See the titles ACTIONS, vol. 1, p. 138; CONSOLIDATION OF ACTIONS, vol. 3, p. 125; INJUNCTIONS; LIMITATION OF ACTIONS; PROFERT AND OYER; SERVICE OF PROCESS; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHERIFFS AND CONSTABLES.

As to equitable defenses, see the title ACTIONS, vol. 1, p. 138. As to the office judgment in debt, see the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2; JUDGMENTS AND DECREES.

I. Definition and Distinctions.

A. DEFINITION.

The action of debt is, in legal consideration, a remedy for the recovery of a debt eo nomine and in numero; namely, a specific sum of money due by contract, express or implied, and is most frequently brought on a deed. Virginia Fire, etc., Ins. Co. *v.* Saunders, 84 Va. 210, 4 S. E. 584; State *v.* Harmon, 15 W. Va. 115; Dungan *v.* Henderlite, 21 Gratt. 149.

B. CONTRASTED WITH CASE.

See the title TRESPASS.

The difference between actions of debt and case rests in the different measure of damages applicable to these two forms of action; in case the measure of damages being uncertain and dependent upon the actual damages sustained, while in debt the amount is fixed. Stone *v.* Wilson, 10 Gratt. 539. See Byrd *v.* Cocke, 1 Wash. 232.

C. CONTRASTED WITH ASSUMPSIT.

See the title ASSUMPSIT, vol. 2, p. 1.

The West Virginia statute has to a great extent made the action of assumpsit concurrent with the action of debt. And assumpsit has more of the characteristics of an action of debt than any other form of action in our practice. Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

Debt lies in all cases of determinate contract, whether evidence, by specialty, or by simple contract, either verbal or written, and is distinguished from assumpsit in this, that the latter must be brought where the object is to recover damages for the nonperformance of a parol or simple contract, but where the sum due is ascertained, debt may be brought. Eib *v.* Pindall, 5 Leigh 110.

Status of Debt in West Virginia.—Because of the necessity for a broader, more liberal and comprehensive form of action than the old action of debt, the action of assumpsit has been extended in its scope by the legislature, and has finally evolved a statute which has largely taken the place of debt in practice. It provides that an action of debt or assumpsit may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking or obligation to pay money, if the same be signed by the party who is to be charged thereby or his agent. But in light of the following remarks in a well-considered West Virginia case, it is advisable, as being more than safe and simple, under the present state of the law, to bring debt where it will lie, instead of assumpsit. State *v.* Harmon, 15 W. Va. 115. See Middle States Loan, etc., Construction Co. *v.* Engle, 45 W. Va. 588, 31 S. E. 921.

The court expressed the opinion, that the change or amendment in the tenth section of chapter 144 of the Code of Virginia of 1860, providing that an action of debt or assumpsit may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby or his agent, was not intended to give the action of assumpsit upon any sealed instrument or writing, except one containing a promise, undertaking or obligation to pay money. Because "the pleadings in assumpsit and debt upon sealed instruments are so materially different at common law in many respects, as in force with us, that the tenth section of said chapter 99 must produce great confusion and difficulty in practice in the absence of express legislation changing the pleadings in assumpsit so as to conform to and harmonize with the extension of the remedy of assumpsit made by the section. For instance, the general issue in debt upon a writing obligatory is non est factum, and no such plea is known in the action of assumpsit. The plea of nonassumpsit is the general issue in assumpsit; and it puts in issue the con-

sideration, etc., of the contract alleged in the declaration. This is so at the common law, and is still so with us, unless it can be determined that the said tenth section has by implication changed the common-law rules of practice in assumpsit, when the action is founded upon a sealed promise, undertaking or obligation in writing to pay money, so as to make the pleadings and principles of law governing in actions of debt apply in actions of assumpsit." State *v.* Harmon, 15 W. Va. 115.

II. Right to Maintain the Action.

A. IN GENERAL.

1. Statutory Provisions.

The Virginia statute provides that an action of debt may be maintained upon any note or writing by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent. Va. Code, 1904, § 2852.

And the statute in West Virginia provides that an action of debt or assumpsit may be maintained on any note or writing, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, if the same be signed by the party who is to be charged thereby, or his agent. W. Va. Code, 1899, ch. 99, § 10.

The alterations made by the West Virginia legislature were the insertion of the words (or assumpsit) after the words (an action of debt), and after the words (any note or writing) the words (whether sealed or not). The object was simply to permit an action of assumpsit to be brought in certain cases, where under the common law and the Code of 1860 only an action of debt could be brought; and it would not seem that anything else was intended by these changes. Accordingly, it was held, that since the passage of the Code, as before, a single bill under seal was not a note, but a specialty, and therefore the drawer and endorsers of such single bill, though it be made payable and negotiable at a bank in the state, can not be sued jointly in debt or in assumpsit by virtue of the above section of the Code. Laidley *v.* Bright, 17 W. Va. 779; State *v.* Harmon, 15 W. Va. 115.

2. Must Be Obligation for Payment of Money or Equivalent.

The action of debt will lie only on an obligation payable in money. On an obligation to pay or deliver any other article, covenant is the proper remedy. State *v.* Harmon, 15 W. Va. 123, citing Beirne *v.* Dunlap, 8 Leigh 514; Butcher *v.* Carlile, 12 Gratt. 520.

Bonds Dischargeable in "Notes or Bonds."—An obligor bound himself to pay to the obligee or order on or before a certain day, a certain sum of money, with interest, "which sum may be discharged in notes and bonds due on good solvent men residing in the county of Randolph, Virginia." This is a bond for the payment of money and for which an action of debt will lie. When the obligation is to pay a sum of money, or some other article in the alternative, on or before a certain day; or to pay a certain sum of money, with a privilege to the obligor to pay it in some other article on or before a certain day, the obligor has his election to deliver the article on or before that day; but if he fail to do so, he is liable absolutely for the money in an action of debt for its recovery. Butcher *v.* Carlile, 12 Gratt. 520.

Bonds Payable in "Goods or Money."—An obligation was made for the payment of a certain sum of money in monthly installments, "either in goods at regular prices or current money." At the dates of payments neither the goods were delivered, nor the money paid. It was held that this was an obligation to pay money, with the privilege to the obligor to discharge the money obligation by the delivery of goods at regular prices in equal amount

on or before the time of payment; and the obligor having failed within that time either to pay the money or so to deliver the goods, was liable in an action of debt thereon. Minnick *v.* Williams, 77 Va. 758.

Bonds Payable in "Gold or Silver."—An action of debt was brought on a bond promising to pay, "twenty-four hundred dollars, in gold or silver, or its equivalent." The court was of the opinion that this was an obligation to pay a certain sum, and "gold or silver" was named as the standard of value. The obligor was not obliged to pay in that coin, he could have paid its equivalent. Such an obligation is an absolute one for the payment of a sum certain of money, and as held in Butcher *v.* Carlile, 12 Gratt. 520, although there was a privilege to discharge it in its equivalent, the action of debt was properly maintainable on it. Turpin *v.* Sledd, 23 Gratt. 238.

Military Certificates.—It was held in Gibbon *v.* Jameson, 5 Call 294, that as debt could only be supported for money or tobacco, it did not lie for military certificates.

Bond "Payable in the Currency of Virginia and North Carolina Money."—On the 14th of September, 1862, H bound himself by bond to pay to D twelve months after date eight hundred dollars for the purchase money of land, describing it, "payable in the currency of Virginia and North Carolina money." The obligation upon which this suit was brought, promised to pay eight hundred dollars "payable in the currency of Virginia and North Carolina money." Bank notes, though they pass generally by common consent as money, and answer the purpose of money, are not money, in a legal sense unless they be made a legal tender in payment of debts. The action of debt will not lie where the amount of recovery in money must be ascertained by evidence of value and the intervention of a jury. The action of debt only lies for money and the plaintiff recovers the sum in numero, and not a compensation in damages. In this case the quantity of the Virginia and North Carolina currency was fixed, and the insertion of the words eight hundred dollars has no reference to current coin, but to the amount of bank notes which represents so much coin. In cases of indeterminate quantity there can be no other measure of damages than the named sum, and the intervention of a jury is unnecessary. The named sum must necessarily be the amount of the debt, which is then precisely ascertained. But where the named sum is to be paid in any determinate quantity of a collateral article subject to fluctuation in its market price, the value of that article is the thing due, and as it may be more or less than the named sum for which the creditor is willing to take the article, it must be estimated in damages by the jury. This was a promise to pay this sum in the currency named, and the action of debt can not be maintained upon it. Dungan *v.* Henderlite, 21 Gratt. 149.

Bank Notes.—See the title BANKS AND BANKING, vol. 2, p. 283.

Within the meaning of the rule that the action of debt only lies for money, bank notes are not money. Butcher *v.* Carlile, 12 Gratt. 520.

For example, the obligor in a bond, promised to pay, on or before a certain specified day, the sum of "813 dollars and 79 cents, in notes of the United States Bank or either of the Virginia banks," and an action of debt is brought, on this writing. It is held that the action of debt will only lie upon a money or tobacco bond, and the plaintiff recovers the sum in numero, and not a compensation in damages. This is substantially a contract to pay bank notes to a certain specified amount, expressed in words as appropriate as any other, to signify how much bank paper was to be paid, and is equivalent to an engagement to pay bank notes amounting to 813 dollars and 79 cents, or so many bank notes as

on their face will nominally make that sum. Paper may rise or depreciate in value before the day of payment, and if the day passes, when the contract is to be fulfilled, the measure of the obligee's right, and of the obligor's liabilities is the value of the notes on that day to be ascertained by the verdict of a jury, and awarded in damages. But where the promise is to pay a determinate sum in an article of fluctuating or uncertain value, if the quantity be fixed, so that at the day of payment it may fall short of the debt, there debt will not lie, because the essence of the contract was the delivery of the article and the creditor can only recover the value. As where there is an obligation to pay 500 dollars in wheat at a certain day, a failure is made to deliver the wheat on that day, debt will lie because the obligation was for 500 dollars, whether it be paid in coin or wheat. But if the obligation be to pay 500 dollars by the delivery of 500 bushels of wheat, there debt will not lie, although the day be past, for it is possible that the wheat on the day of payment will be worth less than 500 dollars. Beirne *v.* Dunlap, 8 Leigh 514.

Negotiable Note. — The proposition of Metcalf *v.* Battaile, Gilmer 191, that an indorsement of a note is not a note in writing for the payment of money within the meaning of the act of 1804, was approved in Hatcher *v.* Lewis, 4 Rand. 156. And in Commercial Union Assurance Co. *v.* Everhart, 88 Va. 956, 14 S. E. 836, it was said: "It was held, before the statute was changed to its present form, 'that a negotiable note was not, as to the indorser, a writing for the payment of money, although so as to the drawer, because the undertaking of the indorser is not for the payment of money absolutely, but is a collateral contract to pay it under certain circumstances. Hatcher *v.* Lewis, 4 Rand. 152; Metcalfe *v.* Battaile, Gilmer 191. See also, Rees *v.* Conococheague Bank, 5 Rand. 326; Shelton *v.* Welsh, 7 Leigh 175."

Note Payable in Money or Its Equivalent.—When the obligation is to pay a sum of money, or some other article, in the alternative, on or before a certain date; or to pay a sum of money, with the privilege to the obligor to pay it in some other article on or before some other day, the obligor has his election to deliver the other article on or before that day, but if he fails to do so, he is liable absolutely for the money, and an action of debt will lie for its recovery. Butcher *v.* Carlile, 12 Gratt. 523, citing Crawford *v.* Daigh, 2 Va. Cas. 521. See also, citing this case, Dugan *v.* Henderlite, 21 Gratt. 151; Minnick *v.* Williams, 77 Va. 761. But see Beirne *v.* Dunlap, 8 Leigh 521.

B. brings his action of debt on a bond for a sum of money. The defendant pleads payment, and two special pleas, the first of which is that the consideration of the bond was the payment of confederate treasury notes, an illegal currency, etc.; the second special plea was that the bond was executed for cattle bought of B., to be paid for in confederate treasury notes, etc. Defendant proves that it was his understanding that as at the time the bond was executed there was no other currency but confederate treasury notes in Greenbrier county, it was to be paid in that. The plaintiff, B., proves that he refused to sell the cattle for confederate notes, and it was agreed that he should be paid in a bond which one Beard, for whom the cattle were bought, and who was to settle satisfactorily the bond sued on (which latter fact appeared by a memorandum underwritten on the bond sued on), held on one W., the plaintiff being then indebted to W.; that Beard afterwards came to the house of plaintiff to pay the bond sued on, in the bond of W., but it could not be found, and for that reason the exchange was not made; whereupon the court instructed the jury "that if the facts were as stated by the plaintiff, that he had misconceived his action;

that it ought to have been an action upon the special contract and not upon the bond, and that in this action the plaintiff could not recover." Held, had the supposed special contract been incorporated in the bond, it would nevertheless have been clearly an obligation for the payment of money, with a mere privilege to the obligor to discharge it in the note on W., eo instanti, or, at most, within a reasonable time. If the special contract is not incorporated in the bond but is sought to be established by parol testimony, the same doctrine applies; and the obligor in this case, having failed to discharge the obligation in the specific thing, he is liable absolutely for the payment of the money in an action of debt. Burr *v.* Brown, 5 W. Va. 241, citing Butcher *v.* Carlile, 12 Gratt. 520.

3. Must Be Sum Certain.

The action of debt will lie only for a sum certain, or which may be rendered certain. Davis *v.* Mead, 13 Gratt. 118; Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99; Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 842; Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 186.

The common-law action of debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty, and is the appropriate action for the recovery of a statutory penalty, upon the ground of an implied promise which the law annexes to the liability. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

The action of debt only lies for money, and the plaintiff recovers the sum in numero, and not a compensation in damages, they being merely nominal; the action will not lie for any collateral thing, where the amount of recovery in money must be ascertained by evidence of value and the intervention of a jury. Thus, where an obligation is to pay a certain sum of money in a commodity of which the quantity is uncertain, an action of debt will lie; but, if the obligation is to pay money in a fixed quantity of a commodity, debt does not lie. For, in cases of indeterminate quantity, there can be no other measure of damages than the named sum, and the intervention of a jury is unnecessary; the named sum must necessarily be the amount of the debt, which is therefore precisely ascertained. But where the named sum is to be paid in any determinate quantity of a collateral article, subject to fluctuation in its market price, the value of that article is the thing due, and, as it may be more or less than the named sum, for which the creditor is willing to take the article, it must be estimated in damages by a jury. Thus, for instance, where the promise is to pay one hundred dollars in wheat on a certain day, debt will lie; but, if the promise is to pay one hundred dollars by the delivery of one hundred bushels of wheat, then debt will not lie, for, in this last case, the promise is to pay a fixed quantity of a commodity of fluctuating value,—the contract is for quantity only, and not for value. So also an obligation to pay in bank notes—which are a mere commodity "enumerated in dollars and cents" like lawful money—bonds, or other choses in action, is for the payment in an article of which the quantity is ascertained; it is a promise to pay a fixed quantity of a commodity of fluctuating value,—in other words, the contract is for quantity only, and not for value—and debt will not lie thereon. In this respect there can be no difference between bank paper and any other commodity, for the paper may rise or depreciate in value before the day of payment, and if the day passes, and the contract has not been fulfilled, the measure of the obligee's rights and the obligor's liabilities is the value of the notes on that day to be ascertained by the verdict of the jury and awarded in damages. These principles of law, affirmed in Beirne *v.* Dunlap, 8 Leigh 514, have met with approval in Butcher

v. Carlile, 12 Gratt. 520, 522, 523, 524; Dungan *v.* Henderlite, 21 Gratt. 153, 154, 156; Wrightsman *v.* Bowyer, 24 Gratt. 437, 439; Jarrett *v.* Nickell, 9 W. Va. 355 (quoting with approval from opinion of Joynes, J., in Dearing *v.* Rucker, 18 Gratt. 438); State *v.* Harmon, 15 W. Va. 123; Randall *v.* Jaques, 20 Fed. Cas. 234; Dearing *v.* Rucker, 18 Gratt. 438, 439, 440, 442, 445. In this last case, Judge Joynes thought the above principles applied to contracts to pay so many dollars in Confederate notes, as well as to contracts to pay so many dollars in bank notes.

To support an action of detinue the things must be certain, as in debt. Marston *v.* Parish, Jeff. 1.

Amount Must Be Ascertained.

Bond Payable in Installments.—When the obligation is to pay a sum of money in twenty-five annual installments, debt can not be maintained on the bond, until the whole amount becomes due and payable. The proper remedy is an action of covenant for the recovery of the installments as they fall due. Peyton *v.* Harman, 22 Gratt. 643.

A paper contains a statement of account of rents collected through a number of years by an agent for his principal. And at the foot of the account there is a written statement setting out the gross amount of the rents received, certain deductions for commissions and expenses, leaving the net sum of one thousand, one hundred and thirty-seven dollars and thirty-five cents; and it concludes, "In the foregoing statement all errors to be corrected. As witness my hand and seal." And it is signed and sealed by the agent. Quære: If this paper will sustain an action of debt. If the paper will sustain an action of debt, in declaring upon it, if the plaintiff claims the sum stated in it as the net rents, it must be averred that there is no error in the bond. And if the plaintiff seeks to recover more or less than the sum stated, he should aver such error in the bond as will sustain her demand. Davis *v.* Mead, 13 Gratt. 118.

Action on Sheriff's Bond.—Upon a motion under § 5, ch. 121, of the W. Va. Code, the court may give judgment against the sheriff and his sureties for so much as the plaintiff is entitled to recover in any form of action by virtue of the sheriff's official bond, though the demand be not of a fixed sum, or one capable of being fixed by arithmetical calculation, but be for an unascertained amount, which, if the sheriff had been sued for a tort, would have sounded in damages. "I will now examine the objections urged to this notice, which make it fatally defective. It is claimed by the counsel of the defendants in error that the true interpretation of § 5, of chapter 121, of Code of W. Va., under which this notice was given, makes it applicable to cases where the sheriff was liable to pay a fixed money demand, or a sum which could be made certain by an arithmetical calculation; in other words, a demand which could be recovered by an action of debt. The language of this section (see W. Va. Code, § 593) is: 'In any case of any bond given by a sheriff, filed in the office of the clerk of the county court of the county, the circuit court of the county may, on motion of any person, give judgment for so much money as he is entitled to by virtue of such bond to recover by action.' I have copied only so much of this section as is necessary to the full understanding of it, so far as the question before us is concerned, and I have italicized those words relied upon by the parties respectively, as serving especially to show the meaning of this section on the point I am considering. I consider that in construing § 35, ch. 19, of the acts of 1881 (see W. Va. Code, ch. 41, § 30, p. 256), this court has in effect decided the point now under consideration. This section, so far as is necessary to quote it in considering this point, is thus worded:

'If any sheriff shall make such return upon any process as entitled any person to recover money from such sheriff, by action, the court may on motion give judgment against such officer and his sureties for so much principal and interest as could, at the time said return ought to have been made, have been recovered by such action, and certain specified interest.' This section, we decided in Bank *v.* Horner, 26 W. Va. 442, entitled a party in the case specified in it to recover, not simply a sum certain, such as action by debt might be recovered, but a sum also sounding in damages, which might be recovered in any form of action against the sheriff. The principal reason which compelled us to give this statute this construction was that by the revisal of 1849 it was changed by substituting in it the word 'action' (underscored in the quotation of this act above) in lieu of the words 'action of debt,' which was before that the wording of this act. See Va. Code, 1819, ch. 134, § 48. As worded before the Code of 1849, it was clear there could be no recovery by notice in a summary manner, except when the recovery was a sum certain, and it had been so repeatedly decided by the courts. But this significant change of the Code of Virginia of 1849 showed that the legislature no longer intended to confine this summary remedy under this section against the sheriff and his sureties to cases where the recovery was a sum certain. And we so decide in the case in 26 W. Va. above cited. Now, having adopted this policy of making the sheriff and his sureties responsible in the case named in this section, by a summary proceeding by notice, whenever he was responsible by action in any form, they proceeded further, and by a section exactly like the one contained in § 5, ch. 121, W. Va. Code, to make the sheriff always liable on his bond, by motion in a summary manner, whenever he would be liable in any form of action, using language very similar to that contained in the preceding section in another chapter, and which was construed as not confined to cases where sums certain could be recovered by action. They used the word 'action' and not, as before had been done, 'action of debt' in a somewhat similar act to the one above quoted. The section under which these proceedings in this case were instituted was introduced into our statute law for the first time in the Code of 1849." Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 191.

Although the statute once required the sheriff to give bond "for the true and faithful performance of his duty as sheriff," yet the action in this case was not on his official bond—see 1 Rev. Code, 1803, page 120, § 3. But as an officer who commits a trespass, colore officii, violates the duty of his office and breaks the condition of his official bond, the usual remedy now would be an action of debt on the bond —see Sangster *v.* Com. (1866), 17 Gratt. 124; Va. Code, 1887, §§ 180, 2852.

Where Statute Imposes No Penalty. —An action of debt will not lie against a sheriff under a statute for levying an execution upon the property of the plaintiff's tenant, without paying him a year's rent, because the act does not impose a penalty upon the officer; and therefore an action upon the case, for consequential damages, was the proper remedy. Byrd *v.* Cocke, 1 Wash. 232.

B. SIMPLE CONTRACTS.

1. Bills, Notes and Checks.

See post, "The Pleadings," III. See the title BILLS, NOTES AND CHECKS, vol. 2, p. 483.

The West Virginia statute provides that upon any note, whether sealed or not, by which there is a promise, undertaking, or obligation to pay money, which, on its face, is payable at a particular bank, or at a particular office thereof for discount and deposit, or at the place of business of a savings institution, or savings bank, and upon any bill of exchange, whether such note

or bill be payable in or out of this state, if the same be protested, an action of debt or assumpsit may be maintained, and judgment given jointly against all liable by virtue thereof, whether drawers, endorsers, or acceptors, or against any one or any intermediate number of them, for the principal and charges of protest, with interest thereon from the date of such protest; and in the case of such bill, for the damages also. W. Va. Code, 1899, ch. 99, § 11.

In a well considered West Virginia case the court was of the opinion that the only change in the pre-existing law produced by this section, was to allow a joint action of assumpsit against certain defendants, who before the passage of that section would be sued jointly in an action of debt only. Laidley *v.* Bright, 17 W. Va. 779, citing and discussing Mann *v.* Sutton, 4 Rand. 254. See State *v.* Harmon, 15 W. Va. 110.

The Virginia statute provides that upon any notes, check, bill of exchange, or other instrument which under the laws of the state is negotiable, whether the same be payable in or out of this state, an action of debt or assumpsit may be maintained and judgment given jointly against all liable by virtue thereof, whether drawer, indorsers, or acceptors, or against any one or any intermediate number of them for the principal and charges of protest if the same should be protested, with the interest thereon from the date of protest, and in case of such bills for damages also. (1875-6, p. 263; 1897-8, p. 716.) Va. Code, 1904, § 2853.

Foreign Bill of Exchange.—The action of debt lies on a foreign bill of exchange, which was drawn in another state and endorsed in this state. Stott *v.* Alexander, 1 Wash. 331.

To Hold Maker and Endorsee Jointly Liable Protest and Notice Necessary.—To make an endorsee of a negotiable note liable, in debt, with the maker, it must appear that the note was duly and formally protested for nonpayment, and that he was duly notified of such nonpayment, and protest. See W. Va. Code, 1868, ch. 99, § 11. Shields *v.* Bank, 5 W. Va. 254.

Parties Plaintiff.—The holder of a negotiable note, which has been transferred to him, as collateral security for a debt, by a person who could not have recovered in an action on the note against the maker, can not recover in an action of debt on the note against the maker, more than the amount of the debt for which the note was taken as security. Shepherd *v.* Anderson, 2 Pat. & H. 203.

Acceptor of an Order.—Under the fourth section of the act, 1 Rev. Va. Code, ch. 125, p. 484, the payee of an order can bring an action of debt against the acceptor of an order, because by his acceptance he obliges himself to pay the amount of the order to the payee by an absolute and unconditional obligation, and the subsequent treatment of the paper does not affect him. Hollingsworth *v.* Milton, 8 Leigh 50.

Parties Defendant.

Acceptor of Bill of Exchange.—An action of debt was held in Smith *v.* Segar, 3 Hen. & M. 394, and also in Wilson *v.* Crowdhill, 2 Munf. 302, not to lie against the acceptor of a bill of exchange. Otherwise by Va. Code, 1887, § 2853.

But these cases were disapproved in Regnault *v.* Hunter, 4 W. Va. 269, and it was held that an action of debt will lie in the name of the payee of a bill of exchange against the acceptor, under § 10, ch. 144, Va. Code, 1860, provided it be averred in the declaration that the acceptance is signed by the party who is to be charged thereby or his agent.

An action of debt will lie in the name of the drawer of a bill of exchange against the acceptor, independently of statute, and an action of debt will lie in the name of the endorsee of a bill of exchange against the acceptor under the Virginia statute, Code, 1860,

ch. 144, § 10; Regnault *v.* Hunter, 4 W. Va. 257, overruling Smith *v.* Segar, 3 Hen. & M. 394, and Wilson *v.* Crowdhill, 2 Munf. 302.

And under § 4, ch. 125, 1 Rev. Code, which is the equivalent of § 10, ch. 144, Va. Code, 1860, it was held, that an action of debt will lie for the payee against the acceptor of an order. Hollingsworth *v.* Milton, 8 Leigh 50.

In Regnault *v.* Hunter, 4 W. Va. 271, it was said: "This section (meaning § 10, ch. 144, Va. Code, 1860), and the construction of it, given in the case of Hollingsworth *v.* Milton (8 Leigh 50), overrules the cases of Smith *v.* Segar, Wilson *v.* Crowdhill (2 Munf. 302), Cloves *v.* Williams, and Powell *v.* Ancell, and sustains the case of Robarg *v.* Peyton, that an action of debt will lie in the name of the payee of a bill of exchange against the acceptor, provided it be averred in the declaration that the acceptance is signed by the party who is to be charged thereby, or his agent."

In Hollingsworth *v.* Milton, 8 Leigh 50, it was held that, under the statute of Virginia, 1 Rev. Code, ch. 125, § 4 (equivalent to Va. Code, 1860, ch. 144, § 10), an action of debt will lie for the payee against the acceptor of an order. In delivering the opinion of the court in this case (Hollingsworth *v.* Milton) Judge Tucker said (p. 52): "In the cases of Smith *v.* Segar, 3 Hen. & M. 394, and Wilson *v.* Crowdhill, 2 Munf. 302 (which however were acceptances on bills of exchange), the influence of this statute (the one referred to above) does not seem to have been considered."

Pleading.—It was held in Regnault *v* Hunter, 4 W. Va. 257, that an action of debt will lie in the name of the payee of a bill of exchange against the acceptor, under § 10, ch. 144, of the Code of Virginia, 1860, provided it be averred in the declaration that the acceptance is signed by the party who is to be charged thereby, or his agent. An action will therefore lie in the name of the drawer of a bill of exchange against the acceptor, independently of statute. An action will lie in the name of the endorsee of a bill of exchange against the acceptor under the statute.

Quære, must an action of debt, under the act of assembly, be brought against all the parties to a negotiable paper, or may it be maintained against any intermediate number? Taylor *v.* Beck, 3 Rand. 316.

But this query is answered in the affirmative by the Virginia Code, 1904, § 2853; W. Va. Code, 1899, ch. 99, § 11.

2. Money Counts in Assumpsit.

See the title ASSUMPSIT, vol. 2, p. 1.

Account Stated.—Of the simple contracts for which debt lies, there is no doubt that a contract for money due on an account stated is included. Eib *v.* Pindall, 5 Leigh 110.

The action of debt lies for an account stated. Somerville *v.* Grim, 17 W. Va. 803.

Money Lent, etc.—The action of debt lies to recover money lent, paid, had and received. Somerville *v.* Grim, 17 W. Va. 803.

3. Arrears of Rent.

The action of debt lies for the recovery of arrears of rent, but at common law no interest on rent was recoverable, unless expressly or by implication contracted for, or where justice required it. Cooke *v.* Wise, 3 Hen. & M. 463. But in Virginia and in West Virginia by statute interest is recovered "in any action for rent" as in other contracts. Va. Code, 1187, §§ 2787, 3396; 4 Min. Inst. (3d Ed.) 162; W. Va. Code, 1899, ch. 93, § 7.

4. Insurance Policy.

See the title INSURANCE.

Declaration showing plaintiff's intention to proceed under the statute "to simplify declarations in actions against insurance companies" (Va. Code, 1873, ch. 167, § 14), is a good statutory declaration, even though largely follow-

ing the form of a declaration in debt. Virginia Fire, etc., Ins. Co. *v.* Saunders, 84 Va. 210, 4 S. E. 584.

C. SEALED INSTRUMENTS.

See post, "The Pleadings," III. See generally, the title SEALS AND SEALED INSTRUMENTS.

In General.

West Virginia Practice.—It is held in State *v.* Harmon, 15 W. Va. 115, in interpreting § 10, ch. 99, of the Code of West Virginia 1868, that so far as it applied to the action of assumpsit upon sealed instruments containing a promise, undertaking or obligation to pay money, the court did not feel at liberty to give a more enlarged or liberal interpretation to it, than bound to by the language or terms thereof applicable thereto, but that it regarded it to be the safer practice under the then state of legislation to declare in debt upon a sealed instrument for the payment of money rather than in assumpsit.

Contractor's Bond.—Either debt or covenant will lie to recover the penalty of the following bond, though the action of debt is preferable: "Know all men by these presents, That we, George K. Leonard and A. G. Leonard, Alfred Foster, Thompson Leach and Wm. B. Caswell are held and firmly bound unto the Board of Supervisors of Jackson county, State of West Virginia, in the sum of ten thousand dollars, to the payment whereof well and truly to be made, we jointly and severally bind ourselves, our joint and several heirs and personal representatives. Sealed with our seals and dated this 29th day of October, 1867." Jackson Co. *v.* Leonard, 16 W. Va. 470.

Statutory and Official Bonds.—See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PUBLIC OFFICERS; RECEIVERS; TRUSTS AND TRUSTEES.

Fiduciary Bonds.—Barton, in his Law Practice (vol. 1, p. 166), in speaking of fiduciary bonds, says: "The action of debt may be maintained upon bonds executed by fiduciaries, such as executors, administrators, guardians, committees, trustees and receivers, which are made payable to the commonwealth, and conditioned for the faithful performance of their several duties by the various officers who execute them. The suit is brought in the name of the commonwealth at the relation of the claimant; but the relator must be the party having the legal right to the debt." Quoted in State *v.* Hall, 40 W. Va. 455, 21 S. E. 760, citing Allen *v.* Cunningham, 3 Leigh 395.

On Bond of Sheriff for Trespass.—Action of debt is the proper remedy when proceeding on the official bond of a sheriff who takes the property of A under an attachment against the property of B. This was a violation of the duty of his office and the condition of his bond, and his sureties are liable therefor. Sangster *v.* Com., 17 Gratt. 124.

Replevy Bond.—The executors may either maintain the statutory remedy of motion, or the common-law remedy of action of debt on a replevin bond, payable to their testator. Booker *v.* McRoberts, 1 Call 243; Early *v.* Owen, 6 Munf. 319.

Defective Forthcoming Bond.—Although a motion has been brought on a forthcoming bond, and dismissed because it was defective, this does not prevent the subsequent bringing of an action of debt upon the same bond, the said bond being taken by the sheriff, and the property not being delivered according to the condition of the bond and the motion on said bond being dismissed because of its insufficiency. Hewlett *v.* Chamberlayne, 1 Wash. 367; Johnston *v.* Syme, 3 Call 523. The fact that the bond was taken payable to the sheriff instead of to the creditor, does not prevent his bringing an action of debt on it. Beale *v.* Downman, 1 Call 249.

Act of 1813-1814, Ch. 13, § 2, Construed—Administration Bond.—M. H. admin-

istrator of R. H., recovers a judgment against E. B. administratrix of R. B., for debt due plaintiff's intestate, and sues out a fi. fa. thereon, which is returned nulla bona; then, M. H., the plaintiff, dies; and administration de bonis non of R. H.'s estate is granted to A. Held, the action of the debt on the administration bond of E. B. against her and her sureties, lies at the relation of A., the administrator de bonis non of R. H. and not at the relation of the representative of M. H., the first administrator of R. H., upon the construction of the statute of 1813-1814, ch. 13, § 2; 1 Rev. Code, ch. 104, § 63. Allen *v.* Cunningham, 3 Leigh 395.

Bonds Payable in Confederate Notes.—A bond was given in 1862, novating several prior transactions between the parties. If the intention of the parties to the bond was that it was payable in Confederate States treasury notes, the defendant is entitled to recover in an action of debt the value of the amount of such notes, scaled according to the value of such notes with reference to gold. Dearing *v.* Rucker, 18 Gratt. 426.

Endorsement on Bond.—P. executes a bond submitting a certain matter to arbitration. The arbitrators disagree, and then P. makes an endorsement on the bond by which he agrees that the arbitrators shall choose an umpire, and binds himself to abide by his award; and he signs and seals this endorsement. This endorsement is to be considered as a part of the bond, upon which as a whole, an action of debt may be instituted. Price *v.* Kyle, 9 Gratt. 247.

Bond with Collateral Condition.—Covenant (as well as debt) lies on a bond with collateral condition. If there be no stipulation, by articles, or in the condition itself, that it shall be performed, the breach assigned should be the failing to pay the penalty; but, where such stipulation is either expressed or implied, the failure to perform the condition may be assigned as the breach. Ward *v.* Johnston, 1 Munf. 45.

A bond with collateral condition is a bond to pay money with a condition annexed to be void, if the collateral stipulation to do or omit something be complied with. At common law the penalty is forfeited by the breach of the condition, and then becomes a debt, and as such is recoverable by an action of debt, the relief to the obligor being in a court of equity alone, which was accustomed to enjoin the obligee from compelling the obligor to pay the penalty, provided the latter would pay the actual damages sustained in consequence of the breach of the stipulation. Reynolds *v.* Hurst, 18 W. Va. 648.

Assignment of Errors.—In an action of debt upon a bond with collateral condition, error is assigned that the declaration is fatally defective, because no damage is averred or demanded; no measure of damage is exhibited; no damages could have accrued to the plaintiff because of the facts stated, and damage was a gist of the action. The court in deciding that this assignment of error was unfounded, said: "Though the breach of the condition of the bond is not stated in the usual or common form in such cases, still the amount of money and damages claimed under the conditions are stated in the declaration and a breach of the condition alleged by the allegation and averment of the nonpayment thereof. It is unnecessary for me to determine whether the declaration in this respect would be held good upon general demurrer, as that question is not before us. It is quite manifest, I think, that the part of the declaration, to which the first and second divisions of this assignment are directed, is good after the final judgment, under the statute of jeofails." Holliday *v.* Myers, 11 W. Va. 276.

Partially Sealed Contracts—How Suit Brought.—An instrument in writing, binding all of the parties thereto, pur-

porting to be under their hands and seals, is not sealed as to one of the parties. An action of debt is brought on the paper, and on demurrer it is held proper to sue all of the parties to such paper in one action of debt. In order to maintain the action the undertaking must be either joint and several, or joint; it was held to be plainly one joint undertaking. Rankin *v.* Roller, 8 Gratt. 63.

An action of debt was brought upon the following instrument. "On demand, I promise to pay to David Keller the just and full sum of $200.00, for value received, as witness my hand and seal the 1st day of March, 1862.

Thos. McHuffman, [Seal.]

Security:—David M. Riffe." This action was a joint one, and was brought by Keller's administrator against the obligor and the surety. The court held that this writing constituted a joint and several promise to pay, and that the action of debt was properly brought on it; it was held not necessary to sue in separate actions the obligor and surety. Keller *v.* McHuffman, 15 W. Va. 64.

Since the passage of the West Virginia Code of 1868, as before, a single bill under seal is not a note, but a specialty; and the drawer or endorsers of such a bill, although it be made payable and negotiable at a bank in West Virginia, can not be sued jointly in an action of debt by virtue of § 11, ch. 99, of said Code. See Mann *v.* Sutton, 4 Rand. 253; Laidley *v.* Bright, 17 W. Va. 779. But see same section in the Code of 1899.

A single bill, under seal, is not a note, but a specialty; and therefore the drawer and endorsers of such a note made negotiable and payable at the Farmers' Bank, can not be sued jointly in an action of debt. Mann *v.* Sutton, 4 Rand. 253.

Amount of Recovery.—It seems, that in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages. Baker *v.* Morris, 10 Leigh 285.

D. ESCAPE.

See the title ESCAPE.

From the earliest times, the action of debt was employed in Virginia to recover against an officer for an escape. Price *v.* Holland, 1 Pat. & H. 289.

Under the act, 1 Rev. Code, 1819, ch. 136, § 3, an action of debt may be maintained against a sheriff for either a willful or negligent escape. In order to maintain the action, it is only necessary for the plaintiff to show the escape, which may be done by evidence aliunde the return on the execution. And to defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made. Stone *v.* Wilson, 10 Gratt. 529.

Negligence of Sheriff.—In debt on official bond of sheriff, assigning for breach the escape of a debtor in his custody, no judgment can be entered on verdict against defendants, unless it be expressly found (as prescribed by the statute, 1 Rev. Code, ch. 136, § 3), that the debtor escaped with the consent or through the negligence of the sheriff, or that he might have been retaken, and the sheriff neglected to make immediate pursuit. Vanmeter *v.* Giles, 1 Rob. 329.

Defenses.—A sheriff, who has released a debtor, taken in custody upon a ca. sa., by authority of a warrant of discharge from a magistrate under the act for the relief of insolvent debtors, is not liable to the judgment creditor in an action of debt for an escape, although it is shown that the notice by the debtor to the creditor, of his intention to apply for the benefit of the act, was insufficient. Price *v.* Holland, 1 Pat. & H. 289.

Sufficiency of Plea.—In debt on official bond of the sheriff of H. assigning for breach that the sheriff permitted the escape of a debtor in execution under a ca. sa. from the superior court of

H., the defendants plead that the debtor gave bond according to law, with good security, to keep the prison rules for the county of H. and thereupon betook himself to the prison rules for said county, without this that he escaped in any other manner. The bond (of which profert is made in the plea) is with condition that the debtor shall keep within the prison bounds prescribed by the superior court of H. Plaintiff takes oyer of the bond and demurs to the plea. Held, as the bond, made part of the plea by oyer, shows that the debtor was admitted to the proper bounds, the defect if any in the allegations of the plea is thereby cured. Vanmeter *v.* Giles, 1 Rob. 328.

Amount of Recovery.—"I have therefore never had a doubt, that in debt for an escape under the statute, the recovery was for the whole sum, and could not be reduced by proof of the debtor's insolvency, or in any other way, except by evidence of part payment or satisfaction. But in the action on the case, it would be otherwise. Nor is it a wrong to the plaintiff in the latter action, so to limit the amount of his recovery; since he may still proceed to retake his debtor, and compel payment of his whole debt from him." Perkins *v.* Giles, 9 Leigh 401.

"Would any one conceive that in the action of debt at common law, fifteen per cent. interest would be given? So for failure to return an execution, the creditor may, by motion, recover five per cent. per month. But if he brings an action on the case at common law, the limit of the recovery would be the debt, interest and costs. So in case of escapes on final process, case lies at common law; and the authorities are very clear, that in such action the amount of the debt is not necessarily the measure of damages, but the plaintiff must recover damages commensurate to the injury he has sustained." Perkins *v.* Giles, 9 Leigh 400.

E. JUDGMENTS.

See post, "The Pleadings," III. See generally, the title JUDGMENTS AND DECREES.

In General.—Debt is the proper form of action on a judgment either domestic or foreign. Anderson *v.* Dudley, 5 Call 529; Draper *v.* Gorman, 8 Leigh 629.

On Judgment "if Assets."—It was held, in Braxton *v.* Wood, 4 Gratt. 25, that the action of debt could be brought on a judgment, confessed by the administrator in a suit by a debtor of his testator, "if a sufficiency of the assets of the defendant's testator's estate shall remain after payment of debts of superior dignity."

When Records Destroyed.—The action of debt may be maintained on a judgment, although the records of such judgment have been destroyed by fire, which also destroys the record of an appeal taken on said judgment. Newcomb *v.* Drummond, 4 Leigh 57.

Foreign Judgments.—In debt on judgment rendered in state of Ohio, upon confession, under a power of attorney made before the action brought, defendants plead that they never executed such power of attorney, and had no notice of the commencement or pendency of the suit in Ohio; on general demurrer to the plea, held, it was well pleaded, and a good bar. Wilson *v.* Bank, 6 Leigh 570.

"This is an action upon a judgment of the state of Ohio, which, it is contended, is conclusive in the courts of Virginia, upon the principles of the constitution of the United States. It is unnecessary in this case, to go into the question of the construction of that clause of the federal compact, which relates to the effect of the judicial proceedings of the several states in other states; for it seems to be agreed, on all hands, that the doctrine of the conclusiveness of the judgments of the respective states, is to be taken with the qualification, that where the court has no jurisdiction over the subject matter or the person, or where the defendant has no notice of the suit,

or was never served with process, and never appeared to the action, the judgment will be esteemed of no validity. 1 Kent's Comm. 243, 4, and the cases here cited: Phelps *v.* Holker, 1 Dall. 261; Benton *v.* Burgot, 10 Serg. & Rawle 240; Green *v.* Sarmiento, 3 Wash. C. C. R. 17; Starbuck *v.* Murray, 5 Wend. 148, in which all the cases are collected. In what manner, then, are the defendants to avail themselves of the objection that they never appeared, or were served with process, or had notice of the suit? The answer is, that they must plead it. In those states, where the plea of nil debet is held to be a good plea to an action of debt on the judgment of a sister state, the defendant may impeach the justice of it under the plea of nil debet, upon the ground that he never had notice of the proceeding. But the party may also plead the matter specially, even in those states. And in those states in which nil debet is not a good plea, it is obvious, that the defendant is compelled to plead the special matter." Wilson *v.* Bank, 6 Leigh 574.

Limitation of Action.—See the title LIMITATION OF ACTIONS.

The statute 1 Rev. Code, Va. 1819, p. 489, ch. 128, § 5, declaring that where execution hath issued and no return is made thereon, the party in whose favor the same was issued may obtain other executions for ten years from the date of the judgment and not after, does not bar such party from maintaining an action of debt on the judgment after ten years. Herrington *v.* Harkins, 1 Rob. 591.

The statute 1 Rev. Code, Va., 1819, Code, Va., ch. 128, § 5, whereby the remedy on a judgment by debt or scire facias is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing. Lipscomb *v.* Davis, 4 Leigh 303.

Judgment recovered by D. P. & Co. against F. in September, 1810, and execution sued out in the same month, and another in October, 1815, but neither returned; to a scire facias to revive the judgment against F.'s executor, sued out in July, 1826, defendant pleads in bar, the statute of limitations, 1 Rev. Code, Va., ch. 128, § 5; plaintiffs reply the two executions sued out in September, 1810, and October, 1815; on demurrer to this replication; held, the statute is a bar to the scire facias. But it seems, by the opinion of Tucker, P., that debt would lie on the judgment, and the statute would not be a bar to that action. Fleming *v.* Dunlop, 4 Leigh 338.

Recovery of Interest as Damages.—In Mercer *v.* Beale, 4 Leigh 189, Judge Tucker said: "That in an action of debt upon a judgment, the plaintiff may, in the shape of damages, recover interest upon his demands is a proposition too plain to have required proof;" although he subsequently says that, while interest on a judgment not carrying interest may be given, it is not a matter of course. And that such an action lies, and that the same judgment can be rendered upon a decree of a court of chancery as upon a judgment at law. Stuart *v.* Hurt, 88 Va. 345, 13 S. E. 438.

In an action of debt on a decree for an amount of interest thereby found due the plaintiff from the defendant; held, interest on the amount of the decree may be recovered in the shape of damages for its detention, though the decree makes no provision for the payment of interest thereon. Stuart *v.* Hurt, 88 Va. 343, 13 S. E. 438.

F. FINES AND PENALTIES.

See post, "The Pleadings," III.

1. Fines.

See the title FINES AND COSTS IN CRIMINAL CASES.

The statute provides that where a fine without corporal punishment is prescribed, the same shall be recovered, if not limited to an amount not exceeding $20, by action of debt. Va. Code, 1904, § 712.

2. Penalties.

See the title PENALTIES AND FORFEITURES.

Where Statute Provides No Remedy.—See the title ACTIONS, vol. 1, p. 125.

Where a statute imposes a penalty for the nonperformance of a duty prescribed, no part of which penalty can accrue to the commonwealth, and the statute provides no particular mode by which the person aggrieved may recover the penalty, the common-law action of debt may be maintained therefor, and is proper. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99; Sims *v.* Alderson, 8 Leigh 479; Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; West *v.* Rawson, 40 W. Va. 480, 21 S. E. 1019.

An action of debt for the penalty of a statute is a common law action, and will be tried in a common law manner. United States *v.* Mundel, 6 Call 245.

In Sims *v.* Alderson, 8 Leigh 483, Tucker, J., says "that the action of debt is the peculiarly appropriate action to recover a penalty by statute."

Actions to recover specific penalties imposed by statute do not sound in damages, and where a statute imposes a penalty no part of which can accrue to the commonwealth, but provides no particular mode by which the person aggrieved may recover the penalty, the common-law action of debt is the proper action. An action on the case does not lie. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

Where Statute Provides Remedy.—Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520. Compare Sims *v.* Alderson, 8 Leigh 479.

Cumulative Remedies. — Assumpsit and debt are concurrent remedies under the act of congress giving the right to recover a penalty for exacting and receiving usurious interest on loans made by national banks. Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

Illustrative Cases.

Failure to Construct Cattle Guards.—The common-law action of debt is the proper action against a railroad company to recover the penalty imposed by § 1262 of the Virginia Code for the failure to construct cattle guards. "Section 1262 making no provision for the recovery of the penalty prescribed, and the case not coming under the provisions of the general statute, § 712 of the Code, in which it is provided that the proceedings to collect fines due in whole or in part to the commonwealth shall be in the name of the commonwealth, if the plaintiff be entitled to recover, under the allegations of his declaration, his remedy is by action of debt. The statute declares and fixes a sum certain for each day's failure, after twenty, to construct cattle guards. The recovery in cases like this is not measured by the damages sustained. The verdict does not sound in damages; but is a sum eo nomine and in numero; otherwise in an action on the case." Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

Exacting Usurious Interest.—An action of debt will lie for the recovery of the penalty prescribed by the national currency act, for exacting and receiving usurious interest on loans made by a national bank. Lynch *v.* Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

Interfering with Elections.—By the supplement to Rev. Code, Va., ch. 88, p. 112, it provides that if any officer of an election, who interferes in the election in any way by showing partiality for any candidate, he shall forfeit a certain sum, to be recovered by bill, plaint, or information in any court of record. In an action of debt brought under this statute it was con-

tended that debt not being mentioned as a means of recovery, the action did not properly lie, but the court held it to be embraced in the words "bill" and "plaint." Sims *v.* Alderson, 8 Leigh 479.

Failure of Sheriff to Return Execution.—An action of debt will not lie against the surety of a sheriff, on his official bond, to recover the penalty imposed by law, for failing to return an execution. Such penalty can only be recovered by motion; and an action of debt will only lie for the damage actually sustained by the sheriff's failure to return the execution. M'Dowell *v.* Burwell, 4 Rand. 317.

For Levying without Paying Year's Rent Due.—An action of debt was not sustainable under an act which did not impose a penalty upon the officer for levying an execution on the property of the tenant, when a year's rent was due to the landlord, which the officer did not pay. The sheriff was liable in such case, but the remedy was an action on the case for consequential damages. Byrd *v.* Cocke, 1 Wash. 232.

Violation of Revenue Laws.—The statute provides that penalties for violations of revenue laws are recoverable by action of debt. Va. Code, 1904, § 575.

G. OBLIGATION TO PAY MONEY IN INSTALLMENTS.

Debt can not be maintained on an obligation to pay a sum of money in installments, until the whole is due. The proper remedy would be an action of covenant for the recovery of the installments as they fall due. Peyton *v.* Harmon, 22 Gratt. 643.

In debt on a bond, if the defendant, after craving oyer, plead "payment," and it appear, from the condition of the bond, that only a part of the debt had become due at the time of institution of the suit, the plea extends to that part only, and not to sums which might become due thereafter. Thatcher *v.* Taylor, 3 Munf. 249.

H. CLAIM FOR SERVICES RENDERED.

A claim for $1,400 due from the plaintiff to the defendant for services rendered at his request as his agent, is a debt for which this action will lie, and is therefore a proper subject of set-off. Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833.

I. WRITING ACKNOWLEDGING DEBT.

When there is a writing, signed by the debtor, acknowledging his indebtedness in a certain amount, the real owner may bring an action of debt thereon. Cunningham *v.* Herndon, 2 Call 530; Murdock *v.* Herndon, 4 Hen. & M. 200. An acknowledgment of indebtedness between the parties to a deed, contained in its recitals, is a sufficient acknowledgment of a debt to sustain an action of debt thereon. Newby *v.* Forsyth, 3 Gratt. 308.

III. The Pleadings.

A. THE DECLARATION.

1. In General.

A declaration in debt, which sets forth the instrument sued upon according to its legal effect, is sufficient. Henderson *v.* Stringer, 6 Gratt. 131; Newby *v.* Forsyth, 3 Gratt. 308.

It is a sufficient declaration in debt, which states that the defendant had acknowledged by his certain writing, the settlement of his account with W. R., and a certain amount due to him, which the said W. R. had by writing on the bill of settlement assigned to the plaintiffs, directing the same to be understood as belonging to the plaintiffs. This stated a sufficient cause of action. Cunningham *v.* Herndon, 2 Call 530.

On a bond payable to "A, executor of B," the declaration technically should have been in the debet as well as the detinet, but it was only in the detinet. The plaintiff has the right to abridge his demand, and the omission to declare in the debet is such mere

matter of form, that it will not be regarded, even on special demurrer. Bailey *v.* Beckwith, 7 Leigh 604; Waller *v.* Ellis, 2 Munf. 88.

Payment of Money in Alternative.—In Minnick *v.* Williams, 77 Va. 761, it is said: "When the obligation is to pay money with a mere privilege to the obligor to pay in some other article on or before a certain day, it is unnecessary to take any notice of such privilege in the declaration if the day passes without payment of the money, or the delivery of the other equivalent article. Lewis *v.* Long, 3 Munf. 136; Butcher *v.* Carlile, 12 Gratt. 520."

Statement in Queritur.—The queritur in an action of debt brought upon an injunction bond should demand the aggregate of all the injunction bonds named in the declaration, where there are several counts, and there are apparently several bonds. But if the queritur demands only the penalty and not the aggregate, it will not be so material an error as to be available on general demurrer. Bank *v.* Fleshman, 22 W. Va. 317.

If a declaration in debt be blank as to the sums, the date of the obligation, the assignment thereof to the plaintiff, and as to the damages, a judgment rendered thereupon is erroneous; and ought to be reversed and the suit dismissed with the costs of both courts. Blane *v.* Sansum, 2 Call 495.

2. In Debt on Negotiable Paper.

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 486.

Promissory Note—Presentment.—In an action of debt on a promissory note, brought by an indorsee against the maker, the declaration stated the note as one made negotiable at the Bank of Virginia at Petersburg, and averred that the note was presented at the bank at maturity and protested for nonpayment; the note offered in evidence, was made negotiable at the bank; there was no proof that it was presented at the bank for payment. The note was not made payable at any particular place, it was only made negotiable at the bank at Petersburg, and was not necessarily payable there. The averment of presentation at the bank is mere surplusage and immaterial, and need not be proved. Barrett *v.* Wills, 4 Leigh 114.

What Omissions in Declaration Fatal.—The declaration in an action of debt on a negotiable note, which fails to state that the plaintiff is the payee or endorsee or holder of the note, though the drawing of the note, and its endorsement by the payee in blank is alleged; which also fails to state that it was duly presented for payment at the place where it was payable, at the time when it became due and payable, that it was not paid, and that thereupon it was then duly protested for nonpayment, of all of which the endorser had prompt notice, is fatally defective on general demurrer. Bank of Huntington *v.* Hysell, 22 W. Va. 142.

Interest Not Claimed.—An action of debt was brought upon a promissory note, bearing interest from date. The declaration stated the principal sum right, but omitted to state the amount of interest. Judgment for the principal sum without interest must be entered upon non sum informatus. Hubbard *v.* Blow, 1 Wash. 70. See also, Brooke *v.* Gordon, 2 Call 212. But now under the act which took effect April, 1805, the clerk issues executions for interest, though not mentioned in the writing, nor demanded in the declaration. Wallace *v.* Baker, 2 Munf. 334; Baird *v.* Peter, 4 Munf. 76. See Va. Code, §§ 3390, 3391.

In debt upon a note for £300, with interest from the date, if the declaration does not demand interest, and the defendant withdraws his plea, the court can not give judgment for the interest. Hubbard *v.* Blow, 4 Call 224.

Omission of Sum.—In an action of debt upon a protested negotiable note against the makers and endorsers, the accidental omission of the sum for

which the note was given, in the description of it in the declaration, where it appears from other parts of the declaration, is not ground of demurrer. Archer *v.* Ward, 9 Gratt. 622.

3. In Debt on Specialties.

a. Bonds.

See the title BONDS, vol. 2, p. 541.

It is sufficient for a declaration in debt to set out the bond according to its legal effect. Henderson *v.* Stringer, 6 Gratt. 131.

Errors in Bond.—A paper contains a statement of account of rents collected through a number of years by an agent for his principal. And at the foot of the account there is a written statement setting out the gross amount of the rents received, certain deductions for commissions and expenses, leaving the net sum of one thousand, one hundred and thirty-seven dollars and thirty-five cents; and it concludes, "In the foregoing statement all errors to be corrected. As witness my hand and seal." And it is signed and sealed by the agent. Quære: If this paper will sustain an action of debt. If the paper will sustain an action of debt, in declaring upon it if the plaintiff claims the sum stated in it as the net rents, it must be averred that there is no error in the bond. And if the plaintiff seeks to recover more or less than the sum stated, she should aver such error in the bond as will sustain her demand. Davis *v.* Mead, 13 Gratt. 118.

Date of Bond Blank in Declaration.—An action of debt was brought on two bonds, which were described in the declaration as dated on the — day of —— 1859, and the — day of —— 1860. The objection on general demurrer to these counts was not held sound, the bonds being fully described. Simmons *v.* Trumbo, 9 W. Va. 358.

Omission of Obligor's Residence.—It is immaterial that the words, "of the county of Essex," the place of the obligor's residence, which is stated in the bond, are not stated in the declaration. Evans *v.* Smith, 1 Wash. 72.

Declaring against Remote Heir.—In declaring in an action of debt against the heir of an heir on a bond in which such heirs are bound, he should be charged as heir of the heir of the obligor, or as heir of the obligor, with a videlicet, setting forth the intervening descent, but it is not necessary for the declaration to state how he is heir. Waller *v.* Ellis, 2 Munf. 88.

Joint Obligors.—In an action of debt against one only of two joint obligors, where the declaration described the bond as joint, and did not state that the other obligor was dead, this was a fatal error, and though it was not pleaded in abatement, was not cured by verdict. Newman *v.* Graham, 3 Munf. 187. But it is held in Meredith *v.* Duval, 1 Munf. 76, that if the bond be spread on the record by oyer, and appear to be a joint and several bond, the defect in the declaration will be obviated. In neither case was the statute of jeofails adverted to. See Va. Code, 1887, § 3449.

In an action of debt on bond with collateral condition, the writ (which by the defendants' praying oyer was spread on the record) was against four persons, as heirs of the obligor, but the declaration only charged three as such heirs, the declaration was too defective for a judgment to be entered thereon, and such defect was not cured by verdict. Watson *v.* Lynch, 4 Munf. 94.

On Bond of Partner for Firm.—In an action of debt against a partnership, on a bond signed by only one partner for the firm, the declaration charged that "W." for "W. G." bound himself, his heirs, executors and assigns to pay, etc. This was adjudged insufficient in law to maintain the action against the firm in the absence of other averments binding them. Shelton *v.* Pollock, 1 Hen. & M. 423.

Attachment Bond.—In an action of debt upon an attachment bond, the condition of which was that the defendant should pay all costs and dam-

ages that might accrue from wrongfully suing out the attachment, the declaration averred that the defendant "did not pay all such costs and damages as have accrued, etc." But there was no averment that the attachment was wrongfully sued out, or that costs and damages had been sustained. This was not a sufficient declaration; a direct averment was essential. Dickinson *v.* M'Craw, 4 Rand. 158.

Sheriff's Bonds.—When the action of debt was brought on a sheriff's bond, and the declaration averred that the deputy sheriff acknowledged that he had received the amount of the execution, not that he had received it, this was a bad averment. For though it may be true, that the deputy made the acknowledgment, it may be false that he received the money. The receipt of the money was the gist of the action, and it should have been directly averred, that the defendant might put in an issue. The acknowledgment of the receipt of it did not offer proper matter upon which an issue could be made up. An issue made up on it would have been immaterial. Bennett *v.* Lloyd, 6 Leigh 316.

A declaration in an action of debt upon a sheriff's official bond, for the use of the county court of his county, for failing to pay over moneys received by him in his official capacity for the use of such county, which fails to aver that before such action was commenced, the county court had, by its order entered of record, or by a draft made in pursuance thereof, ordered him to pay such moneys to his successor in office, or to some other person, and that said sheriff had notice thereof, is, upon general demurrer, fatally defective. State *v.* Hays, 30 W. Va. 107, 3 S. E. 117.

In an action of debt on the bond of a sheriff, with collateral condition, it was held, that where the declaration charged that he failed to pay the taxes on demand, instead of at the time appointed by law, that this was sufficient after verdict. Winslow *v.* Com., 2 Hen. & M. 459.

On Executor's Bond.—In an action of debt on an executor's bond, the declaration must aver that assets sufficient to pay the debt came to the executor's hands, or the amount of assets that came to his hands, and the devastavit thereof; and if the declaration contain no such averment, it is bad on general demurrer. Burnett *v.* Harwell, 3 Leigh 89.

Executor's and Commissioner's Bond.—A bond is executed to an executor and commissioners under decree of court, with conditions reciting that the obligor has borrowed of the executor and commissioners a certain sum of his testator's estate, which by said decree he is authorized to put at interest, on real estate security and to take bonds in his own name as executor, the interest to be paid semi-annually, and the principal when he may so require. The declaration in debt on this bond did not aver any order of the court authorizing the collection of the money. On demurrer the declaration was held sufficient. Cabell *v.* Cox, 27 Gratt. 182.

On Administration Bond.—As administration bonds are for the use of others, and are specifically designated and provided for by law, it follows, that when such a bond is sued upon, and is to be exhibited as evidence, it ought clearly to appear from the declaration, that the bond declared on, is in its character an administration bond. It ought not to be left to inference from the declaration that it is a mere private bond, which is the ground of action. When an official bond is the ground of action, it should be laid in the declaration to have been made to the obligee in his official capacity; that the declaration should manifest in what right the plaintiff sues is a general principle of law. The failure to state in a declaration in debt on an administration bond that the plaintiffs sued as justices of the court is a fatal

variance, and the bond was inadmissible in evidence. Cabell *v.* Hardwick, 1 Call 345.

Bond with Collateral Condition.—"Under the statute of 8 & 9 W. III., ch. 11, § 8; 1 R. C. 1819, p. 509, § 82; Code of Va., 1860, ch. 177, § 17; Code of W. Va., ch. 131, § 17, p. 627, there are two ways of declaring on a bond with collateral conditions. One is simply to declare on the obligation without setting forth the conditions. If this is done, the declaration will be good, till the defendant takes oyer of the obligation and thereby makes the conditions a part of the declaration. If after such oyer the defendant pleads conditions performed, * * * the plaintiff ought not to reply generally. But to sustain his declaration the plaintiff must in such case by a replication allege a breach of the conditions. See Green *v.* Bailey, 5 Munf. 246. The better mode, however, of pleading in such a case is to set out in the declaration the conditions of the obligation, and assign the breaches of it, as was done in Allison *v.* Bank, 6 Rand. 227. The first was the mode of pleading adopted in the case before us for consideration. The counsel for the plaintiff in error does not point out any errors in the special replication of the plaintiff assigning the breach of the conditions of the bond sued upon; and the declaration has in it no defect which can be now taken advantage of by demurrer; for the failure to make profert of the obligation sued on can not, under our statutes, be taken advantage of by demurrer. See Code of W. Va., ch. 128, § 33, p. 603." Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 459.

In debt on a bond with collateral condition, if the condition be not set out in the declaration, nor made part thereof by oyer, it should be distinctly stated in the replication. Graham *v.* Graham, 4 Munf. 205.

Laying the Damages.—In debt on a bond for the payment of sterling money, damages need not be laid in the declaration or found by the jury. Taylor *v.* M'Clean, 3 Call 557.

b. Deeds.

Acknowledgment of Indebtedness in a Deed.—In a declaration in debt on a deed, which contains the acknowledgment of the debt, it was held, unnecessary to set out any more of the deed than that which contains the acknowledgment; and that only according to its legal effect. Newby *v.* Forsyth, 3 Gratt. 308.

4. In Debt on Judgments.

In General.—In an action of debt on a judgment, the gist of the action must be shown with certainty. Tazewell *v.* M'Candlish, 10 Leigh 116.

In debt on a decree for money, which does not give running interest thereon, the declaration demands interest from the date of the decree, as part of the debt. Held, declaration bad on general demurrer, for demanding interest as part of the debt. Shelton *v.* Welsh, 7 Leigh 175.

A Maryland judgment was rendered for a debt, damages and costs, with a memorandum at the foot that the plaintiff shall release the damages on payment of the interest due on the debt. In an action of debt brought on this judgment in Virginia, the declaration demanded the debt with interest, and not the damages. The demand of the plaintiff was substantially for the debt with interest, and hence there was no error in the declaration, which was held to be good in Kemp *v.* Mundell, 9 Leigh 12.

Penalty.—A judgment was rendered in favor of testator of the defendant, against the plaintiff for £64, 8s, 4d, to be discharged by the payment of £32, 4s, 2d. The declaration in an action of debt, brought upon the above judgment, claimed only the latter sum, and a verdict was given to the plaintiff, and judgment entered. On appeal the judgment was reversed, because by the declaration it is manifest that the suit should have been for £64, 8s, 4d, in-

stead of £32, 4s, 2d. Ragsdale *v.* Balte, 2 Wash. 201.

Amendment of Declaration.—An action of debt was brought upon a judgment for a certain sum. In the declaration the sum declared for was slightly different from the judgment. The plea of no such record was filed. Upon the trial of the cause, the plaintiff moved to amend the declaration by inserting the true sum, which was allowed. There was no error in permitting the amendment. Anderson *v.* Dudley, 5 Call 529.

Cure by Verdict—Statute of Jeofails.—The plaintiff brought an action of debt against the defendants, and the declaration filed alleges that on the 15th day of April, 1869, the defendants, by their certain writing obligatory, "bound themselves, their heirs, executors, administrators, etc., jointly and severally to pay unto J. and R. Holliday, executors as aforesaid, the sum of $400; the conditions of said obligation being in substance as follows, to-wit: If the said Joseph Myers shall well and truly pay unto said J. and R. Holliday, executors of J. W. Holliday, the judgment in a suit, and all loss, damages or injury they may sustain by reason of an injunction which was awarded by E. B. Hall, Judge, on the 28th day of January, 1869, in the case of John W. Holliday's executors *v.* Joseph Myers, then said obligation shall be void; otherwise to remain in full force and effect." And plaintiffs aver that the judgment due them which was enjoined by the order of E. B. Hall, on the 28th day of January, 1869, was for the sum of $100, with interest thereon from the 24th day of December, 1861; and $100 with interest from the 24th day af December, 1862, and $24.41, costs of the original suit, and $32.45, costs of the injunction suit; and that the injunction so ordered by said E. B. Hall, Judge, etc., was dissolved on the 15th day of November, 1870, and that in pursuance of the statutes in such case made and provided, the said plaintiffs were entitled to recover from the defendants the amount of said judgment and costs as aforesaid, together with ten per cent. damages thereon from the 28th day of January, 1869, to the 15th day of November, 1870, and costs of the injunction, $32.45. Yet the said defendants have not paid the amount of the said judgment for debt, interest and costs, or damages aforesaid, etc. The declaration was filed at April rules, 1871. Afterwards, on the 22d of September, 1871, the parties appeared in court, by their attorneys; and the office judgment had at rules in the cause was set aside, and the defendants filed their joint plea to the action, upon which issue was joined. Afterwards, on the 4th day of January, 1872, the parties again appeared in court, by their attorneys, and the defendants, by their attorney, withdrew their plea at a former day pleaded. Thereupon the plaintiffs having proved their cause it is considered by the court that the plaintiffs recovered against the defendants, Joseph Myers and James M. Johnson, $301.72, with interest thereon from the 4th day of January, 1872, till paid; also their costs by them on their behalf in this cause expended. And the defendants file their bill of exceptions in the following words and figures, to wit, which are duly signed and enrolled: "No demurrer was filed to the declaration, and oyer was not craved of the bond declared upon." The third section of chapter 134 of the Code of this state, provides that "no judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict, when there is one, or the judgment or decree, be for him and not to his prejudice;" or for want of warrant of attorney; or for want of a similiter; or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not

appear that the verdict was rendered by the number of jurors required by law; or for any defect, imperfection or omission in the pleadings which could not be regarded on demurrer, or for any other defect, imperfection or omission which might have been taken advantage of on demurrer or answer, but was not so taken advantage of. Held, for reasons stated in the opinion in writing filed in the cause; that under and by virtue of said 3d section of said 134th chapter of the Code, the defects in said declaration are cured after the rendition of said judgment. That the allegations of the declaration do not affirmatively show that plaintiffs have no right to recover in the action. Holliday *v.* Myers, 11 W. Va. 276.

Wrong Sum Demanded.—The declaration in an action of debt on a judgment for a certain sum to be discharged by a lesser, demanded a wrong sum, and no special demurrer was filed. The error was cured by the statute of jeofails, there being enough in the declaration to show the true amount of the judgment. Roane *v.* Drummont, 6 Rand. 182.

5. Penalties.

See the title PENALTIES AND FORFEITURES.

a. Penal Statutes.

In an action of debt under a statute imposing a penalty on the sheriff for partiality in conducting an election, the declaration was objected to because it contained mere recitals and not express averments; because it did not aver that there was an election, nor that defendant conducted it, the words "being, etc.," were mere recital. The court held that while the facts of the election, of the plaintiff being a candidate, and that the defendant was the sheriff, were set forth by way of recital, the fact that the defendant "did interfere and show partiality," which was the gist of the action, was set forth directly and not by way of recital, and that the declaration was good on general demurrer. Sims *v.* Alderson, 8 Leigh 479.

b. Penal Bonds and Penal Bills.

There are two modes of declaring in debt upon a penal bond, one by declaring upon it as a single bill without noticing the condition, in which case the defendant craves oyer of the condition and pleads performance, and the plaintiff replies by assigning breaches. The other is to set out the condition in the declaration and assign the breaches in it. Coalter, Judge, in Allison *v.* Bank, 6 Rand. 227; Ward *v.* Fairfax Justices, 4 Munf. 494; Nadenbush *v.* Lane, 4 Rand. 413; Green *v.* Bailey, 5 Munf. 246. Or if the defendant fails to plead, and the case goes to a writ of inquiry without plea, the plaintiff must assign his breaches by suggestion thereof in writing. In either mode the form of action is debt; and the defendant must demand the penalty of the bond and allege its nonpayment as in all other cases of actions of debt. The cases are numerous on this subject in Virginia and are uniform, that in an action of debt nonpayment of the debt demanded must be averred. Braxton *v.* Lipscomb, 2 Munf. 282; Green *v.* Dulany, 2 Munf. 518; Norvell *v.* Hudgins, 4 Munf. 496; Hill *v.* Harvey, 2 Munf. 525; Buckner *v.* Mitchell, 2 Munf. 336; Nicholson *v.* Dixon, 5 Munf. 198; Cobbs *v.* Fountaine, 3 Rand. 484; Strange *v.* Floyd, 9 Gratt. 474; Douglass *v.* Central Land Co., 12 W. Va., opinion of Green, Judge, 510, 511; Reynolds *v.* Hurst, 18 W. Va. 650.

Omission of Interest.—A judgment entered upon nil dicit or non informatus, in an action of debt in a penal bill, will not be reversed because the declaration, although describing the bill penal correctly as to the principal, penalty, and date, omitted to mention that the debt was payable "with interest from a day prior to the date," and judgment, in conformity with the penal bill was entered for the penalty, to be discharged by the principal, with interest

and costs. Harper *v.* Smith, 6 Munf. 389.

Demand.—In an action of debt on a penal bill payable on demand, the declaration contained no averment of a special demand. An obligation to pay money on demand is evidence of a present debt payable instanter, and the writ is a demand, which entitles the plaintiff to the penalty. Payne *v.* Britton, 6 Rand. 101.

Nonpayment of Penalty.—In a declaration in debt on a penal bond or bond with collateral condition payable to an individual, there must be an averment of the nonpayment of the penalty; otherwise as to official bonds. Reynolds *v.* Hurst, 18 W. Va. 648.

A declaration in debt on a penal bond executed to an individual must contain an averment of the nonpayment of the penalty; and if it does not, the defect will be fatal on general demurrer. Rigg *v.* Parsons, 29 W. Va. 522, 2 S. E. 81.

Sum Certain.—In an action of debt on a judgment for the penalty of a bond, "to be discharged by a smaller sum with interest," the declaration ought not to demand "the smaller sum with interest till paid," but "the penalty to be discharged thereby." On the ground of this defect the court was of opinion that the error was a fatal one, even after verdict. Anderson *v.* Price, 4 Munf. 307.

Statement of Condition—Replication.—In debt on a bond in a penalty, with conditions for the payment of a less sum, by installments, upon certain prescribed conditions, the plaintiff in his declaration claimed the penalty, and made no mention of the condition. The defendant pleaded payment. The plaintiff replied, setting forth the condition of the bond, and averring nonpayment of the sum mentioned in the condition at the time therein specified. Held, on general demurrer, that the replication was bad, and the cause was remanded with leave to the plaintiff to file a new replication. Mitchell *v.* Thompson, 2 Pat. & H. 424.

"The case of Reed *v.* Hanna is an express authority in point. It was a suit brought on an injunction bond, for the penalty of the bond, not noticing the condition of the bond. The defendant pleaded that he had paid the debt in the declaration mentioned, which was the penalty of the bond. The plaintiff replied, that the defendant did not pay the amount of the judgment enjoined, with interest thereon and damages and costs. This replication was held to be a departure. If there be a material difference between the cases of Reed *v.* Hanna and the case now under consideration, I can not perceive it. The judgment in Reed *v.* Hanna was reversed and all the proceedings subsequent to the plea set aside. A like disposition of the pleadings was made in the case of Green *v.* Bailey, 5 Munf. 246, and repleader awarded." Mitchell *v.* Thompson, 2 Pat. & H. 440.

An action of debt is brought on a forthcoming bond. The declaration declares for the penalty of the bond, without setting out the condition. The defendants filed three special pleas, which, on the motion of the plaintiffs, were rejected. But at a subsequent term of the court, leave was granted the defendants to file the same pleas; to which pleas the plaintiffs then demurred, and the demurrer was overruled. The plaintiffs thereupon filed two special replications to the pleas, setting out, among other things, the conditions of the bond declared on. No issue appears to have been taken on the replication, or any disposition made of them. But upon the filing of them, the defendant moved the court to "quash the execution and forthcoming bond taken thereunder, both of which are filed in this cause." It was held, that a judgment in which this motion was sustained and the execution and bond were quashed and costs adjudged

against the plaintiffs, "including fifteen dollars as allowed by law," would be reversed. It is from this judgment that the appellants have appealed. Arnold *v.* Given, 5 W. Va. 257.

6. Averment of Consideration.

See the title ASSUMPSIT, vol. 2, p. 37.

The Virginia statute provides that the rule as to averment and proof of consideration shall be the same in an action of assumpsit on any note or writing by which there is a promise, undertaking, or obligation to pay money, as in any action of debt thereon. Va. Code, 1904, § 2852.

In an action of debt on a promissory note, the plaintiff need not aver in the declaration, or prove, consideration, but the defendant may go into evidence touching consideration. Peasley *v.* Boatwright, 2 Leigh 195; Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751; State *v.* Harmon, 15 W. Va. 122; Snead *v.* Coleman, 7 Gratt. 302.

It is an unnecessary averment in the declaration in an action of debt on a writing for the payment of money, that there was any consideration, or that it was for value received. The plea is nil debet, which calls for proof of note, and allows evidence to be given that the consideration is bad or lacking. Crawford *v.* Daigh, 2 Va. Cas. 521; Peasley *v.* Boatwright, 2 Leigh 195. See Va. Code, 1887, § 2852.

In Virginia by statute (Va. Code, 1873, ch. 141, § 10; Va. Code, 1887, § 2852) in case of notes for the payment of money, a valuable consideration is prima facie presumed, at least where an action of debt is brought on the writing (Peasley *v.* Boatwright, 2 Leigh 198), and by the Code of 1887, § 2852, the same doctrine is applicable to assumpsit. Crawford *v.* Daigh, 2 Va. Cas. 521; Jackson *v.* Jackson, 10 Leigh 453; 4 Min. Inst. (3d Ed.) 31. But the defendant may go into evidence touching consideration. Jackson *v.* Jackson, 10 Leigh 453.

In Jackson *v.* Jackson, 10 Leigh 452, it is said that in general the plaintiff which brings an action of assumpsit must state the consideration; but in assumpsit on the promissory note it is said that no consideration need be averred and proved, because the act of assembly allows an action of debt to be brought on the note itself, without laying or proving the consideration. Citing Peasley *v.* Boatwright, 2 Leigh 195; Crawford *v.* Daigh, 2 Va. Cas. 521.

Note for Payment of Money or Tobacco.—The action of debt may be maintained on a note in writing, for the payment of money or tobacco, under our statute, and it is immaterial that the declaration should set out the consideration of the note, or that it was given for value received. Crawford *v.* Daigh, 2 Va. Cas. 521. And it was held in Hatcher *v.* Lewis, 4 Rand. 152, that debt lies against the endorsers of a note by a joint action.

7. Averment of Nonpayment.

In General.—In an action of debt upon a promissory note or bond, it is indispensable to aver nonpayment, and that to every party connected with the note entitled to receive payment, whether payee, assignee, decedent, or representative, or survivors of decedents, and each one of parties jointly entitled to receive payment. Smoot *v.* McGraw, 48 W. Va. 144, 35 S. E. 914, citing Douglass *v.* Central Land Co., 12 W. Va. 502; Reynolds *v.* Hurst, 18 W. Va. 651; Strange *v.* Floyd, 9 Gratt. 474; Hill *v.* Harvey, 2 Munf. 526.

To the point that, in an action of debt, nonpayment of the debts demanded must be averred. Cobbs *v.* Fountaine, 3 Rand. 484, is cited in Reynolds *v.* Hurst, 18 W. Va. 651; footnote to Strange *v.* Floyd, 9 Gratt. 474, containing an excerpt from Reynolds *v.* Hurst, 18 W. Va. 651. Moundsville, etc., R. Co. *v.* Wilson, 52 W. Va. 647, 44 S. E. 169.

"In Virginia as we shall presently see, it is held, that an allegation that a debt was not paid when it became due, would be insufficient to sustain a declaration either in assumpsit or debt, but on the other hand, in either of these forms the declaration must allege nonpayment of the debt generally, including its nonpayment at any time after it fell due." Douglass *v.* Central Land Co., 12 W. Va. 508.

Sufficiency of Averments.

In General.—"A long train of Virginia decisions has settled beyond controversy that in that state and in this, in an action for the recovery of a debt, whether it be assumpsit or debt, the plaintiff in his declaration must not only allege the nonpayment of his debt, but this allegation of nonpayment must be general and not confined to the time when it became due, and must therefore be extended to every person who had a right to receive the payment either at the time it fell due or at any subsequent time." Douglass *v.* Central Land Co., 12 W. Va. 510.

"As an original question the necessity of averring in every form of action in the declaration the nonpayment of a debt either at the time it fell due or at any time subsequently might well have been questioned. But these numerous decisions settle beyond a controversy that in Virginia and this state, the declaration, whatever be the form of action, must allege nonpayment of the debt generally; that is, so as to include not only when it fell due, but also subsequently. And such being the settled law here we must hold that the general plea of payment denying this necessary general allegation of nonpayment in the declaration must in every case, whether the action be assumpsit, debt or covenant, conclude to the country." Douglass *v.* Central Land Co., 12 W. Va. 511.

Assigned Bond.—Thus if the suit be on a bond which has been assigned, the allegation must be, that the debt has not been paid to the obligee nor to his assignee. Braxton *v.* Lipscomb, 2 Munf. 282.

In an action of debt upon an assigned bond, the declaration did not aver that neither the defendant, nor her testator, in his lifetime, paid the debt to the obligee, or to either of the assignees of the said bond, but only averred that neither of them paid the same to the plaintiff. The declaration should state a failure to pay to the obligee, and each of the assignees, as well as to the plaintiff, and a failure to do so is too great a defect to permit the action to be maintained, and such defect is not cured by verdict. Braxton *v.* Lipscomb, 2 Munf. 282; Green *v.* Dulany, 2 Munf. 518; Nicholson *v.* Dixon, 5 Munf. 198.

And in a similar case, although the partner, who did not sign the debt, put in a plea of payment, and verdict and judgment is given against him in the lower court, still this is too defective to support a judgment against him, in the absence of other averments binding him, and the judgment was reversed. Garland *v.* Davidson, 3 Munf. 189.

By Administrator of Assignee.—On general demurrer the declaration, in an action of debt on an assigned bond by the administrator of the assignee of the obligee against the aministrator of the obligor, was held to be essentially defective, because it did not aver that the defendant had not paid the assignor, before notice of assignment, nor the plaintiff's intestate in his lifetime afterwards. Mitchell *v.* Thompson, 2 Pat. & H. 424.

On Assigned Promissory Note.—A declaration in debt on an assigned promissory note, which did not state that the defendant had failed to pay the money to the drawee, as well as to the plaintiff, was held to be too defective to maintain the action. Norvell *v.* Hudgins, 4 Munf. 496.

Joint Obligors.—In an action of debt

on a bond to more than one obligee, nonpayment of the debt to all of the obligees must be averred in substance in the declaration; or the objection will be fatal on general demurrer. Strange *v.* Floyd, 9 Gratt. 474.

If two obligors executed the bond and only one is sued, the declaration must negative the payment by either obligor. Hill *v.* Harvey, 2 Munf. 525.

Joint and Several Debt.—In an action of debt against one on a joint and several obligation, the declaration need not refer to the other obligors nor allege nonpayment as to them. Reynolds *v.* Hurst, 18 W. Va. 648.

Action by Surviving Executor.—If the action is brought by a surviving executor for a debt due from the testator, the declaration must aver nonpayment to the testator or to the deceased executor or to the surviving executor. Buckner *v.* Mitchell, 2 Munf. 336.

So in action for a debt brought by a surviving partner, the allegation must be of nonpayment to the two partners during the life of the deceased partner, as well as nonpayment to the surviving partner. Nicholson *v.* Dixon, 5 Munf. 198.

Penalty of Bond.—"The proposition is too plain for discussion, that in a declaration at common law upon a bond with collateral condition for the payment of money or for the performance of some specific duty, it is necessary to aver the nonpayment of the penalty, as well as the breach of the condition; and such are all the forms." Reynolds *v.* Hurst, 18 W. Va. 648.

In Reynolds *v.* Hurst 18 W. Va. 648, it is said: "In either mode the form of action is debt; and the defendant must demand the penalty of the bond and allege its nonpayment as in all other cases of actions of debt. The cases are numerous on this subject in Virginia and are uniform, that in an action of debt nonpayment of the debt demanded must be averred. Braxton *v.* Lipscomb, 2 Munf. 282; Green *v.* Dulany, 2 Munf. 518; Norvell *v.* Hudgins, 4 Munf. 496; Hill *v.* Harvey, 2 Munf. 525; Buckner *v.* Mitchell, 2 Munf. 336; Nicholson *v.* Dixon, 5 Munf. 198; Cobbs *v.* Fountaine, 3 Rand. 484; Strange *v.* Floyd, 9 Gratt. 474; Douglass *v.* Central Land Co., 12 W. Va., opinion of Green, Judge, 510, 511."

Demurrer.—A general demurrer will lie to a count in a declaration in an action of debt, which fails to aver nonpayment of the debt, but if there are other good counts in the declaration, a demurrer to the entire declaration should be overruled. Simmons *v.* Trumbo, 9 W. Va. 358, citing Green *v.* Dulany, 2 Munf. 518.

A demurrer, which was entered after the bond had been introduced in evidence and oyer had been prayed and allowed, should have been sustained, because it failed to allege the nonpayment of the debt by the co-obligors, against whom suit had not been brought. Vandiver *v.* Hyre, 5 W. Va. 414, overruled in Reynolds *v.* Hurst, 18 W. Va. 648.

A declaration in debt contains but one count, and claims the sum of $569, made up of the aggregate amount averred to be due by two single bills; by the first of which the defendant bound himself, as it alleged, to pay the plaintiff $100 in cash, and $85 in good cash notes; and by the second he bound himself to pay to the plaintiff $385. The breach laid is that "the defendant has not paid the said several parcels of the said sum of $569, or any or either of them, or any part thereof, in money or good cash notes." The defendant demurred to the declaration, and stated four special grounds of demurrer. Held, the demurrer can not be sustained. Henderson *v.* Stringer, 6 Gratt. 131.

A declaration in debt which charges only that the defendant "hath and does refuse to pay," without alleging that

he has not paid, is good upon general demurrer. "In all the cases referred to, there was a total want of averment of nonpayment to some one who was, at some time, entitled to receive the money. But in this case, the declaration alleges that the defendant 'the aforesaid several sums, hath and does refuse to pay.' This averment, although not full and formal, is yet not so defective as that the court can not give a judgment on this verdict, according to the very right of the case; and is therefore, not objectionable, on a general demurrer." Cobbs *v.* Fountaine, 3 Rand. 484.

8. Assignment of Breaches.

See the titles BONDS, vol. 2, p. 550; CONTRACTS, vol. 3, p. 307.

In General.—Where an action of debt is based upon a single bill and simple contracts for money lent, money received, or money paid, and the aggregate of all the counts is demanded, the usual conclusion need not be added to each count, and if the general conclusion of the declaration is in the proper form and good, it will be considered as applying to each count, as well as to all collectively. And when the breach in the count on the single bill is alleged to have been defective, and the breach at the end of the declaration is sufficient, the breach to the count of the single bill will be cured by the breach at the end of the declaration. Somerville *v.* Grim, 17 W. Va. 803.

"Where an action of debt is brought upon two promissory notes, or two bonds, it is unnecessary to add to each count the usual conclusion. 1 Saunders on Plead. and Ev. 497, side page 405; Gilb. Debt 414; Robinson's Forms 409, 410, 412. It is not pretended in this case, that the general conclusion to the declaration is not a sufficient breach, if it had been added to the first count of the declaration in this case; and being added to the declaration as a general conclusion it applies to each count as well as all collectively in the action of debt. Whatever defects, if any, there may be in the form of the breach as added to the said first count, are cured by the said general conclusion. In declaring on the common counts in the action of debt 'the usual conclusion in each count by reason whereof, etc., an action hath accrued, etc., is unnecessary, and the usual breach at the end will suffice.' 1 Saunders on Plead. and Ev. 497, side p. 405; Gilb. Debt 414. And so, as above stated, in an action of debt upon two or more promissory notes or bonds, according to Mr. Robinson's forms which I think are correct." Somerville *v.* Grim, 17 W. Va. 803.

Demurrer.—If there be a single count in a declaration in debt containing several breaches, any one of which is well assigned, that is sufficient to maintain the action. Henderson *v.* Stringer, 6 Gratt. 130.

A demurrer to a declaration in debt with a statement, as special cause of demurrer, that one of the counts, or breaches, or parts of the plaintiff's demand of a distinct or divisible nature, is bad, does not alter the character of the demurrer. And if there be matter enough in the declaration to maintain the action, the demurrer must be overruled. Henderson *v.* Stringer, 6 Gratt. 130.

If there be a single count in a declaration in debt containing a demand of several matters which in their nature are divisible, any one of which is well claimed, that is sufficient. Henderson *v.* Stringer, 6 Gratt. 130.

Assignment of Breach by Way of Recital.—An assignment of a breach of a bond with collateral condition, in the declaration which commenced "and whereas, etc.," and continued in this way of recital to the end, and which did not contain any direct averment, was held insufficient, and the error was fatal on general demurrer. Syme *v.* Griffin, 4 Hen. & M. 277. See Va. Code, 1887, § 3272.

Bond by Distributees to Indemnify Administrator.—In an action of debt on a bond given by distributees to indemnify an administrator for dividing the estate among them, the condition being, "that they should pay him their respective proportions of all debts which he should be compelled to pay, that should thereafter come against said estate," it was a sufficient assignment of the breach for the declaration to say, "that the plaintiff on a day subsequent to the date of the bond, had paid, by the consent of the defendants, a debt which was then due from the estate aforesaid, and which, as administrator he was bound to pay, and that the defendants had not paid him their respective parts nor any proportion thereof, but the same had refused, although often requested." Moss *v.* Moss, 4 Hen. & M. 293.

On Bond with Interest.—The declaration in an action of debt described it as being for a certain sum of money, with interest from a certain day. The breach laid was that the defendant had not paid "the aforesaid sum of money," without alleging the nonpayment of interest. The defendant was not allowed to object to errors which were for his benefit, and the defect was cured by the verdict for the principal sum, together with damages and costs. Hammitt *v.* Bullett, 1 Call 567.

Administration Bond.—In a suit on an administration bond, if no breach of the condition of the bond be stated in the declaration, or by an assignment of breaches in some other part of the record, a judgment upon it is erroneous, and must be reversed. Ward *v.* Fairfax, 4 Munf. 494.

Condition of Bond.—An averment of a breach of the condition of a bond, although it may not entitle the plaintiff to all the demands, will entitle him to recover what he is legally entitled to in consequence of the breach. M'Dowell *v.* Burwell, 4 Rand. 317.

Bond with Collateral Condition.—It is sufficient in declaring on a bond with collateral condition, if the declaration in debt on such bond assign the breach in the very words of the condition. Craighill *v.* Page, 2 Hen. & M. 446. Judgment was sustained although no damages were laid in the declaration in an action of debt on bond with a collateral condition. Craighill *v.* Page, 2 Hen. & M. 446.

In an action of debt on a bond with collateral condition, if the breach be assigned in as general terms as those of the condition, this is sufficient. In such cases, the plaintiff may recover more damages than he has laid in the declaration. Winslow *v.* Com., 2 Hen. & M. 459.

In a declaration in an action of debt on a bond with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled. Martin *v.* Sturm, 5 Rand. 693.

"Before these statutes (1 Rev. Va. Code, 1819, p. 509, § 82, contained in Va. Code of 1849, 1860) only one breach could be assigned in an action of debt on a bond with collateral condition. The assignment of more was duplicity. However small the breach shown the whole penalty was recovered, and the party was driven into a court of equity to be relieved against the penalty. Coalter, Judge, in Allison *v.* Bank, 6 Rand. 227. Upon breach of the condition, the bond became forfeited, and constituted a debt." Reynolds *v.* Hurst, 18 W. Va. 650.

Official Bond.—In an action of debt on a bond conditioned for the faithful discharge of the duties of an office, the declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the defendant in his office; nor is it necessary to state the damages occasioned by the breaches. It is not necessary for the declaration, after the

assignment of breaches, to allege that the plaintiffs have been injured by the breaches, but it is sufficient if it is stated that an action has accrued to the plaintiffs to demand and have the penalty of the bond. In an action for the penalty of a bond, it is not necessary to state that in consequence of the refusal of the defendant to pay, the plaintiff sustained damage. Allison *v.* Bank, 6 Rand. 204.

In debt on official bond of sheriff, breach assigned is, that the sheriff permitted relator's debtor in execution to escape, by wrongfully accepting from him a defective bond, erroneously purporting to be a prison bounds bond, and that the relator, from the erroneous and defective form of the said bond, was unable to recover his debt by virtue thereof, but was cast in an action brought by him founded upon the same; but declaration makes no profert of such bond, nor vouches the record of the action alleged to have been brought thereon, nor gives any further description of the bond or of the action. On general demurrer to the declaration, held, the assignment of the breach is insufficient. Vanmeter *v.* Giles, 1 Rob. 328.

Official Bond of Marshal.—In debt in a circuit court, upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is, that the chancery court having, in a suit therein pending in which the relator was defendant, made an order directing the marshal to take possession of certain slaves (averred to be the property of the relator) and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, "to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit, remaining in the office of the circuit court." On general demurrer to the declaration, held, the assignment of the breach is defective in substance, the title of the relator to demand and receive the hires from the marshal not being sufficiently set forth. Tazewell *v.* M'Candlish, 10 Leigh 116, cited with approval in State *v.* Hall, 40 W. Va. 455, 21 S. E. 760.

9. The Ad Damnum Clause.

See generally, the title DAMAGES, ante, p. 162. See also, the title ASSUMPSIT, vol. 2, p. 63.

In General.—In an action of debt on a bond with collateral condition, the plaintiff can not recover any costs or damages, which he did not demand in the assignment of breaches in the declaration. Woodson *v.* Johns, 3 Munf. 230.

Verdict in Excess of Ad Damnum.—In an action of debt upon a bond with a collateral condition, the jury may assess damages beyond those laid in the declaration, if the penalty be sufficient to cover them. Payne *v.* Ellzey, 2 Wash. 143; Johnston *v.* Meriwether, 3 Call 523; Winslow *v.* Com., 2 Hen. & M. 459; Peerce *v.* Athey, 4 W. Va. 22.

Cure by Verdict.—The omission to lay damages in the declaration in an action of debt, although in an action sounding in damages, was cured after verdict by the statute of jeofails. Stephens *v.* White, 2 Wash. 203.

B. PROFERT AND OYER.

See the title PROFERT AND OYER.

Formerly it was error to dispense with the actual production of a bond of which profert was made in the declaration. Staples *v.* Com., Gilmer 213.

Harmless Error.—In an action of debt on a bond, oyer of the bond is craved after witnesses have been examined as to the handwriting thereto, and before it is offered to the jury in evidence, and is refused. After it is introduced, oyer is again craved and

allowed. And it is held, that under the circumstances, the refusal was not error to the defendant's prejudice, as he subsequently had the full benefit of the oyer. It is further held, that permitting the bond to be read as stated in No. 2, after oyer craved and refused, is not error. Vandiver *v.* Hyre, 5 W. Va. 414.

The court in Moore *v.* Fenwick, Gilmer 214, assigns as the reason why a bond of which profert has been made should be produced that "in all actions of debt upon bonds for the payment of money, judgment is to be rendered for the penalty to be discharged by the payment of the principal money and the interest due thereon, which can not be ascertained but by inspecting the same to see the amount and dates of the credits endorsed thereon." Rand *v.* Hale, 3 W. Va. 495.

In an action of debt on a bond with collateral conditions, if oyer is not craved of the bond in the declaration mentioned, and it is admitted in argument by the counsel on both sides, the bond sued upon is not part of the record and can not be considered by the appellate court as such. They are confined to the declaration. Holliday *v.* Myers, 11 W. Va. 276.

In debt upon a judgment in the same court where the judgment was rendered, it is error to inspect a transcript only, instead of the original record. And in such case, if the suit was in the county court, and that judgment reversed in the district court, the court of appeals will direct the district court to remand the cause to the county court, there to be tried by the original record. Anderson *v.* Dudley, 5 Call 529.

Lost Bond—Copy Admissible in Evidence.—An action of debt was brought upon a bond, with profert, the defendant craved oyer, which was given, but the bond shown was a copy, and the defendant plead payment, by doing which he waived the necessity of producing the original, and a copy may be given in evidence at the trial, upon due proof of the loss or destruction of the original. Taylor *v.* Peyton, 1 Wash. 252.

But the statutes now provide that it shall not be necessary in any action to make profert of any deed, letters testamentary, or commission of administration; but a defendant may have oyer in like manner as if profert were made. Va. Code, 1904, § 3244; W. Va. Code, 1899, ch. 125, § 33.

C. THE PLEA.

1. Nil Debet.

a. In General.

Nil debet is the proper plea, and is the general issue in an action of debt on a simple contract. Eib *v.* Pindall, 5 Leigh 109; Roanoke Grocery, etc., Co. *v.* Watkins, 41 W. Va. 788, 24 S. E. 612; Hughes *v.* Kelly, 2 Va. Dec. 588.

Nil debet is the general issue in an action of debt on a note under seal, or for rent. Cheuvront *v.* Bee, 44 W. Va. 103, 28 S. E. 751.

Waiver of Objection.—Where the plaintiff, in an action of debt on a bond, instead of demurring, replies to a plea of nil debet, he will be put upon proof of every allegation in his declaration; and the defendant may avail himself of any ground of defense which, in general, might be taken advantage of under that plea. Hughes *v.* Kelly, 2 Va. Dec. 588.

b. Negotiable Paper.

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 489.

The general issue in debt on a promissory note is nil debet; and if the defendant, without objection from the plaintiff, files a plea of non est factum, and the plaintiff joins the issue thereon, such plea of non est factum may be withdrawn on motion of the defendant, and the plea of nil debet filed in its stead. Hunter *v.* Snyder, 11 W. Va. 198; Bank of Va. *v.* Handley, 14 W. Va. 823.

Matters Provable under.

Denial of Purchase for Value.—In an action of debt upon a negotiable note, the defense that the plaintiffs are not holders for value of the note, may be made under the plea of nil debet. Fant *v.* Miller, 17 Gratt. 47.

Alteration of Instruments.—If a promissory note be signed and sent to the payee with a blank for him to insert the amount, it is good evidence on the plea of nil debet. Jordan *v.* Neilson, 2 Wash. 164.

Denial of Execution.—In an action of debt at common law on a negotiable note the plea of nil debet put in issue the execution of the note and all transfers thereof, but by statute in Virginia (§ 3279, Code), when the execution and endorsements of the note are averred in the declaration, no proof thereof is required unless the plea putting it in issue be supported by affidavit. The object of the statute is to dispense with the proof of handwriting in certain cases, and it has no application to a transfer of paper by mere delivery. Upon an averment of such transfer by the wife, proof of transfer by the husband, without proof of his agency, is not sufficient, even on a demurrer to the evidence by the defendant, to maintain the issue on the part of the plaintiff tendered by the plea of nil debet. Clason *v.* Parrish, 93 Va. 24, 24 S. E. 471.

Absence of Revenue Stamp.—Under the plea of nil debet in an action of debt on a promissory note, the defendant may prove that the note was never stamped in the manner and form required by the act of congress. Crews *v.* Farmers' Bank, 31 Gratt. 348.

Accord and Satisfaction.—Several smaller promissory notes were given for a large one, and suit was brought on the large one. The plea was nil debet. The smaller notes were held not to be a discharge, but at most an accord and satisfaction, which would have to be pleaded. It could not be admitted under the general issue. McGuire *v.* Gadsby, 3 Call 234.

Where a plea of non est factum is filed to a declaration in debt on a promissory note, the plaintiff may object to the filing of the plea on the ground that the plea of non est factum is not a proper plea in the cause, or he may demur thereto. Hunter *v.* Snyder, 11 W. Va. 198. See Richmond, etc., Improvement Co. *v.* West Point, 94 Va. 668, 27 S. E. 460.

c. Judgments.

See the title JUDGMENTS AND DECREES.

In General.—"I can not see under what form of pleading, known to the common law, this matter of law; that is, the efficiency of this judgment as matter of evidence, can be tried as a matter of fact by a jury. The plea of nil debet will not try it. That assumes the matter in dispute, that the judgment is not conclusive; and if issue were taken on that plea, the plaintiff would waive the conclusive effect of his judgment; this he can only assert by a demurrer to the plea, which is an issue of law, and must be tried by that court. If the plea of nul tiel record would try it (of which I am not satisfied) still that tenders no issue to the country. And if the defendant should plead, that the court pronouncing the judgment was not a court of record, and that the judgment is not conclusive evidence, that would be no bar to the action; for debt lies on a judgment which is not conclusive evidence. Suffice it, however, to say, that in his case the plea is nil debet, which assumes that the judgment is not conclusive evidence; and the plaintiff, who contends that it is, had no course left for him but to demur. This he has done; and the law arising on this issue must be tried by the court, not by the jury; for it is an issue of law." Clarke *v.* Day, 2 Leigh 176.

The plea of nil debet puts the plain-

tiff upon the proof of his case. Rand *v.* Hale, 3 W. Va. 495.

Foreign Judgments.—Nil debet is not a good plea to an action on a judgment of a sister state. Clarke *v.* Day, 2 Leigh 172; Kemp *v.* Mundell, 9 Leigh 12. Compare Draper *v.* Gorman, 8 Leigh 628; Bowler *v.* Huston, 30 Gratt. 266.

The plea of nil debet is not a good plea to an action of debt on a judgment of another state of the Union, for the reason that the judgments of sister states, being regarded as domestic judgments, are conclusive in other states, and hence the merits can not be reexamined. Kemp *v.* Mundell, 9 Leigh 12.

"It is abundantly clear that the plea of nil debet is, in this view of the case, the proper plea. The proceedings of a foreign court are never looked upon as a record, because they have not the force of a record. This position requires neither argument nor authority for its support." Tucker, P. Draper *v.* Gorman, 8 Leigh 628.

Brooke, J., in Kemp *v.* Mundell, 9 Leigh 17, in referring to his opinion in Clarke *v.* Day, 2 Leigh 172, said: "I then entertained the opinion I do now,—that the judgments of our sister states, under the constitution of the United States and the acts of congress in pursuance thereof, are to be treated as domestic judgments; and that the effect of such judgments in the state from which they come, is a question of law, not a question of fact as in the case of foreign judgments. And I was surprised to hear it argued to the contrary in this case."

Illustrative Cases.—In an action of debt brought in Virginia upon a judgment of the circuit court of the District of Columbia, a plea of nil debet is proper, but a special plea, alleging that the judgment was recovered on a bill of exchange, drawn while the party was in a state of intoxication, is an improper plea. Draper *v.* Gorman, 8 Leigh 628.

In an action of debt on judgments of the courts of Kentucky the plea of nil debet is not a good plea. That plea assumes that the judgment is not conclusive, and if issue were taken on the plea, the plaintiff would waive the conclusive effect of his judgment; this he can only assert by a demurrer to the plea. Clarke *v.* Day, 2 Leigh 172.

This was an action of debt brought in the state of Virginia on a judgment rendered in Kentucky. The constitution and acts of congress of the United States have placed the judgments of the courts of other states, when sued on here, on the same ground and as having the same effect, as they would have if sued on in the state where they were obtained. The plea filed was nil debet, which assumes that the judgment is not conclusive evidence. Such judgment was affirmed on appeal to the supreme court of Kentucky, and was conclusive on the parties in that state. The plea was held bad. Clarke *v.* Day, 2 Leigh 172; Kemp *v.* Mundell, 9 Leigh 12.

To an action of debt brought in Virginia upon a judgment entered in the District of Columbia, the defendants tendered a plea of nil debet, and a special plea, alleging that the said judgment was recovered on a bill of exchange given while in a state of intoxication for money won at gaming. The judgment of the court of the District of Columbia is a foreign judgment, the "full faith and credit" clause of the constitution only applying to "states," and the plea of nil debet is admissible, but the special plea should be rejected, as the defendant can not bring into question the merits of the original judgment. Draper *v.* Gorman, 8 Leigh 628.

An action of debt was brought in Virginia on a Maryland judgment. The defendant pleaded no such record, on which issue was joined. He afterwards tendered a plea of nil debet, which was allowed, and issue was

joined on it. At the next term as on general demurrer to the plea of nil debet, judgment was entered for the plaintiff on both pleas. It was error to receive the improper plea of nil debet (Clarke *v.* Day, 2 Leigh 172), and the court might properly have corrected this by subsequently setting aside the issue and the plea. This was substantially done by entering a judgment as if there had been a demurrer. The proceedings were not reversed for the irregularity. Kemp *v.* Mundell, 9 Leigh 12.

District of Columbia.—It was the unanimous opinion of the court in Draper *v.* Gorman, 8 Leigh 628, that the judgments of the District of Columbia are to be regarded as foreign judgments in the courts of Virginia, and hence the plea of nil debet, in action on such judgment, would be a good plea. The court based its opinion on the ground that the full faith and credit clause of the constitution of the United States and the acts of congress did not apply to the District of Columbia but only to the states. It is difficult to reconcile this decision with the rule just stated.

Special Pleas.—"In those states where the plea of nil debet is held to be a good plea to an action of debt on the judgment of a sister state, the defendant may impeach the justice of it under the plea of nil debet, upon the ground that he never had notice of the proceeding. But the party may also plead the matter specially, even in those states. And in those states in which nil debet is not a good plea, it is obvious, that the defendant is compelled to plead the special matter." Tucker, P. Wilson *v.* Bank of Mt. Pleasant, 6 Leigh 570. See also, Draper *v.* Gorman, 8 Leigh 628.

d. Rent.

In debt for rent, nil debet is the proper plea. Ross *v.* Gill, 1 Wash. 87.

In action of debt for rent, the defendant, on a plea of nil debet, may give in evidence any special circumstance showing that the rent ought to be apportioned. Newton *v.* Wilson, 3 Hen. & M. 470.

In an action of debt for rent, the verdict was for a certain sum, the debt in the declaration mentioned, and for a certain sum as damages. Judgments for the same to be discharged by the payment of a different sum. This latter sum is no part of the judgment, but is merely surplusage and is to be considered as a release of the difference. Ross *v.* Gill, 1 Wash. 87.

e. Matters Provable under Nil Debet.

In General.—Discussing this plea, Mr. Minor, vol. 4, pt. 1, p. 641: "Under the plea of nil debet the defendant may prove at the trial, coverture, lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, want of consideration, failure of consideration, fraud, and, in short, anything which proves that there is no existing debt due. The statute of limitations, bankruptcy and tender are believed to be the only defense which may not be proved under this plea," etc. Keckley *v.* Union Bank, 79 Va. 462.

Under the pleas of nonassumpsit, and nil debet, any matter of defense whatever is admitted which tends to deny the defendant's liability to the plaintiff's demands, except the statute of limitations, bankruptcy and tender, which do not contest the owing of the debt, but merely that no action can be maintained for it. And notwithstanding the Virginia Code, § 3264, allows defendant to plead as many matters of defense as he chooses, yet it does not give him the "absolute right" to his special pleas setting up defenses admissible under pleas already received; and the court may strike out such special pleas though already admitted, and issue joined. Virginia Fire, etc., Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

"Under the plea of nil debet the defendant may prove at the trial coverture when the promise was made,

lunacy, duress, infancy, release, arbitrament, accord and satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, and, in short, anything which shows there is no existing debt due. The statute of limitations, bankruptcy and tender are believed to be the only defenses which may not be proved under this plea, and they are excepted because they do not contest that the debt is owing, but insist only that no action can be maintained for it. And to the same effect seem to be all the authorities. 1 Chitty on Plead. (4th Amer. Ed.), § 18; Stephen Plead. (4th Amer. Ed.), p. 162, note 20; 1 Rob. (old) Prac. 210; 5 Rob. Prac. 259." Virginia Fire, etc., Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

Want of Consideration.—See the title ACTIONS, vol. 1, p. 144.

Under the plea of nil debet the defendant may prove at the trial want of consideration. Keckley *v.* Union Bank, 79 Va. 462.

Special Pleas.—While under the well-established rule stated above, the defense of want of consideration may be made under the plea of nil debet, still it belongs to the class which may be pleaded specially. Keckley *v.* Union Bank, 79 Va. 458.

2. Non Est Factum.

See the titles BILLS, NOTES AND CHECKS, vol. 2, p. 489; PLEADING.

In General.—The general issue in debt on specialty is non est factum. Keen *v.* Monroe, 75 Va. 424; Eib *v.* Pindall, 5 Leigh 109; State *v.* Harmon, 15 W. Va. 125.

Nature of Plea.

Plea to the Merits.—The plea of non est factum to a declaration in debt is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for. Franklin *v.* Cox, 4 Rand. 448.

Sufficiency of Plea.—A special plea of non est factum in an action of debt on bonds, which admits the execution and delivery of the bonds sued on, but avers that they were to be redelivered to the defendant when he should request it, is not a good plea. Harris *v.* Harris, 23 Gratt. 739.

A special plea, to an action of debt on a supersedeas bond, that the original judgment, which, on writ of error had been affirmed by the supreme court of appeals of the state, "was recovered because of an act done by a citizen of this state according to the usages of civilized warfare in the prosecution of the late war between the government of the United States and a part of the people thereof," presents a complete defense to the action. White *v.* Crump, 19 W. Va. 584.

In debt on bonds by the executor of H. against G., G. tenders a special plea: That at the time of the execution of said bonds he owed nothing to G., and the consideration of said bonds was as follows: In 1866, four suits at law were pending against him in the county, naming plaintiffs, to recover damages for trespass during the civil war in impressing horses, etc., by him, under orders of the confederate government, he being an officer of the army under that government. He did not regard these claims as debts or just liabilities on his part, but owing to the unfavorable and unjust constitution of courts and juries at that time, he feared they might be enforced against his property. He was informed by his counsel that the result was uncertain, that judgment had been given in similar cases in Berkeley county. That he conferred with his father, who warmly advised him to secure his property against these claims. The plan adopted was for him to execute to his father the bonds sued on, antedated, with the distinct understanding that they were only to be used and treated as obligations to claim priority over the plaintiffs in case of necessity, and if unnecessary, were to be handed back to the defendant; said bonds were executed

under this understanding, and upon no other consideration. Wherefore said G. and his executor were bound to redeliver said bonds to defendant, because said suits had been dismissed in 1867, before the death of G., and the bonds were therefore null and void, and to be surrendered. Therefore he has sustained damages, etc. On the motion of the plaintiff the plea was rejected. Held, the plea was properly rejected, because no issue, either by general or special replication, could be made upon it. Harris *v.* Harris, 23 Gratt. 737.

Matters Provable under Non Est Factum.

In General.—It may be stated generally that whatever shows that the bond never was the deed of the defendant may be given in evidence upon non est factum. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

It is not error to exclude evidence as to statements made by persons who are not parties to the suit, concerning the interest such persons have in the claim, under the issue raised by the plea of non est factum in debt. Vandiver *v.* Hyre, 5 W. Va. 414.

Denial of Execution.—On the plea of non est factum, to a declaration in debt on a sealed instrument, it being proved that a son of the plaintiff said he could counterfeit the hand of the defendant, evidence may be given to show the infamy of the son's character, circumstances existing to render the execution of the instrument doubtful. Rowt *v.* Kile, Gilmer 202.

Fraud in Execution.—In an action of debt founded on a bond or other deed, the defendant may put in issue the execution of the instrument by pleading non est factum generally and in the common form. In a court of common law, fraud may be given in evidence to vacate a deed on the plea of non est factum, if such fraud relates to the execution of the instrument; as the essential element of delivery. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

In an action of debt in a court of common law, fraud may be given in evidence to vacate a deed on the plea of non est factum, if such fraud relates to the execution of the instrument, as, for example, the essential element of delivery. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

Want of valid delivery may be given in evidence under the general plea of non est factum. Stuart *v.* Livesay, 4 W. Va. 45; Newlin *v.* Beard, 6 W. Va. 110.

Under the plea of non est factum it is competent to prove that at the time of the delivery of the bond to the obligee by the principal debtor, it was stated by him that the two other obligors, who were in fact sureties, had signed it with the understanding and agreement that certain other parties were also to sign it. And this being established, and that the obligee took the bond with this understanding, the delivery, which is essential to the existence of the bond, was not such a one as the bond of the parties to be bound thereby, and therefore there was no such bond. Stuart *v.* Livesay, 4 W. Va. 45.

Alteration of Instruments.—Such a material alteration of an instrument as has the effect of rendering the instrument void, may be shown under the plea of non est factum. Connor *v.* Fleshman, 4 W. Va. 693.

Evidence to Support Plea.—In an action of debt upon a bond for two thousand dollars, purporting to be for money loaned, the issue is made up upon the plea of non est factum. On the trial the plaintiff introduces ten intelligent and creditable witnesses, well acquainted with the handwriting of the obligor, all of whom express a confident opinion that the signature to the bond is his. The defendant, to

support his plea, introduces evidence of the circumstances of the obligor, the relations and conduct of the parties, and the ability of the plaintiff to lend the money. To rebut the evidence on the last ground the plaintiff who was a merchant, introduced a witness C., who had been his bookkeeper, who professed to speak from memoranda taken by him on a recent examination of the plaintiff's books; and he stated that the plaintiff had a large amount of cash notes and accounts not known to the defendant's witnesses, and that he had the control of a large estate of S. of which he was the executor. When the cross-examination of this witness, and the examination of witnesses to rebut his testimony, was ended, which was late in the evening the defendant's counsel announced that they had no other witnesses to examine, but would on the next day introduce some documentary testimony. On the next day they offered in evidence the settled accounts of the plaintiff as executor of S. to show that he could not have from that source united with his own means, sufficient to enable him to make the loan. To this evidence the plaintiff objected, and the court excluded it; and in doing so, remarked that the evidence previously introduced by the defendant without objection, as well as that then offered, was too vague, remote and indefinite in its character, to sustain the plea of non est factum against such evidence of factum as the plaintiff had introduced; and would have been excluded if objected to. The defendant then asked that the witness C. might be recalled, and that they might be permitted to re-examine him, and test the accuracy of his statements, by requiring the production of the books, which were near and might be obtained in a few minutes. But the court refused to permit the witness to be recalled, or to require the books to be produced; because the evidence was irrelevant, and because the defendants had announced on the day before, that they had concluded the examination of witnesses. Held, the settlements of the plaintiff as executor of S. were competent and relevant testimony, and should have been admitted. "It is true, that the plea of non est factum to an action of debt upon a bond, puts in issue only the validity of the bond; and no evidence is relevant to the issue, or admissible, that does not tend to prove or disprove that the bond is the act and deed of the alleged obligor. If the defendant wishes to rely for his defense on any want or failure of consideration, or fraud (unless it relates to the execution of the instrument; as if it be misread to the party, or he did not intend to sign such an instrument), he must plead the matter specially, or apply for relief to an equitable forum. The evidence introduced by the defendant as to the circumstances, etc., of the parties, was introduced not to show any want or failure of consideration, or any fraud on the part of the plaintiff antecedent to, or independent of the execution of the bond, but to show that the supposed bond was not the act and deed of the defendant's testator. And if it tended in any degree to show that fact, it was relevant and admissible evidence to be weighed by the jury." McDowell *v.* Crawford, 11 Gratt. 377, 395.

On the plea of non est factum in an action of debt upon a bond, proof of the handwriting of the subscribing witnesses, and that they are dead, will be sufficient to submit the case to the jury. Bogle *v.* Sullivant, 1 Call 561.

Verification of Plea.—A plea of non est factum, in an action of debt on judgment, will not be admitted or received by the court over objection, unless verified by affidavit. Wilson *v.* Bank, 6 Leigh 570.

The affidavit filed with the plea of non est factum to a declaration in debt need not allege that the defendant did not deliver the paper in question, as his deed, after the blank was filed up with the sum without his pres-

ence or knowledge. Franklin *v.* Cox, 4 Rand. 448.

In an action of debt upon a single bill under seal, the defendant pleaded payment and the office judgment was set aside. On trial the defendant moved for leave to file the plea of non est factum, with affidavit annexed that said plea was true "to the best of the defendant's knowledge and belief." The lower court rejected the plea. The plea, being one which goes to the merits, should have been received, especially so, when it was not offered for the purpose of delay. An objection that the affidavit was not positive was not sustained. No man can swear positively to legal inferences, and the words of the affidavit do not render it defective. Jackson *v.* Webster, 6 Munf. 462.

In debt on judgment rendered in state of Ohio under confession, under a power of attorney made before the action brought, the question was raised whether the plea that the defendants had never executed such power of attorney, should be verified by affidavit, being a plea of non est factum, according to the statute providing that no plea of non est factum offered by any person charged as obligor, covenantor, or grantor of a deed, shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation. The court did not decide whether such plea should be verified, but did hold, that, whether the affidavit was necessary or not, the plea having been received without objection for want of the affidavit, and a general demurrer put in to it, the objection was thereby waived, and can not avail in a court of error. And the inferior court having sustained the demurrer to the plea, and given judgment for the plaintiff; and this court holding that the demurrer ought to have been overruled, and therefore reversing the judgment; held, judgment must be entered here for the defendants. Dissentiente Brockenbrough, J. Wilson *v.* Bank, 6 Leigh 570.

Time of Filing Plea.—The plea of non est factum to a declaration in debt is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for. Franklin *v.* Cox, 4 Rand. 448.

3. Nul Tiel Record.

Nul tiel record is the proper plea to an action of debt on a judgment. Dykes *v.* Woodhouse, 3 Rand. 287; Shelton *v.* Welsh, 7 Leigh 175; Anderson *v.* Dudley, 5 Call 529; Jackson *v.* Conrad, 14 W. Va. 526.

"The maxim of the law is, that the judgment of a court of general jurisdiction, imports absolute verity, and its truth can not be questioned, either by showing, otherwise than by the record itself, that the court had no jurisdiction, or that its jurisdiction was fraudulently procured. Both upon the merits of the cause of action, and upon all jurisdictional facts, the record imports absolute verity in law, and is to be tried by the court upon inspection of the record only. Hence at law, the validity of the judgment can be put in issue by the plea nul tiel record only, and if on inspection it turns out that the plea is not true, there is an end of the controversy. If its validity is to be impeached from without some other appropriate remedy must be found." Wandling *v.* Straw, 25 W. Va. 692. See Smith *v.* Johnson, 44 W. Va. 278, 29 S. E. 509.

Foreign Judgments.—It has been held, that nul tiel record is a good plea to an action of debt, founded on a judgment of another state. Bowler *v.* Huston, 30 Gratt. 266.

On the other hand, in an early Virginia case, it was held, that if the court rendering a judgment is a foreign court, it is not judicially known by us as a court of record, and its judgments are not considered as records, hence it follows that the plea of nul tiel record

is bad, because it is not applicable to foreign judgments. Draper *v.* Gorman, 8 Leigh 629.

Amendments.—Upon the trial of the issue of nul tiel record, in an action of debt brought upon a judgment, the court may allow an amendment of a declaration; and if the defendant consent, may proceed with the trial. Anderson *v.* Dudley, 5 Call 529.

4. Payment.

See generally, the title PAYMENT.

In General.—In an action of debt, the defendant may plead payment of the debt (or of so much as is due by the condition) before action brought. (Code 1849, p. 653, ch. 172, § 1.) Va. Code, 1904, § 3295.

Condition Performed.—The plea of condition performed, to an action of debt for money, is equivalent to the plea of payment. Defendant was not allowed to object to errors in pleadings which are for his benefit. Hammitt *v.* Bullett, 1 Call 567.

Matters Probable under Plea of Payment. — When an action of debt was brought on a bond with a condition, which was made a part of the declaration by oyer, and that condition only showed that a part of the money secured was due at the time of the institution of the suit, the plea of payment put in by the defendant only extended to such sums, and not to those which afterwards became due. Thatcher *v.* Taylor, 3 Munf. 249.

In an action of debt on a bond, the defendant plead, as a set-off, the obligation of the plaintiff assigned to him by a third person, and also put in the general plea of payment. The writing when produced proved not to be an obligation, but a promissory note executed by the plaintiff. This was held to be evidence under the second plea of payment, but not under the first. Anderson *v.* Bullock, 4 Munf. 442.

In the trial of an action of debt, when there is a plea of payment, it is error to suppress the deposition of a witness who has died, and whose testimony tends to prove the settlement, before suit brought, of the note sued on, by a partial payment, and a new note given for the residue. Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

Parol Evidence under Plea of Payment. — This was an action of debt brought on a bond, to which the defendant filed a plea of payment. On the trial the defendant introduced a witness, who stated that he heard the plaintiff, before the institution of the suit, tell the defendant that $25 only of the bond remained unpaid. The plaintiff's counsel moved to exclude this evidence from the jury on the ground that no such payment as that was stated in the account of payments filed with the plea. But as by the act of assembly, 1 Rev. Va. Code 487, ch. 127, it was provided, that in an action of debt due by judgment, bond, or otherwise, the defendant shall have liberty, upon the trial thereof, to make all the discount he can against such debt; and upon proof thereof the same shall be allowed in court, it is competent under the plea of payment to give in evidence parol admissions of the plaintiff, that but a portion of the debt claimed was really due. Rice *v.* Annatt, 8 Gratt. 557.

Amendment of Plea.—Where the plea of payment was filed by the attorney, through inadvertence, and for want of information, to a declaration in debt on joint bond against the executors of one obligor, instead of the plea of discharge, which was proper (the death of one obligor on a joint bond, prior to the act of 1786, discharged his executors), the plea was allowed to be amended, after trial and verdict for plaintiff. Richardson *v.* Johnston, 2 Call 527. See Va. Code, 1904, § 2855.

Verification of Plea.—In debt on a paper under seal, purporting to be a penal bill, and to be executed by the defendants, the defendants pleaded payment, and issue was joined. The bill of exception sets out an affidavit

which was offered with the plea, stating that the defendant subscribed his name and affixed his seal to a paper then in blank, for the purpose of becoming surety in a bond not to exceed $600; that at the time he subscribed his name, no sum of money was expressed, and the bond was to have been filled up in a sum not exceeding $600; which paper was afterwards filled up with the sum of $1150, without his knowledge, and not in his presence. It was held, that the affidavit filed with the plea need not allege that the defendant did not deliver the paper in question as his deed, after the blank was filled up with the sum of $1150 without his presence and knowledge. Franklin *v.* Cox, 4 Rand. 448.

Conclusion of Plea.—See the title PAYMENT.

The plea of payment, whether in assumpsit, debt, or covenant, should conclude to the country. Douglass *v.* Central Land Co., 12 W. Va. 502.

In an action of debt on bond, the defendant files as his plea, this, "that he has well and truly paid the debts in the declaration mentioned, and the statute of limitations; and of this he puts himself upon the country, and the plaintiff likewise, and issue was joined." The pleas of the statute of limitations and payment should have concluded with a verification, and issue could not have been joined upon them by adding a similiter, but only after replication. This was a misjoinder of issue and improper, but was cured after verdict by the statute of jeofails. Simmons *v.* Trumbo, 9 W. Va. 358.

Joinder of Issue on Immaterial Pleas.—In debt on a bond, if the declaration describe it as writing obligatory for a sum of money; and the defendant, without praying oyer of the bond, plead payment, and also several other pleas, alleging performance of a condition, according to which the bond was to be discharged, by the delivery of a certain quantity of iron; and, issue being joined thereupon, the parties go to trial; and it appears, by bills of exceptions, that the evidence before the jury did not apply to the plea of payment, but to the other pleas only; a verdict for the defendant ought to be set aside, and a new trial awarded, with leave to him to take oyer of the condition of the bond, and plead de novo;—all his pleas, except that of payment, being irrelevant to the claim set out in the declaration, and, therefore, the issues joined upon them being immaterial. And this is the case, notwithstanding a copy of a bond, corresponding with that described in the pleas, be inserted in the transcript of the record, and certified by the clerk to be the bond on which the declaration was filed. Beatty *v.* Smith, 5 Munf. 39.

In an action of debt, a plea of payment was filed in court, and issue thereon properly made up. At the same time the defendant, by leave of the court, filed other pleas in writing, some of which were immaterial—no objection appearing to have been made to the filing of such pleas. There does not appear to have been a motion made to reject, or demurrer, or any reply or issue made up on the pleas. In this confused state of pleadings the parties waived a jury, and agreed to submit the case to the court. On appeal by the plaintiff, held, that when the appellate court clearly sees that one of the immaterial pleas in the trial of the cause must have been considered by the court as being filed, and the matters therein plead considered by the court as though it was a good plea, and issue thereon made up; and that said plea and the matters therein plead must have entered into and effected the judgment of the court to the prejudice of the plaintiff, the appellate court will reverse the judgment for that cause, set aside the finding of the court and direct a new trial, with leave to perfect the pleadings before such new trial is had. Griffie *v.* McCoy, 8 W. Va. 201.

Proof of Payment.—If an action of debt be brought by the assignee of a bond against the obligor, and the latter pleads payment to the plaintiff, he can not give evidence of payment to the assignor. Phelps *v.* Frazer, 3 Rand. 103.

In debt on a specialty, payment being pleaded, the defendant gives in evidence, as affording ground on which payment might be presumed, a specialty of later date, executed by the plaintiff to the defendant. Held, evidence may be received from the plaintiff to prove the consideration for which the latter specialty was given, and the circumstances under which it was executed. Johnson *v.* White, 8 Leigh 214.

In debt on an assigned bond, the assignee being plaintiff, if the defendant pleads that he has paid the debt to the plaintiff (without pleading payment to the assignor before notice of the assignment), it is not allowable to give in evidence any set-off against, or payment to, the assignor. Hatcher *v.* Cabell, 6 Rand. 353.

In debt on a joint obligation, to which the defendants plead payment, they can not give in evidence a covenant between one of the plaintiffs and one of the defendants, with parol testimony that the plaintiffs settled with that defendant, who was the principal debtor, and in such settlement kept their accounts separately, and that each was entitled to one moiety of the debt; that the defendants gave notice that a discount would be claimed by them on account of said covenants; and that the plaintiff who was party to the covenant, said that the same was not settled, and that he intended to allow a credit for it. Arnolds *v.* Jacksons, 6 Munf. 106.

5. Conditions Performed.

Plea of conditions performed to an action of debt for money, amounts to the general issue of payment. Hammitt *v.* Bullett, 1 Call 567. See Lane *v.* Harrison, 6 Munf. 573.

6. Special Pleas.

a. Specialties.

In an action of debt founded on a bond or other deed, if the defendant wishes to separate the law from the facts so that the court may pass upon the sufficiency of any special ground why it is not his deed, then he must allege such facts specially, concluding with an "et sic non est factum," and so it is not his act. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

b. Foreign Judgments.

To an action of debt brought in Virginia upon a judgment of the circuit court of the District of Columbia, a special plea alleging that the judgment of the circuit court was recovered on a bill of exchange drawn by their testator, while in a state of intoxication, for money won at gaming, is properly rejected. Draper *v.* Gorman, 8 Leigh 628.

c. Want of Jurisdiction.

Where the defense of want of jurisdiction is set up, such defense ought to be specially pleaded, and can not be made under the plea of nul tiel record, nor nil debet. Bowler *v.* Huston, 30 Gratt. 266.

d. Want of Consideration.

Though the defense of want of consideration may be made under the plea of nil debet, it may also be pleaded specially. Keckley *v.* Union Bank, 79 Va. 458.

e Matters Amounting to General Issue.

Where in an action of debt, the pleadings have already been made up on the general issue, and after much delay the defendant tenders prolix and obscure special pleas setting up matters amounting to the general issue and provable under it, the rejection of such pleas by the trial court is not error. Baltimore, etc., R. Co. *v.* Polly, etc., Co., 14 Gratt. 447; Keckley *v.* Union Bank, 79 Va. 458.

Special pleas which only raise ques-

tions which are involved in the plea of nil debet, under which the defendant may rely upon the same matters in evidence which are set out in the pleas, are properly excluded. Crews *v.* Farmers' Bank, 31 Gratt. 348.

Although the rejection of a special plea, in an action of debt, which contained matter which would have been a good defense if offered under the general issue, was proper, because the matter thereof should have been offered in evidence under the general issue, and because it was offered too late; yet where the court, in rejecting the plea, stated, as the reason for so doing, that it did not set forth a legal defense to the action, and thereby prevented the defendant from offering the matter thereof in evidence under the general issue; it was held, to be error, for which the judgment was reversed. Shepherd *v.* Anderson, 2 Pat. & H. 203.

7. Bill of Particulars.

See the title BILL OF PARTICULARS, vol. 2, p. 376.

Plea of Payment. — In an action of debt, no account of payments need be filed to admit proof of general payments. Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612, citing Shanklin *v.* Crisamore, 4 W. Va. 134; Simmons *v.* Trumbo, 9 W. Va. 358.

Plea of Nil Debet.—Under plea of nil debet, defendant can not introduce evidence of payment or set-off, unless such payment or set-off be so plainly and particularly described in an account filed therewith, as to give plaintiff notice of its nature. Richmond City, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148.

In the recent case of Richmond City, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148, it was held, that in order to prove payments under the plea of nil debet, he must file with his plea such a descriptive account as is required by § 3298 of the Virginia Code of 1887. "It will thus be seen that, as respects notice, the statute, as was said by Moncure, P., in Allen *v.* Hart, 18 Gratt. 722, 734, puts payment and set-off on the same footing; so that to entitle the defendant to prove payment under the plea of nil debet, he must file with his plea such a descriptive account as § 3298 requires. 1 Bart. Law Pr. (2d Ed.), 492, 498."

"Under the plea of nil debet, payment or any other defense is admissible that tends to deny an existing debt; and this is undoubtedly so at common law. 4 Min. Inst. 641; Virginia Fire, etc., Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973. But this rule, so far as respects the defense of payment, has been modified in Virginia by statute. In 1705 it was enacted by the general assembly that 'when any suit shall be commenced and prosecuted in any court within this colony for any debt due by judgment, bond, bill or otherwise, the defendant shall have liberty upon tryall thereof to make all the discounts he can against such debt, and upon proof thereof the same shall be allowed in court.' 3 Hen. St. 378. Under this act it was the practice to allow offsets to be given in evidence under the plea of nil debet or non-assumpsit, and this without previous notice. 5 Rob. Pr. 1000; 2 Tuck. Com. 108. But at the revisal of 1819 a change was made, in regard to both payment and offsets, by enacting that 'in every action in which a defendant shall desire to prove any payment or set-off, he shall file with his plea an account, stating distinctly the nature of such payment or set-off, and the several items thereof; and on failure to do so, he shall not be entitled to prove before the jury such payment or set-off, unless the same be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof.' 1 Rev. Code (1819), p. 510. Under this statute it was held, in Johnson *v.* Jennings, 10 Gratt. 1, that in the absence of such an account as the statute contemplated, evidence was not admissible to prove a specific payment under the plea of

nonassumpsit; and the statute, as it now stands in the Code, is, in this respect substantially the same as it was in the Revised Code of 1819. It enacts that 'in a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise.' Code (1887), § 3298." Richmond, etc., R. Co. *v.* Johnson, 90 Va. 775, 20 S. E. 148.

8. Misjoinder of Issue.

In an action of debt the entry on the record is, "the defendant for plea says, that he has well and truly paid the debt in declaration mentioned, and the statute of limitations; and of this he puts himself upon the country, and the plaintiff likewise, and issue is joined." This is a misjoinder of issue, cured by the statute of jeofails after verdict. Simmons *v.* Trumbo, 9 W. Va. 358.

D. THE REPLICATION AND REJOINDER.

See the titles REJOINDER; REPLICATION.

In General. — "As I understand it, there are five essential qualities of a replication: 1. It must answer so much of the plea as it professes to answer. 2. It must be conformable to and not depart from the count. 3. It must present matter of estoppel; or, must traverse or confess and avoid the plea. 4. It must be certain. 5. It must be single. The replication, in this case, does not contain either the first, second or third essential qualities of a replication. 1st. The defendant pleaded that the debt in the declaration mentioned had been paid. The replication does not respond to this allegation. 2d. The replication should be conformable to the count, and not depart from it. The plaintiff counts for $542.84 on a writing obligatory. The replication departs from this, and counts for $271.42, with interest, on the condition of the bond. 3. It does not traverse the plea, nor does it confess it, or rely on an estoppel. It departs entirely from both the count and the plea; introduces no new matter to support the claim to the debt in the declaration mentioned, but departs therefrom entirely; has recourse to the condition of the bond, and seeks to recover the money and interest specified in the condition, and actually recovers judgment for the same against the defendant. That this is a departure in pleading, is clearly shown by 1 Chitty's Pleading 644; Richards et al. *v.* Hodges, 2 Sanders' Reports, 83, note (1) and case of Cossens *v.* Cossens and Hickman *v.* Walker, referred to in the note, and Reed *v.* Hanna, 3 Rand. 56." Mitchell *v.* Thompson, 2 Pat. & H. 439.

Special Replications. — A bond was given with condition to perform an award to be made by certain arbitrators. In an action of debt on this bond, the condition was made a part of the record by oyer, and the defendant pleaded "conditions performed." The plaintiff may set forth the award, and aver a breach of condition, by a special replication, not having done so in his declaration. But if he neglect to do this, and reply generally, the judgment ought to be arrested, after a verdict in his favor. The proceedings subsequent to the plea should be set aside, and a repleader awarded. Green *v.* Bailey, 5 Munf. 246.

Replication Defective in Setting Forth Condition of Bond.—In an action of debt on a bond in a penalty, with a condition for the payment of a less sum by installments, upon certain prescribed conditions, the plaintiff in his declaration claimed the penalty, but made no mention of the conditions. The defendant pleaded payment. The plaintiff in his replication set forth the condition of the bond, and averred nonpayment of the sum mentioned in the condition at the times therein specified. This replication was

held bad on general demurrer. Mitchell *v.* Thompson, 2 Pat. & H. 424.

Replication to Plea of Feme Covert.—In an action of debt on bond, the defendant pleaded in bar that she was, at the time of executing the bond and yet remained, a feme covert. The replication of the plaintiff was, that the defendant's husband had abjured the commonwealth and was not then or now a citizen thereof. To this replication a general demurrer was filed and the replication was held to be wholly defective. If it was intended that the common-law abjuration of the realm was to be relied upon, that never existed here. If it was intended that the expatriation of the husband under our statute was to be relied upon, it should have been shown how he expatriated himself, by a recorded declaration by deed, or in open court and that he had departed from the commonwealth. Even this would not have been sufficient, without the further allegation that he resided abroad at the time of the execution of the bond by his wife. The replication was held defective. Branch *v.* Bowman, 2 Leigh 170.

Replication to Plea of Payment.—An action of debt was brought against the defendant on a note. The defendant plead payment, to which plea a general replication was filed, and issue joined. At the trial the defendant moved for an amendment to set aside the proceedings subsequent to the replication, and proved that issue was joined by the clerk without his consent and against his wish. The general replication to the plea of payment did not constitute an issue. The defendant should have been permitted to prove that the similiter entered was against his consent. The proceedings should have been corrected by giving him a rule to take other measures to the replication. Nadenbousch *v.* McRea, Gilmer 228.

Replication to Plea of No Assets by Descent.—If in an action of debt against an heir, he pleads "no assets by descent, nor at the time the writ issued, nor at any time since, except a tract of 107 acres of land;" and issue is joined on the replication, that he had sufficient other lands by descent; and the jury find for the plaintiff, peremptory judgment will be rendered thereon. Cohoons *v.* Purdie, 3 Call 431.

Repleader.—See the title REPLEADER.

Where the replication to a plea in an action of debt was defective because it did not contain certain of the essential qualities of a replication, a repleader will be awarded. Mitchell *v.* Thompson, 2 Pat. & H. 424.

In an action of debt on a bond against the executor of the obligor, the plaintiff replied precludi non because it was not expressed in the bond that the deceased was jointly bound with a third party as alleged in the plea, and insisted that the action did not survive against a third party. The replication was held defective in not setting forth the time of the deceased's death, and there was no joinder of issue. The court directed a repleader from the plea. Stevens *v.* Taliaferro, 1 Wash. 155.

An action of debt is brought against M as heir and devisee of his father, upon a bond entered into by the father for the payment of money. The defendant pleaded "nothing by descent," and issue was joined. A repleader was awarded, though not asked for in lower court, because the issue only tried the right as to the descent, but not as to the devise. Baird *v.* Mattox, 1 Call 257.

In an action of debt against the executors of one obligor, on a bond given by the testator and one John Pattie, the defendant, without taking oyer, pleaded in bar, "that the said John Thornton was jointly bound with a certain John Pattie, and the said John Pattie survived him." To this plea the replication was "that it is not expressed in the bond that the said John

Thornton was jointly bound with the said John Pattie, as alleged in the plea, and if they were jointly bound, that by act of 1786 it is declared that the representative of one jointly bound with another, may be sued as well as the surviving obligor himself." The plea was held good, the replication faulty and a repleader awarded. Stevens *v.* Taliaferro, 1 Wash. 155.

Rejoinder.—A defendant in an action of debt craves oyer of a conditional bond, and pleads conditions performed; the plaintiff replies, and states the breaches of the condition, concluding the replication with a verification; the record then states that to this replication the defendant pleaded the general issue; and the jury was sworn to try the issue; and it appears that the evidence submitted to the jury was such as would have been proper, if there had been a formal traverse of the replication and issue joined thereon. This court will interpret the entry on the record book as meaning that the defendant rejoined to the replication generally; and after verdict the issue must be held to have been sufficiently well made to sustain the verdict and judgment thereon. Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455.

In an action of debt on the bond of a deputy sheriff, with a collateral condition, the defendant filed, among others, the plea of conditions performed. The plaintiff by replication to this plea charged the breach defectively, but fully avoided by other replications the other pleas of the defendant, which went to the foundation of the action, to which replication demurrers were improperly filed. A judgment entered for the defendant generally upon all the pleadings was erroneous, as it barred any future action on the bond. It should be limited to the replication of the plaintiff to the plea of conditions performed. Lane *v.* Harrison, 6 Munf. 573.

Effect of Failure to Rejoin.—Where, in an action of debt, there is a plea and replication, upon the failure or refusal of the defendant to rejoin, the court may reject the defendant's pleas and proceed to judgment. Wyatt *v.* Woodlief, 1 Leigh 473, citing Nadenbousch *v.* McRea, Gilmer 228.

In an action of debt against an executor, judgment by default having been regularly entered and confirmed, the defendant tendered four good pleas in bar, to which the plaintiff immediately put in replications tendering issues. The defendant refused to join in the issues, rejoin or demur. The court thereupon rejected the pleas of the defendant, and proceeded to judgment. Wyatt *v.* Woodlief, 1 Leigh 473.

E. VARIANCE.

See the title VARIANCE.

1. Between Writ and Declaration.

An action of debt was brought upon a protested negotiable note. The writ demanded the principal sum, but did not demand interest, nor the costs of protest. The declaration contained demands for the principal sum, together with interest and the protest charges. The demand for interest in the declaration, which is not claimed in the writ, is no objection, since by the statute in that case provided, the interest follows the principal as the shadow does the substance. It is error to claim charges of protest not claimed in the writ. Where judgment is by default this error may be taken advantage of. Hatcher *v.* Lewis, 4 Rand. 152.

2. Between Pleadings and Proof.

Debt on Single Bill.—In Thompson *v.* Boggs, 8 W. Va. 63, it is said: "If the defendant in debt on single bill or single bills, craves oyer of the same, and afterwards pleads to issue, he by oyer, has made the single bill, or single bills, a part of the pleadings and record; and, if, after oyer is taken and granted, he pleads payment, he can not, at the trial of the issue, object to the single bill or single bills as evidence, on the ground of variance between the

single bill or bills and the single bill or bills set forth in the declaration. Armstrong *v.* Armstrong, 1 Leigh 491."

Variance in Amount.—The plea of nil debet renders it necessary that the note produced in evidence should correspond with that described in the declaration. Therefore, there is a fatal variance, and a note should be excluded as evidence, where it is described as a note for "three hundred and forty-two dollars," payable "two months after the date thereof," and the note offered in evidence is for "three hundred and forty-two dollars and twenty-five cents," payable "sixty days after date." Scott *v.* Baker, 3 W. Va. 285.

An action of debt is brought upon a bond for 188 dollars; the bond is declared on as a bond for 108 dollars, but is in fact for 188 dollars; the defendant confesses judgment for the debt in the declaration mentioned, and the judgment is entered for 108 dollars. At a subsequent term of the court the plaintiff, upon notice to the defendant, moves the court to correct the judgment by the bond. Held, this is not a clerical error which may be amended under the 108th section of the statute of jeofails. 1 Rev. Code, ch. 128, p. 512. Compton *v.* Cline, 5 Gratt. 137.

Demand Less than Amount of Note Sued on.—If the demand in the declaration in an action of debt be for less than the right of recovery shown by the note described in it, it would be disregarded on demurrer by reason of § 29, ch. 125, W. Va. Code, and as the variance does not aggrieve the defendant, but is to his benefit; and also, in the absence of a demurrer, it is cured after judgment by § 3, ch. 134, W. Va. Code. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197 (1893).

Variance in Date.—In an action of debt, the declaration declares on a note, dated August 9, 1884, the case is tried on the plea of nil debet and the court against the objection of the defendant permits the plaintiff to read in evidence a note dated August 9, 1883. Held, the variance between the note declared on and the one admitted in evidence is fatal, and the action of the court was erroneous. Damarin *v.* Young, 27 W. Va. 436.

A general demurrer will not lie to a count in a declaration in debt, because the bond sued on is stated to be dated, "on the —— day of——, 1860." Simmons *v.* Trumbo, 9 W. Va. 358.

In an action of debt on a bond, the latter was recited in the declaration as bearing date in 1811; the bond produced, and made part of the declaration upon oyer was dated in 1810. This variance was held to be a matter of substance, and fatal to the case. Bennett *v.* Loyd, 6 Leigh 316.

The declaration in debt counts on a bond by which defendant bound himself to pay. The bond offered in evidence is dated September 2, 1837, and says for value received, 1st of March next, I bind my heirs, etc., to pay. Held, that from the face of the paper, it is to be inferred the obligor intended to bind himself. There was, therefore, no variance in that respect. Henderson *v.* Stringer, 6 Gratt. 131.

Variance in Name of Obligors.—A writing beginning, "Know all men, etc., that I, H. R., of the county, etc., am held and firmly bound," etc., and running throughout in the name of H. R. alone, is not to be received as evidence in support of a declaration against H. R. and H. B., charging that they both acknowledged themselves to be indebted, etc., notwithstanding the name of H. B. was signed under that of H. R., and issue was not joined on the plea of non est factum, or nil debet, but of "payment by H. B." See Atwell *v.* Towles, 1 Munf. 175; Bell *v.* Allen, 3 Munf. 118.

Place of Payment of Note.—In an action of debt, the declaration describes the note sued on as "a certain promissory note" and mentions no place of payment, and the court permits the plaintiff against the objection of the defendant to read in evidence a

negotiable note payable at the Kanawha Valley Bank. Held, this was error for which the judgment in favor of the plaintiff is reversed by this court. Damarin *v.* Young, 27 W. Va. 436, citing Bennett *v.* Loyd, 6 Leigh 316.

Several and Joint and Several Notes.—If a declaration describe a note of several parties as several, while the note is joint and several, and no objection is made on account of the variance before judgment, though it be rendered on demurrer to evidence, it is unavailing to reverse the judgment by reason of § 3, ch. 134 of the Code of West Virginia. Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197.

Cure by Verdict.—The defendant gave a bond, with condition, that he would collect certain debts due to obligee, make return of amounts collected, and surrender all bonds not paid, except such as might be lodged with lawyers for collection, agreeing to perform the duty of collector for the obligee to the best of his skill. An action of debt was brought on this bond, and the breach was laid on the defendant's neglecting to bring suits for the recovery of the debts, etc. This variance was held immaterial, particularly after verdict. Hawkins *v.* Berkley, 1 Wash. 204. See the title AMENDMENTS, vol. 1, p. 359.

IV. Parties.

See generally, the title PARTIES.

Parties Plaintiff.—An administrator may declare in the debet and detinet on a bond executed to himself as such, and his executor, or administrator, has a right to bring an action upon it. Moore *v.* Taggart, 3 Munf. 513.

An administrator de bonis non may maintain an action of debt, on a judgment obtained by the executor. In such an action, it will be sufficient to allege in the declaration, that A. B., executor of C. D., recovered the judgment; and it will be inferred that the debt was originally due to the testator on the plea of nul tiel record. Decided by two judges out of three. Dykes *v.* Woodhouse, 3 Rand. 287.

In Allen *v.* Cunningham, 3 Leigh 404, Tucker, P., said: "In deciding this case, I shall take the case of Dykes *v.* Woodhouse, 3 Rand. 287, to be unquestionable. Certainly, it ought not to be questioned except by a full court; and I should regret to see it disturbed, because it is better that the question of practice should be considered as settled, particularly, as the decision is in perfect conformity with the rights of parties and the convenience of suitors. By that decision it is declared, that an administrator de bonis non with the will annexed, may maintain an action of debt on a judgment obtained by the executor of his testator; which accords with the doctrine of Brudenel's case, 5 Co. 9, that the executor of an administrator who recovers a judgment, is not entitled to have execution of that judgment; and the converse of the proposition is equally true, as to the administrator of an executor." To the same point, Dykes *v.* Woodhouse, 3 Rand. 287, is cited in Wernick *v.* M'Murdo, 5 Rand. 64, 112, 113; Bishop *v.* Harrison, 2 Leigh 535, 536; Allen *v.* Cunningham, 3 Leigh 404; Tyler *v.* Nelson, 14 Gratt. 224; Holt *v.* Lynch, 18 W. Va. 572.

The heir may maintain an action of debt on a bond to his ancestor, conditioned for the quiet enjoyment of lands, when the breach has happened since the ancestor's death. Every decedent leaves two representatives, the executor, who represents his personal rights, and the heir, who represents his real rights. The executor is entitled to the collection and possession of the personal estate for the purposes of payment of debts and legacies, but the heir is entitled to the realty. The bond sued on constituted no part of the testator's personal estate, as no breach occurred during his lifetime, but belonged to the heir as appertaining to the inheritance, and it was proper

for him to sue in debt for the breach. Eppes *v.* Demoville, 2 Call. 22.

Contracts for Benefit of Third Persons.—Prior to the statute, upon an indenture or parol agreement between A. and B., wherein B. promises, upon a consideration moving from A., to pay money to C., it was held, that C. could not maintain debt for the money, because of the lack of privity. Ross *v.* Milne, 12 Leigh 204, 37 Am. Dec. 646. But this rule has been changed by statute in Virginia and West Virginia. See the title CONTRACTS, vol. 3, p. 457.

Parties Defendant—Joint Judgments—One Defendant Dead.—Where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant; the law respecting partitions, joint rights and obligations, 1 Rev. Code 359, being applicable to joint judgments. Roane *v.* Drummond, 6 Rand. 182.

Joinder of Parties—Husband Joined in Suit on Bond to Wife.—In an action of debt on a bond in the name of a married woman as assignee of the obligee, the declaration stated that her husband had no interest in the subject matter of the suit but was joined with his wife by way of conformity. Held, the declaration was unobjectionable. Tate *v.* Perkins, 85 Va. 169, 7 S. E. 328; Hayes *v.* Va. Mut., etc., Ass'n, 76 Va. 225.

Waiver of Objection.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

In the case of Bush *v.* Campbell, 26 Gratt. 403, it was held, that where, "in an action of debt upon a bond against five persons, the plaintiff endorsed on the process 'not to be served on G,' who was one of the five, and he was not brought before the court, there having been two continuances of the cause and a verdict and judgment against one of the defendants, and he having moved for a new trial and also in arrest of judgment, without at any time objecting to the failure of plaintiff to make 'G' a party; and it appearing further from the motion in arrest of judgment that 'G' had absconded and left the state before the suit was brought, 'B' must be held in the appellate court to have waived the objection, and it was too late to make it in the appellate court." Shrewsbury *v.* Miller, 10 W. Va. 121.

In an action of debt upon a joint bond against eleven persons, as to one the sheriff returns "no inhabitant of my bailiwick," and thereupon the court orders the action to abate as to that defendant; and none of the other defendants object to the abatement, and do not object at any time in the court below; there are two continuances of the cause, one verdict in favor of all the defendants—verdict set aside on motion of plaintiff; another trial and verdict and judgment against all said defendants; the said defendants must be held in the appellate court to have waived the error, if any, and it is too late to insist upon it in the appellate court. Shrewsbury *v.* Miller, 10 W. Va. 115.

V. Verdict and Judgment.

See generally, the titles JUDGMENTS AND DECREES; VERDICT.

A. CERTAINTY.

A verdict and judgment for a debt claimed in the declaration with interest, subject to a credit for a specified sum, paid at a specified date, is certain enough. Barrett *v.* Wills, 4 Leigh 114, 26 Am. Dec. 315.

If the jury find a verdict for the amount mentioned in the declaration, in an action of debt, and the plaintiff, in court, release so much thereof as is equal to the credits endorsed on the bond, judgment ought not to be rendered, to be discharged by the payment of the sum stated in the condition of the bond, subject to a deduction of the credits endorsed. Such deduction

ought to be made, and judgment rendered for the real balance due. Grays *v.* Hines, 4 Munf. 437.

Plea of Fraud.—In an action of debt issue was joined on a plea that the bond which was sued upon was obtained by fraud. A verdict "for the defendant, because the jury believed the bond was obtained by fraudulent means" was held to be sufficiently positive and certain. Chew *v.* Moffett, 6 Munf. 120.

B. RESPONSIVENESS.

A verdict in an action of debt, in which there are several issues, in these words: "We, the jury, find for the plaintiff, and assess the damages at $1,102. December 2, 1870. (Signed) J. S. Fleming, Foreman," does respond to the issues, and is not so defective that judgment can not be entered thereon. Snyder *v.* Snyder, 9 W. Va. 416.

An action of debt was brought against the appellant upon a bond of his testator. Issue was joined on the pleas of payment and fully administered and the jury found "for the defendant, he having fully administered all the assets which came to his hands." This verdict was held defective in not being responsive to the issue joined on the plea of payment, and the judgment will be reversed by the appellate court, although no objection was taken in the court below; and a venire facias denovo will be directed as to both the issues. Brown *v.* Henderson, 4 Munf. 492.

Where One of Several Joint Obligors Dies.—Where an action of debt was brought against two persons on a bond executed by both and it abated as to one by his death, a verdict which only found that the surviving defendant had not paid the debt, is bad in that it does not negative the payment of the money by the deceased defendant. Triplett *v.* Micou, 1 Rand. 269.

Judgment on Declaration Blank as to Sums, etc., Erroneous. — The assignee of the obligee brought suit against the obligor in a bond. The writ was in debt, and the declaration was also in debt, but was blank as to the sum declared for, the date of the bond, the assignment to the plaintiff, and as to the damage. A judgment entered thereon was held erroneous and reversed in Blane *v.* Sansum, 2 Call 495.

C. OBLIGATIONS WITH PENALTIES ANNEXED.

In General.—Judgment in debt on a penal bond should be for the penalty, to be discharged by the payment of the sum actually due. Moore *v.* Fenwick, Gilmer 214.

Debt upon a bond in the penalty of £1800, Pennsylvania currency; of the value of £1440, Virginia currency. The defendant having confessed judgment, it was entered for £1800, Pennsylvania currency; of the value of £1440, current money of Virginia, to be discharged by the payment of £720, current money of Virginia with interest, etc. The confession of judgment fixed the value of the money, and furnished the clerk with a standard for ascertaining the value of the sum mentioned in the condition., Strode *v.* Head, 2 Wash. 149.

The penalty and condition of a bond for the payment of money is in the same sum, and it is proper to treat it as a single bill. Proper judgment on such a bond in an action of debt is for the amount of the bond with interest from time of payment. Fleming *v.* Toler, 7 Gratt. 310.

On Injunction Bond with Condition.—The declaration in an action of debt brought upon an injunction bond demanded the aggregate of all the injunction bonds named, where there were several counts, and there were apparently several bonds. The bond was for $940, to be discharged by the payment of the damages assessed by the jury, the judgment was entered up in the old form for $940, the penalty of

the bond to be discharged by the payment of $920.76, the damages assessed by the jury. The Code of West Virginia, ch. 131, § 17, says that in such suits "judgment shall be entered up for what is so ascertained to be due by the jury." If this statute was regarded as requiring, not simply permitting, the judgment to be entered in this new form, the defendant would not be prejudiced by the old form, the judgment would not be reversed for such error, if any. Bank *v.* Fleshman, 22 W. Va. 317.

Bond with Collateral Condition.—The judgment is always entered for the penalty, in an action of debt on a bond with collateral condition, to be discharged by the principal and interest, and if that exceed the penalty, the defendant has his election, and may satisfy it by paying the penalty. Atwell *v.* Towles, 1 Munf. 175.

Bond for Tobacco with Pecuniary Penalty.—A executes a writing obligatory to B for the payment of tobacco, under a pecuniary penalty, with a condition annexed, that it shall be void if G shall pay the tobacco, or its value to A. In an action of debt brought on this writing the declaration assigns a breach of the condition, and the defendant pleads payment. The verdict and judgment ought to be for the penalty, to be discharged by payment, not of the tobacco with interest thereupon, but of damages, for breach of the condition. Overstreet *v.* Marshall, 1 Hen. & M. 381.

Sheriff's Bond.—In an action of debt upon a sheriff's bond in the name of the commonwealth, for the benefit of a person aggrieved by the misconduct of the sheriff, the judgment should be entered for the penalty, to be discharged by the payment of the damages assessed and costs, "and such other damages as may be hereafter assessed upon suing out a scire facias, and assigning new breaches, by the said C or any other person or persons injured." It was error in the judgment, in attaching the recovery to C as to future injuries, excluding all others. Bibb *v.* Cauthorne, 1 Wash. 91.

Penalty in Current Money, Condition in Sterling.—The penalty of a bond was in current money, with condition to pay so much sterling money. After verdict for the plaintiff in an action of debt upon the bond, the judgment should be for the current money mentioned in the penal part of the bond, to be discharged by the sterling money in the condition. Terrell *v.* Ladd, 2 Wash. 150.

Aggregate of Principal and Interest.—In an action of debt upon a bond, with a penalty, for the payment of money, the jury may make their verdict of the aggregate of principal and interest. The defendant will not be allowed to appeal for that cause, since that mode of finding the verdict was for his benefit. Smith *v.* Harmanson, 1 Wash. 6.

Harmless Error.—A bond was given for making a title to a tract of land, and an action of debt was brought thereon. The defendant plead "covenants performed." Verdict and judgment were rendered for damages for nonperformance, but said nothing of the penalty of the bond. Such judgment should not be reversed at the instance of the defendant, as such irregularity can not be injurious to him, because the true ground of action appears by the declaration, and the satisfaction thereby demanded extending to the whole injury, the action can in no form be repeated. Pate *v.* Spotts, 6 Munf. 394.

In an action of debt on a judgment for a certain sum, to be discharged by a lesser, when the declaration demands a wrong sum, a verdict which finds an erroneous sum, "that being the debt in the declaration mentioned," is substantially good, the sum being surplusage, and the conclusion of the verdict being, of itself, sufficient to show the real sum demanded. Roane *v.* Drummond, 6 Rand. 182.

D. IN ACTIONS BY AND AGAINST PERSONAL REPRESENTATIVES.

See the title EXECUTORS AND ADMINISTRATORS.

Form of Judgment.—The executor of the intestate executed his note as executor for a debt of his testator. An action of debt was brought on this note, and he was declared against as executor. The count was in the debet and detinet, and the breach was laid in his failure to pay. Upon a judgment by the default; Quære, If it should be de bonis testatoris or de bonis propriis. If it was error to enter judgment de bonis propriis, it was a clerical error, which should be amended on motion, and was no ground for an appeal. Snead *v.* Coleman, 7 Gratt. 300, 56 Am. Dec. 112.

If an executor obtain a judgment against the administrator of the debtor, for a debt due to his testator, to be levied of the goods and chattels of the intestate, and he afterwards bring an action of debt against the administrator suggesting a devastavit and declare in detinet only, he can not have judgment de bonis propriis of the administrator but only de bonis testatoris. To entitle the plaintiff to a judgment de bonis propriis he should declare in the debet and detinet. Spotswood *v.* Price, 3 Hen. & M. 123.

An action of debt was brought against an administratrix on a bond of her intestate. The defendant plead fully administered. A verdict was given in general terms that the defendant had not fully administered, and judgment thereupon for the debt was demanded to be levied de bonis testatcris. The verdict was held insufficient to warrant the judgment. Brizendine *v.* Tisdale, 5 Leigh 51.

Judgment "When Assets."—Where an executor has confessed judgment in favor of the creditors of his intestate, "when assets" or "if assets," and an action of debt has been brought thereon, the executor pleaded plene administravit. The issue was found for the executor, but the plaintiff may take another judgment "when assets." Braxton *v.* Wood, 4 Gratt. 25.

When a plaintiff in an action against an executor or administrator takes judgment of assets quando acciderint, it is well settled that he can not at any future time proceed to execution on the judgment, without first suing out a scire facias to state that assets have come to hand, and to warn the defendant, should he be able to allege anything against such execution. These judgments are not barred by the statute, until the lapse of that period after assets have come in the hands of the executor or administrator, and not from the date of the judgment. Smith *v.* Charlton, 7 Gratt. 425.

Verdict on Plea of Plene Administravit.—The defendant to an action of debt brought upon a bond given by the testator, pleaded a special plene administravit, and that he hath not, nor had any goods except to a certain value, which were not sufficient to satisfy the judgments mentioned in the plea. To this special plea a replication was filed that the defendant hath, and had goods more than sufficient to satisfy the said judgments, whereof he could have satisfied the plaintiff. The verdict was "for the debt in the declaration mentioned." This was insufficient; the verdict should have found that the defendant had goods more than sufficient to satisfy the judgments, whereof he could have satisfied the plaintiff, or the value of the assets, if they were not sufficient. Booth *v.* Armstrong, 2 Wash. 301.

An action of debt was brought against an administrator on a penal bill, said to have been executed by the testator in his lifetime. Among other pleas the defendant filed the plea of fully administered. The jury found a verdict "that the writing obligatory in the declaration mentioned, is the deed of the defendant's intestate; that the debt in the declaration mentioned

hath not been paid, and that assets sufficient hath come to the hands of the administrator to pay the same; that he hath not fully administered the said assets." The court gave judgment for the amount of the penalty in the declaration mentioned. On appeal the court held that the verdict in this case was clearly insufficient in respect to the plea of fully administered. A verdict upon that plea should have ascertained the amount of the assets in the hands of the defendant at the commencement of the suit, and at the time of the plea pleaded, to enable the court to pronounce the proper judgment. It ought not only to have found the amount of assets in the hands of the defendants at the commencement of the suit or that they were sufficient to pay the plaintiff's demands; but also the amount in his hands at the time of pleading, or that they were sufficient to pay the plaintiff's demands; since the defendant might have received or duly disbursed assets between the commencement of the action and the time of pleading. The verdict should also have found the time when the assets came to the defendant's hands. For these reasons the judgment was reversed, the verdict set aside and a new trial awarded. Gardner *v.* Vidal, 6 Rand. 106.

In an action of debt on bonds brought by the executor of the creditor against the administrator of the debtor, issues were joined on the pleas of payment and fully administered. Verdict was given for the plaintiff on the first issue, and on the last, "that assets more than sufficient to pay the debt came to the defendant's hands to be administered." Carr, J., reviewed the cases cited and said: "It seems clear to me, from the whole tenor of these decisions, and the reason on which they stand, that the verdict before us must be pronounced insufficient. All the cases decide substantially, I think, that it must appear from the verdict, that at the institution of the action, there were in the hands of the representative, assets not bound by superior claims, sufficient to discharge the debt due the plaintiff; or if not sufficient, that the amount of such assets must be found. Here it is found that assets more than enough to pay the debt came to the defendant's hands; but whether he had them at the institution of this suit; whether before he had not properly disbursed them, or whether if he still held them, they were not bound by prior judgments, does not appear. There is therefore, all that uncertainty and insufficiency, for which in the other cases, the verdicts were set aside; and I think this must share the same fate." Sturdivant *v.* Raines, 1 Leigh 481.

Verdict on Plea of "No Assets."—On the plea of "no assets" to an action of debt brought against the administrators of their intestate, a verdict which found that the administrator had in his hands assets belonging to the estate of his intestate, without saying of what amount, was held defective and a new trial directed. Epps *v.* Smith, 4 Munf. 466.

Separate Judgments Separately Confessed.—The administratrix and other defendant gave separate confessions of judgment to an action of debt against them, where the suit had been revived against the administratrix. It was not error to enter separate judgments against each. Richardson *v.* Jones, 12 Gratt. 53.

Joint Judgment.—A joint promissory note was given by M and P. An action of debt was brought on this, and judgment by default was entered against M. P appeared and pleaded nil debet, and verdict was given against him. There should be given one and the same joint judgment against both. Peasley *v.* Boatwright, 2 Leigh 195.

Survivability of Action. — Where a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant; the law respecting partitions, joint

rights and obligations. 1 Rev. Va. Code, § 359, being applicable to joint judgments. Roane *v.* Drummond, 6 Rand. 182.

E. MONEY JUDGMENTS.

On Debt Due in Sterling Money.—On an action of debt brought upon a protested bill of exchange, drawn for sterling money, if the declaration is for the current money value of the sum for which the bill was drawn, the judgment, being for the sum so demanded, will be reversed on a writ of error. The suit should have been for the sterling money. Scott *v.* Call, 1 Wash. 115.

A sterling debt may be sued for without laying the value in current money; if it be laid it is merely surplusage, and will not vitiate; but in such case, the damages should be laid in sterling money; the verdict and judgment should be for sterling money, and the court is to fix the rate of exchange. Skipwith *v.* Baird, 2 Wash. 165.

F. INSTALLMENT CONTRACTS.

See ante, "Obligation to Pay Money in Installments," II, G.

Bond for Payment of Debt by Installment.—A judgment to an action of debt on a bond, for the payment of a debt by installments, should be, "for the debt in the declaration mentioned, to be discharged by the sum due at the time of the institution of the suit; reserving liberty to the plaintiff to resort to a scire facias to recover such other damages as might thereafter arise under the condition of the bond." Thatcher *v.* Taylor, 3 Munf. 249. See Va. Code, 1904, § 3394.

G. JOINT ACTIONS.

In an action of debt, under the statute, against the drawer and endorser of a protested negotiable note, upon a demurrer by both defendants to the evidence offered by the plaintiff, in which the plaintiff joins, the court may give judgment against one defendant and in favor of the other. Raine *v.* Rice, 2 Pat. & H. 529.

H. INTEREST.

See the title INTEREST.

Judgment for Interest Not Demanded in Declaration Invalid.—If the plaintiff does not demand interest in his declaration in debt on a promissory note, and the defendant waives his plea of payment, judgment can not be given for the interest on the note, not claimed in the declaration. Brooke *v.* Gordon, 2 Call 212.

But since the act of January 29, 1805, judgment may be entered as well as execution issued, for interest, though not mentioned in the writing, and not demanded by the declaration. See Wallace *v.* Baker (1811), 2 Munf. 334; Baird *v.* Peter (1813), 4 Munf. 76; 1 Rev. Code, 1819, p. 508, § 80; Va. Code, 1887, ch. 166, §§ 3390-91.

Verdict for "Amount Named in Declaration"—Judgment Including Interest Valid.—The verdict in an action of debt on a protested inland bill of exchange was simply for "the amount of the debt in the declaration mentioned," which, as stated in the declaration, was "the sum of $1,102.60, with interest thereon from the 14th of October, 1890, until paid," and there was judgment accordingly, with costs. Section 2853 of the Virginia Code provides that in a case of this sort judgment may be given "for the principal and charges of protest, with interest thereon from the date of such protest." The legal effect of the verdict was a finding for the principal sum mentioned in the declaration, with interest, as therein claimed; so that the judgment is in conformity both with the verdict and the statute. Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

A judgment which has been entered upon nil dicit or non sum informatus, to an action of debt upon a bill penal, which omits to mention interest, ought not to be reversed because it was entered as in conformity with the bill penal, and was to be discharged by the payment of principal, with such inter-

est and costs. Harper *v.* Smith, 6 Munf. 389.

Judgment Confessed for Interest on a Declaration Which Omitted It Is Valid.—The declaration in debt against joint obligors on a single bill was in the usual form, but said nothing about interest. A common order was entered and confirmed against the obligors and their appearance bail. On motion of the appearance bail at the next term this was set aside and he pleaded payment; but he subsequently waived his plea and acknowledged the debt, with interest. Judgment was properly entered against the principal, as well as the bail. Wallace *v.* Baker, 2 Munf. 334. Decision was based on act of 1805, and the case was distinguished from Brooke *v.* Gordon, 2 Call 212, approved in Baird *v.* Peter, 4 Munf. 76.

Intervention of Jury.—It was held, in Metcalfe *v.* Battaile, Gilmer 191, that a negotiable note as to the indorser, was not a note for the payment of money within the meaning of the act of 1804, ch. 8, and that therefore neither interest, nor final judgment for the principal sum, could be given upon it in an action of debt without the intervention of a jury, as could have been done if it had come within that act, as was decided by the cases of Wallace *v.* Baker, 2 Munf. 334, and Baird *v.* Peter, 4 Munf. 76.

I. AMOUNT OF RECOVERY.

In debt upon a note it is reversible error for the court to render judgment for more than the declaration demands. Hubbard *v.* Blow, 4 Call 224. See ante, "The Ad Damnum Clause," III, A, 9.

Interest beyond Penalty of Bond.—Baker *v.* Morris, 10 Leigh 284, is cited in Perry *v.* Horn, 22 W. Va. 385. Tennant *v.* Gray, 5 Munf. 494, is an express authority in favor of the right at law to recover interest beyond the penalty in the shape of damages.

J. WRIT OF INQUIRY.

See the title INQUEST AND INQUIRIES.

Bond Subject to Credit.—A judgment ought not to be entered in an action of debt on a bond for a sum of money, "subject to a credit for a hogshead of tobacco," without ascertaining its value. The amount of such credit should, in the first place, be ascertained by a writ of inquiry, and judgment should be entered for the balance. Early *v.* Moore, 4 Munf. 262.

A judgment at rules in a clerk's office can not lawfully be made final, on a declaration in debt, for money lent, and not alleged to be founded on any specialty, bill or note in writing; until a writ of inquiry has been awarded and executed. Hunt *v.* M'Rea, 6 Munf. 454.

Office Judgment without Writ of Enquiry.—In an action of debt on a decree for money, a conditional judgment was entered in the office, without awarding a writ of enquiry of damages, and the judgment not being set aside, became final at the next term, and execution was sued out on the judgment. At the ensuing term the judgment was set aside as irregularly entered, and defendants were given leave to plead. It was held error to enter judgment in the office without awarding an inquiry of damages, that this was a clerical error, which was properly corrected at a subsequent term. Shelton *v.* Welsh, 7 Leigh 175.

In James River, etc., Co. *v.* Lee, 16 Gratt. 427, 429, after setting forth the facts and decisions in Metcalfe *v.* Battaile, Gilmer 191; Hunt *v.* McRea, 6 Munf. 454; Hatcher *v.* Lewis, 4 Rand. 152; Rees *v.* Conococheague Bank, 5 Rand. 326; Shelton *v.* Welsh, 7 Leigh 175. Judge Moncure, delivering the opinion, of the court said: "These cases clearly show that under the Code of 1819, the award of a writ of enquiry was necessary in every case of an office judgment against a defendant, except the case of an action of debt upon an instrument of writing for the payment of an ascertained sum of money, absolutely and unconditionally. The

present Code, ch. 171, § 43, seems to have made no other change in this respect than to extend the exception to an action of debt against endorsers, as well as the drawer, of a bill of exchange or negotiable note and to an action of debt or scire facias upon a judgment or recognizance; in which cases it had been held, as we have seen, that a writ of inquiry was necessary, under the Code of 1819." See Va. Code, 1887, § 3285.

Where a joint action is brought against the drawer and indorsers of a negotiable note, an office judgment can not be confirmed against all or either of the defendants without a writ of inquiry. Hatcher *v.* Lewis, 4 Rand. 152, 154, citing Metcalfe *v.* Battaile, Gilmer 191 as decisive of the point. This case is also cited in Hickman *v.* Baltimore, etc., R. Co., 30 W. Va. 296, 4 S. E. 657.

VI. Bail.

See the title BAIL AND RECOGNIZANCE, vol. 2, p. 196.

Statutory Penalty.—Bail is not requirable in an action of debt, for the penalty of a statute. United States *v.* Mundel, 6 Call 245.

If the defendant, in debt on a bond, appear and plead, without giving special bail; and the court (without ruling him to give such bail), set aside the office judgment against him, his appearance bail is thereby discharged. Grays *v.* Hines, 4 Munf. 437.

Bond with Collateral Condition.—Appearance bail is not required in actions of debt on bonds with collateral conditions; and in such cases, it is error to enter a judgment by default against the sheriff for not requiring appearance bail. Ruffin *v.* Call., 2 Wash. 181; Nadenbush *v.* Lane. 4 Rand. 413.

Debts of Decedents.

See the title EXECUTORS AND ADMINISTRATORS.

Decedents' Estates.

See the titles DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Deceit.

See the title FRAUD AND DECEIT.

DECIDED.—In Osliander's Case, 3 Leigh 780, it was held, that a person who had formed or expressed a **decided** opinion, that the accused is guilty or innocent of the offense for which he is about to be tried, is unfit to sit upon the trial. In Armistead *v.* Com., 11 Leigh 659, it is said: "It is supposed that there is difficulty in ascertaining the true meaning of the term **decided,** when applied to opinion. When the question of the truth or falsehood of a proposition is presented to the mind, the wise and discreet examine, reflect, deliberate; and then, and not till then, **decide.** Some examine with more patience and perseverance, and reflect more profoundly than others; some gifted beyond the ordinary lot of man, of fancying themselves endowed with an intuitive perception of truth and error, **decide** after little, nay, almost without any, reflection; but whether the solution has been arrived at by the longer or the shorter process, the question no longer remains for deliberation; it is **decided.** Some minds are so sceptical, that they receive nothing as true, which is not proved by plain and direct evidence, or established upon mathematical demonstration; while others readily adopt the most absurd notions, though unsupported by anything like

evidence, and destitute of all foundation in reason and in the nature of things. And we not unfrequently find opinions of the latter class, as immovable as those which are the result of the most laborious investigation. The mind is, however, in both cases, made up; the question is settled; it is **decided.** And although both classes of persons may say, and believe they say truly, that they are open to conviction, willing to hear evidence and listen to reason, and either adhere to or abandon their opinions as these may dictate, few would be willing to stake their lives and fortunes on the success of an attempt to overturn opinions, which their professors fancy themselves to be thus willing to abandon at the command of truth and justice. The term **decided** used in the rule objected to, is (if anything) rather too strong and definite for the subject to which it is applied." See also, the title JURY.

Decisions.

As to rule of decision in appellate court, see the title APPEAL AND ERROR, vol. 1, p. 576. As to English decisions, see the title COMMON LAW, vol. 3, p. 27. See also, the titles COURTS, vol. 3, p. 708; FINDINGS OF COURT; JUDGMENTS AND DECREES; STARE DECISIS.

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DECLARATIONS AND ADMISSIONS.

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CROSS REFERENCES.

See the titles ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74; BASTARDY, vol. 2, p. 337; CONSPIRACY, vol. 3, p. 132; ESTOPPEL.

As to admissions in pleadings, see the title PLEADING. As to declarations of deceased persons as to boundaries, see the title BOUNDARIES, vol. 2, p. 604.

I. Scope of Title.

The term "admission," as used in this title, applies to civil transactions, and to matters of fact in criminal cases where there is no criminal intent, and is to be distinguished from confessions, which is reserved for another title. Likewise, dying declarations, and the rule as to the admissibility of declarations as being a part of the res gestæ, will be treated in a separate title.

II. Kinds of Admissions Considered.

A. ADMISSIONS FOR SAKE OF COMPROMISE.

In General.—Admissions made by a party for the sake of or with a view to a compromise, and offers to pay money by way of compromise to get rid of an action, if not accepted, can not be given in evidence against the party making them. Brown *v.* Shields, 6 Leigh 440; Williams *v.* Price, 5 Munf. 507; Baird *v.* Rice, 1 Call 18.

Propositions on either side, made by parties on a treaty for compromising their differences, if that treaty be not effectual, are not to operate as evidence in a future contest. Baird *v.* Rice, 1 Call 26.

Modification of General Rule.—But an offer to pay money by way of compromise, is not evidence of a debt. The reasons often assigned for it by Lord Mansfield were, that it must be permitted to men "to buy their peace," without prejudice to them if the offer did not succeed; and such offers are made to stop litigation, without regard to the question whether any thing, or what is due. If the terms buy their peace are attended to, they will resolve all doubts on this head of evidence. But for an example, I will add one case. If A sue B for £100, and B offer to pay him £20, it will not be received in evidence; for this neither admits nor ascertains any debt, and is no more than saying he would give £20 to get rid of the action. But if an account consists of ten articles, and B admits that a particular one is due, it is good evidence for so much. This is a clear and concise view of the point, separating an offer to make a sacrifice or concession for the sake of peace, from the admission of a fact, though made under the same circumstances. Brown *v.* Shields, 6 Leigh 440.

B. JUDICIAL ADMISSIONS.

See the titles PLEADING; RECORDS.

A record may be admitted in evidence in favor of a stranger against one of the parties, as containing a solemn admission or judicial declaration by such party in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing that fact, but as the deliberate declaration or admission of the party himself that the fact was so. 1 Greenl. Ev., § 527; Lee *v.* Virginia, etc., Co., 18 W. Va. 299; Ray *v.* Clemens, 6 Leigh 600; Breathed *v.* Smith, 1 Pat. & H. 301; Honaker *v.* Howe, 19 Gratt. 50; Trogdon *v.* Com., 31 Gratt. 862, 880.

"A record may be admitted in evidence in favor of a stranger against one of the parties as containing a solemn admission or judicial declaration by such party in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is, therefore, to be treated according to the principles governing admissions, to which class of evidence it properly belongs." Morrison *v.* Householder, 79 Va. 627.

Generally, the judicial proceedings to which any one is a party, are evidence against himself or any person claiming to acquire a title or right from him, after such statement or transaction; but they are not evidence against a person having acquired such title or right before. Houston *v.* McCluney, 8 W. Va. 135.

Record of Bankrupt Court.—On the trial of an indictment for obtaining goods upon false pretenses, it appeared that on the 1st of April, 1878, T., the accused, filed his petition in the bankrupt court to have the concern of T. & Co., composed of himself, C. L. T. and J. W. A., adjudicated bankrupts, and they were so adjudicated on the 26th of April, 1878. In the petitions and schedules filed by T., in this bankrupt record, different representations were made as to the affairs of the concern of T. & Co. on the 28th of February, 1878, when the offense was alleged to have been committed, from those stated by him in some of the representations made to M. & Co. The whole record of the bankrupt court was offered in evidence by the commonwealth, to which the accused, by counsel, objected generally, without pointing out any part of the record as objectionable. The court below admitted the whole record. Held, it was not error under the circumstances to do so. The statements contained in the petition and schedules in that record, made by the accused, were admissible as admissions or declarations of the facts therein stated. "And this upon the plain principle that a record is always evidence against a party as containing a solemn admission, or judicial declaration, in regard to a particular fact or facts. In such case, however, it is admitted not as a judgment conclusively establishing the matter, but as a deliberate declaration or admission that the fact was so." Trogdon *v.* Com., 31 Gratt. 862.

Answers.—Where the maker of a note given for purchase money, in defense of a bill filed by the assignee thereof, claims that the assignor, being the original holder, has not parted with his property therein, but the assignment was made for collection alone, and such assignor, being a party defendant, answers denying any interest in such note, such answer will be regarded as a solemn admission of record conclusively barring any right the assignor may have in such note in so far as such maker is concerned; and it is error to allow such maker to put such admission in issue by filing a special replication to such answer, as it is wholly immaterial. Briggs *v.* Enslow, 44 W. Va. 499, 29 S. E. 1008.

Admissions in pleadings are admissible also against the party in the suit in another suit in behalf of either the adverse party or a stranger, provided they were sworn to by the client per-

sonally, or were drawn under his special instruction. 1 Am. & Eng. Ency. L. (2d Ed.) 720. Hast *v.* Railroad Co., 52 W. Va. 396, 44 S. E. 155.

Statements in pleadings signed by an attorney only, not sworn to by the client, are not competent evidence against the latter in another suit when the statements are made without his knowledge or consent. Note 1 in 1 Am. & Eng. Ency. L. (2d. Ed.) 720. Hast *v.* Railroad Co., 52 W. Va. 396, 44 S. E. 155.

Admissions in Answer.—See the title ANSWERS, vol. 1, p. 414.

An answer in chancery may be used as evidence of an admission of a fact or facts. Hunter *v.* Jones, 6 Rand. (Va.) 541; Tabb *v.* Cabell, 17 Gratt. 160; 1 Greenl. Ev., § 527a; 1 Whart. Ev., §§ 836, 838; Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035.

Because admissions or declarations are contained in an answer does not necessarily make the admissions judicial. Tabb *v.* Cabell, 17 Gratt. 160; Hast *v.* Railroad Co., 52 W. Va. 407, 44 S. E. 155.

An answer in chancery in another suit is admissible as evidence of an admission therein in behalf of one though not a party to the suit in which it was filed, though it would not be admissible as an estoppel under the principle of res judicata. Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035.

Deposition of witness taken in one suit, may be read as evidence against him, as an admission, in another suit where the subject matter is the same. See the title DEPOSITIONS.

"Whilst, as a general rule, it is true that the deposition of a witness taken in one suit can not be read against him when a party to another suit; that rule can have no application here, since that was a suit in regard to this very debt, and was admissible as an admission on the part of the appellant, E. M. Hatcher. 2 Whart. Ev., § 1120; Tabb *v.* Cabell, 17 Gratt. 160; Brown *v.* Molineaux, 21 Gratt. 539." Hatcher *v.* Crews, 78 Va. 460.

C. ADMISSIONS IN OPEN COURT.

The admissions of parties given in open court are not only admissible evidence, but are evidence of the most satisfactory character to establish the payment of a debt, or the satisfaction of a lien. Little *v.* Slemp, 2 Va. Dec. 545. See Quarles *v.* Littlepage, 2 Hen. & M. 401.

III. Rules Governing Admissibility.

A. OF ADMISSIONS OF PARTIES TO RECORD.

1. Admissibility against Declarant.

a. In General.

The oral or written admissions of one party to the record, relevant to the issue, and against the interest of the declarant, are admissible in evidence. Smith *v.* Townes, 4 Munf. 191; Powell *v.* Tarry, 77 Va. 250; Fulton *v.* Gracey, 15 Gratt. 314; Fowler *v.* Lee, 4 Munf. 373; Taylor *v.* Peck, 21 Gratt. 11; Walker *v.* Pierce, 21 Gratt. 722.

This general rule, admitting the declarations of a party to the record in evidence, applies to all cases where the party has any interest in the suit. Greenleaf, 1st Vol., § 172. Powell *v.* Tarry, 77 Va. 250.

Parol declarations of a defendant in a suit for freedom, that the plaintiff is free, are admissible evidence of the fact, according to the general rule that the admissions of a party to a suit are evidence against him. Fulton *v.* Gracey, 15 Gratt. 314.

In a suit for divorce the admissions of the plaintiff are competent evidence to support the averments of the answer. Cralle *v.* Cralle, 79 Va. 182, citing Bailey *v.* Bailey, 21 Gratt. 43. See the title DIVORCE.

Beneficial Associations. — A letter written by the supreme dictator, knights of honor, in answer to a communication from the plaintiff, demand-

ing payment of a benefit certificate, containing statements relevant to the issue before the jury, and uncontradicted by any other evidence in the record, though it could not be introduced by the defendant, yet when offered by the plaintiff is, of course, admissible, as tending to prove the facts stated in them. Oeters *v.* Supreme Lodge, 98 Va. 201, 35 S. E. 356, citing Downer *v.* Morrison, 2 Gratt. 237.

Proof of Payment.—Where the defendant relies upon a specific payment or set-off by way of discount against a debt, an account stating distinctly the nature of such payment or set-off, and the several items thereof, must be filed with the plea; though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on; but the defendant offers proof of the admissions of the plaintiff that but a portion of the debt is due. Rice *v.* Annatt, 8 Gratt. 557.

Disclaimer of Title.—In detinue for a slave, the defendant having produced a bill of sale to support his title, the plaintiff may prove parol declarations of the defendant, disclaiming title to the slave, under the bill of sale after he had notice of the plaintiff's purchase, and before he had perfected his own title by obtaining possession. Fowler *v.* Lee, 4 Munf. 373. Compare High *v.* Pancake, 42 W. Va. 602, 26 S E. 536.

The plaintiff in detinue may adduce evidence of parol acknowledgments by the defendant, or by the person under whom the defendant claims, that the property belonged to the plaintiff; for the purpose of rebutting an alleged adverse possession. Smith *v.* Townes, 4 Munf. 191.

In a suit for freedom, the plaintiff must make out his title against all the world. The admissions of the defendant that the plaintiff is free, is evidence against the defendant, whether he ever had any interest in the plaintiff as a slave or not, or whatever such interest, if any, may have been. But it is only presumptive evidence, liable to be repelled by proof that the plaintiff is the slave of the defendant or some other person. Fulton *v.* Gracey, 15 Gratt. 314.

Principal and Surety.—The acts, admissions and declarations of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sureties on the bond, though he is dead, and therefore not a party to the suit. "But they can not sever their responsibility in this action, from that of the principal obligor. They are jointly bound with him and jointly liable to the plaintiff. And the acts and admissions of one joint obligor are binding on all. The general doctrine is, as laid down by Greenleaf, that the declarations of a party to the record, or of one identified in interest with him, are as against such party, admissible in evidence. 1 Greenl. Evi., § 171. As to the admissions of persons who are not parties to the record, the law looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record. Ibid, § 180; also, § 170; 1 Phillips on Ev., p. 491, marg. 406, top." Walker *v.* Pierce, 21 Gratt. 720.

b. Declarations before Interest Accrues.

In General.—The rule that the declarations and admissions of a party to a suit, against his interest, are evidence in favor of the opposite party, does not extend to declarations and admissions made by parties before their interest in the subject matter of the controversy arose. Burton *v.* Scott, 3 Rand. 399.

Admissions by Administrators. — Thus in an action against an administrator, his declarations and admissions, made before he qualified as administrator, are not competent evidence for the plaintiffs, as the admissions of a party

on the record. Gaines *v.* Alexander, 7 Gratt. 257; Gilmer *v.* Baker, 24 W. Va. 72.

In an action of debt against an administrator on a bond alleged to be the bond of his intestate, the issue was upon the plea of non est factum; and on the trial the plaintiff, after calling the attesting witness to corroborate him, offered in evidence a paper signed by the defendant, in which the bond was referred to. This paper was executed by the defendant in the lifetime of his intestate, and did not purport on its face to have been executed by the defendant as the agent of his intestate, nor was there any proof of such agency. Held, the paper having been executed by the defendant before he qualified as administrator, it is not competent evidence as the admission of a party on the record. Gaines *v.* Alexander, 7 Gratt. 257.

An admission made by an administrator in a sworn answer to a bill filed against him and others to recover a fund in his hands, that he holds said fund as administrator, while he is in fact administrator and acting as such, is admissible as evidence against his sureties as administrator in another suit brought to recover said fund from him and his sureties, although the sureties were not parties to the suit in which said admission was made. "But it is insisted by counsel for the appellees that this sworn statement of Berry is simply an admission by him of a past transaction and is, therefore, not admissible as evidence against his surety. 1 Gr. Ev., § 187. If this statement or admission had been made after Berry had ceased to be administrator of Baker, and out of the course of his official duty, it would not be admissible against his surety. But such was not the fact. It was made while he was administrator and in the discharge of an official act as such administrator. It is made in an answer filed by him in defense of the fund and in the performance of an act by him as administrator. It is a part of the res gestæ in connection with the very transaction now in question and was made by him in his official capacity, while in the actual discharge of his duties as administrator. It is, therefore, clearly admissible not only against him but against his sureties as such administrator. 1 Gr. Ev., §§ 174, 178, 179, 180; Cavendish *v.* Fleming, 3 Munf. 198; Swope *v.* Chambers, 2 Gratt. 320, 324; Cox *v.* Thomas, 9 Gratt. 323; Snowball *v.* Goodricke, 4 B. & Ad. 541." Gilmer *v.* Baker, 24 W. Va. 72. See Brewis *v.* Lawson, 76 Va. 46.

The Best Evidence Rule.—See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

A parol admission of a party to a suit is always admissible in evidence against him, although it relate to the contents of a deed or other instrument, and even though its contents be directly in issue in the cause. Taylor *v.* Peck, 21 Gratt. 11, cited in Powell *v.* Tarry, 77 Va. 261.

But in an action against a surety of a sheriff for breach of duty, the admissions of the sheriff are not evidence against the surety, because they are not the best evidence which the nature of the case admits. "This is an inflexible rule. Inferior evidence can never be received, when it appears that better evidence is in the power of the party. Thus, no admissions of a party can be received to prove a matter of record; and the admissions of the party, that he had executed a bond, is not competent to prove its execution, if there be a subscribing witness. If he can be procured, he must be produced; if not, his handwriting must be proved as the next best evidence to his testimony on oath." M'Dowell *v.* Burwell, 4 Rand. 317.

Declarations of Deceased Persons.—The declarations of a former owner of land now dead, can not be shown to prove that he had proper title to the land in controversy. The docu-

ments must be shown. High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

c Written or Oral Admissions.

So, also, written or oral declarations of a party to a suit, relevant to the issue, and against his interest, are admissible as evidence against him. Powell *v.* Tarry, 77 Va. 250.

A letter written by one party to the record, about the very question at issue, and containing an admission against his interest, are admissible as evidence against him. Powell *v.* Tarry, 77 Va. 250.

Oral admissions and declarations of a party against interest, are competent evidence on behalf of his adversary, if they are relevant to the issue. Kelly *v.* Board of Public Works, 75 Va. 263.

2. Admissibility against Coparty.

The admissions of one of the parties to the record, whether as plaintiffs or defendants, are competent evidence against all other parties to the suit who have a joint interest in the matter of it, with the party making the admissions. Dickinson *v.* Clarke, 5 W. Va. 280; Walker *v.* Pierce, 21 Gratt. 722, opinion of Anderson, J.; Gaines *v.* Alexander, 7 Gratt. 257, opinion of Daniel, J.; Burton *v.* Scott, 3 Rand. 399. See Tabb *v.* Cabell, 17 Gratt. 160.

"No rule is better settled than that the answer of one defendant can not be read as evidence by the plaintiff against another defendant, where there is no joint interest, privity, fraud, collusion, or combination between the codefendants." Fisher *v.* White, 94 Va. 236, 26 S. E. 573; Wytheville Crystal, etc., Co. *v.* Frick Co., 96 Va. 141, 30 S. E. 491.

Declarations of one party to a suit, made to third persons not in the presence of the other party, and in disparagement of his rights, are not admissible in evidence against the latter. Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

Heirs.—But the acknowledgment in writing of some of the heirs, that the audited account of an administrator is just, will not suffice to establish it against the others; such account must be established as against all the heirs, or it can not avail as to any. Street *v.* Street, 11 Leigh 498.

Devisees.—By the weight of authority, the declarations, admissions, and conversations of one devisee, can not be admitted in evidence against his codevisees. Forney *v.* Ferrell, 4 W. Va. 729.

But it has been held, that a letter written by a person who was executor and also devisee to a codevisee admitting a debt, bound him personally, and was likewise evidence against those heirs claiming under him. Brewis *v.* Lawson, 76 Va. 46.

B. PERSONS JOINTLY INTERESTED.

In General.—The general rule is well settled that the admissions of one of the parties to the record, whether as plaintiff or defendant, are competent evidence against all other parties to the suit, who have a joint interest in the matter of it, with the party making the admissions; but admissions by one who is not a party to the suit, though jointly interested in the subject matter thereof with the parties to the record, or some of them, are, it seems, incompetent. Dickinson *v.* Clarke, 5 W. Va. 280; Walker *v.* Pierce, 21 Gratt. 722, 732; Willson *v.* McCormick, 86 Va. 995, 11 S. E. 976; Claytor *v.* Anthony, 6 Rand. 291.

Admissions Incompetent to Prove Joint Interest.—But the admissions of one party whether he be a party to the record or not, are incompetent to establish the fact of such joint interest with other parties to the suit. That fact must first be made out by independent testimony; and, until that is done, such admissions can only be evidence against the party making them. Dickinson *v.* Clarke, 5 W. Va. 280.

Nature of Joint Interest.—"It is unquestionable as a general rule, that the admission of one person can not be given in evidence against another. There are various exceptions to the rule, of which I need notice here only such as arise out of a connection of interest between the person making the admission and him against whom it is offered. In solving a question as to the admissibility of such evidence, regard must be had to the nature of the connecting interest, and the time of making the admission. The nature of the connecting interest may be that of a joint ownership or liability, or that of a derivation of title of one several owner from or through another. In the former case, the ownership or liability must be strictly joint, as that of joint tenants or copartners; and there the admission of one is treated as the admission of both; a mere community of interests, as that of tenants in common, is not sufficient. Dan *v.* Brown, 4 Cowen 483, 493. But there is this difference between a joint and a derivative interest; in the former, the joint interest to be affected must be a subsisting one at the time of the admission; in the latter, the derivative interest to be affected must be acquired subsequently to the admission." Pettit *v.* Jennings, 2 Rob. 679.

Interest Must Be a Subsisting One.—Whether the person making the admission, and the party against whom it is offered, be connected by a joint ownership or liability, or by the transmission of a several title from the former to the latter, the interest of the former must be a subsisting one at the time of the admission. If at the time of making it he has parted from his interest, his admission is not legal evidence against him to whom it has passed. Upon this point the authorities are clear and numerous. Pettit *v.* Jennings, 2 Rob. 679.

Vendor and Vendee—Assignor and Assignee.—"And as respects the vendor of property, real or personal, or the assignor of a chose in action, there has been no case, so far as my information extends, allowing his declarations to be given in evidence against a party who had previously acquired his title. Indeed the propriety of rejecting such evidence would seem too obvious to require the support of authority. It would be manifestly of dangerous tendency to permit the vendor or assignor thus to defeat the right or title which he had conveyed or transferred to another; and unreasonable to deprive the latter of the protection to be derived from cross-examination. Nor is this rule of exclusion varied by the circumstance that the vendor or assignor is bound by a warranty, express or implied, to assure the title or interest which he has conveyed or transferred. Such contingent liability does not furnish a sufficient security against indiscretion or fraud, to the prejudice of the derivative owner; there not being a complete identity of interest, and the former owner being divested, in a great measure, of the vigilance, circumspection and forethought incidental to the immediate ownership, enjoyment and control of the subject. It is from this consideration, doubtless, that we find the exclusion of admissions by a vendor or assignor, made after his sale or assignment, laid down in the books without exception or qualification; and that the rule has been applied in various cases notwithstanding the contingent liability of the vendor or assignor. Wilcox *v.* Pearman, 9 Leigh 144." Pettit *v.* Jennings, 2 Rob. 680.

Partners.—On the other hand, the acts and declarations of each member of a partnership, in furtherance of the common object of the association, and the admissions by one partner after the dissolution, in regard to the business of the firm, previously transacted, are binding on the firm. Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976, citing 1 Greenl. Ev., § 112; Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

Although the acknowledgment of the debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations, in an action brought against the firm, the existence of the debt being first proved by other testimony, or admitted by the pleadings; yet, such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners. Shelton *v.* Cocke, 3 Munf. 191.

C. PRIVIES.

1. Declarations in Disparagement of Title.

a. In General.

Declarations and admissions, made while the declarant is in possession of the property, contemporaneous with the transaction, and against his interest, are admissible, not only against the declarant, but also against persons deriving title through or from him, because of the privity of estate, or identity of interest, that subsists between the parties. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974; Houston *v.* McCluney, 8 W. Va. 136; State *v.* Andrews, 39 W. Va. 35, 19 S. E. 385; Boatright *v.* Meggs, 4 Munf. 145.

Declarations of Mortgagee.—Thus, the declarations by the mortgagee, under whom the defendant claims, that the mortgage was paid off, are admissible evidence on the part of the plaintiff. Walthall *v.* Johnston, 2 Call 275.

A purchaser from the grantor, as well as all subsequent vendees, where the trust deed is duly recorded, has no greater rights against the creditor than the grantor himself, and the title and possession of the one are no greater than the other. The purchaser from the grantor is bound by the acts and declarations of the grantor in respect to the trust, while he retains the equity of redemption or any part of it. Camden *v.* Alkire, 24 W. Va. 675.

Admissions by grantee of deed on its face absolute and for a valuable consideration, are admissible to show that the deed was merely intended as a deed of partition between coparceners, and, therefore, no conveyance at all, because "partition makes no degree." Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

In ejectment where wife's heirs demanded land in possession of husband's grantees, on the ground that it had descended upon her from her father, though the wife's brothers had conveyed it to her and her husband by deed reciting a consideration, but which the heirs claimed was only a deed of partition, the declarations of the husband that the land had come to the wife from her father, and that he had only a life estate in it, are admissible against the grantees. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

b. Declarations of Grantor before Conveyance.

The declarations of a grantor in a deed in disparagement of his title, if made before he parts with it, are admissible against his grantee. Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253; High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made, Per J. Carr. Land *v.* Jeffries, 5 Rand. 211, citing Walthal *v.* Johnston, 2 Call 275; Jones *v.* Robertson, 2 Munf. 191.

Relevancy.—But the declarations of the grantor in a voluntary deed made before the execution of the deed, are not competent evidence against the grantee in favor of the grantor's heirs and next of kin, to show that the deed was fraudulently procured. Smith *v.* Betty, 11 Gratt. 752.

Illustrative Cases.—The defendants levied their attachment on and sold, as the property of Shaw, certain personal property, which had been sold by Shaw, it was claimed, to his brother-in-law, the plaintiff, before the issuing

of the attachment. The plaintiff brought his action of trespass, therefor, against them. Held, on the trial the defendants have a right to prove the acts and declarations of Shaw occurring and made a few days before the alleged sale, tending to show a fraudulent purpose of putting his property in the hands of his father out of the reach of his creditors, though the plaintiffs were not present, when such acts were done or declarations made, and had no knowledge thereof. Bishoff *v.* Hartley, 9 W. Va. 100. But in Wustland *v.* Potterfield, 9 W. Va. 438, the court said: That this case does not present the question decided by this court in Bishoff *v.* Hartley, 9 W. Va. 100. If it did, it might be urged that the evidence should have been admitted under the rules laid down in that case.

c. Declarations of Grantor after Conveyance.

On the other hand, it is well settled that the declarations of the grantor in a deed in disparagement of his title, made after the conveyance, are inadmissible to affect the title of his grantee. Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799; Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253; Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753; Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927; Robinson *v.* Pitzer, 3 W. Va. 335; Houston *v.* McCluney, 8 W. Va. 136; Smith *v.* Betty, 11 Gratt. 752; Masters *v.* Varner, 5 Gratt. 168, 50 Am. Dec. 114; High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536; Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 784.

Generally, the statements and acts and judicial proceedings, and other transactions to which any one is a party, are evidence against himself or any person claiming to acquire a title or right from him, after such statement or transaction; but they are not evidence against a person having acquired such title or right before. Houston *v.* McCluney, 8 W. Va. 136.

"Declarations of a vendee, after entry and valuable improvements, that he would throw up his article, and hold as tenant to his vendor, his possession continuing as before, are insufficient to devest his interest." Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

When a transfer of property has been made, a declaration by the transferer that he is still the owner of the property, is not admissible against the transferee, when made after such transfer, if it is a self-serving declaration in his own behalf. Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927, citing Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799; Masters *v.* Varner, 5 Gratt. 168.

The statements of a vendor, made after a sale and conveyance of realty and personalty, and during the continuance in possession of the vendor as agent and manager of the vendee, are not evidence in chief either to disprove the purchaser's title or to establish fraud in the sale, when the other evidence in the cause failed to involve the transaction between the parties in such doubt or uncertainty or raise a reasonable apprehension of collusion, as would warrant a resort to the statements of the vendor after he had parted with the property, though holding a possession inconsistent with the change of ownership. Robinson *v.* Pitzer, 3 W. Va. 335.

Upon the trial of the question whether a particular conveyance was made to defraud creditors, it is not competent to show the acts or declarations of the grantor after the conveyance to impair or affect the title of the grantee. Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753.

The declarations of the grantor in a voluntary deed, made after its execution, are not competent evidence against the grantee, to show that provisions which were intended to be inserted in the deed have been fraudulently omitted. Smith *v.* Betty, 11 Gratt. 752.

Harmless Error.—In a suit to annul a bond and trust deed as fraudulent, it appearing that the same had been assigned to the grantor's wife, the declarations of the grantor, after executing the deed, can not be used to impeach it, but where there is other evidence to the same effect, their admission is harmless error. Thornton *v.* Gaar, 87 Va. 315, 12 S. E. 753.

2. Declarations Explanatory of Possession.

"In regard to the declarations of persons in possession of land, explanatory of the character of their possession, there has been some difference of opinion, but it is now well settled that declarations in disparagement of the title of the declarant are admissible as original evidence. Possession is prima facie evidence of seisin in fee simple; and the declarations of the possessor that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title or otherwise qualifying his possession, if made in good faith, should not be received as a part of the res gestæ, leaving its effect to be governed by other rules of evidence." Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

So, also, 1 Whart. Ev., § 263, says: "Evidence of the declarations of a party taking possession of property may be received as explaining the nature or limitations of such possession." And in § 264, he says: "What is done is part of the res gestæ, as much as what is said." Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

Declarations of one in possession of land explanatory of such possession, as under what right or claim, are admissible to show his claim, but not to show title. Parkersburg Ind. Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Declarations of one in actual possession of land, explanatory of the character of his possession,—that is, for instance, how he claimed, under what title, and to what limits,—are admissible. High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Where an easement by prescription to pass over a turnpike free of toll is claimed by A, in consideration of a free right of way through his lands, rock furnished by him for the use of the road, and also labor furnished in its construction, it was held, that the declarations proven to have been made by A explanatory of his acts in daily passing over this road, without payment of toll, were admissible as explanatory of the character of his possession, and to establish this easement by prescription. Lucas *v.* Smithfield, etc., Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

3. Declarations of Former Owner of Chattels.

In General.—The general rule is that the admissions made by the former owner of a chattel, before he has parted with his interest in the matter in controversy, are admissible as evidence, but not admissions made thereafter. Ben *v.* Peete, 2 Rand. 548; Dade *v.* Madison, 5 Leigh 403; Givens *v.* Manns, 6 Munf. 191; Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217; Wustland *v.* Potterfield, 9 W. Va. 438; Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927.

Provided the party to be affected by the admission claims under the declarant. Vaughan *v.* Winckler, 4 Munf. 136; Walthall *v.* Johnston, 2 Call 275.

Illustrative Cases.—In trespass for goods taken away, proof by witnesses, that the person of whom the plaintiff bought the goods, was heard to say, before the institution of the suit, that, when he sold them, they belonged to the defendant, is not admissible evidence against the plaintiff. Vaughan *v.* Winckler, 4 Munf. 136.

But it has been held, that the declarations of a vendor of a slave, made

after the sale, are good evidence against the vendee, if they accord with the acknowledgments of the vendee himself previously made. Hunter *v.* Jones, 6 Rand. 540.

Disclaimer of Title.—And in detinue for a slave, the defendant having produced a bill of sale to support his title, the plaintiff may prove parol declarations of the defendant, disclaiming title to the slave, under the bill of sale, after he had notice of the plaintiff's purchase, and before he had perfected his own title by obtaining possession. Fowler *v.* Lee, 4 Munf. 373. See Smith *v.* Townes, 4 Munf. 191; Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

Effect of Absence of Other Party.—For example, in an action of trespass for unlawfully, and with force of arms, carrying away goods and chattels of the plaintiff, it was held that the declarations and admissions of the plaintiff's vendor, made prior to the sale and conveyance to him, and not in his presence, are not admissible in evidence against the plaintiff's possession. Wustland *v.* Potterfield, 9 W. Va. 438.

If a proprietor of slaves deliver them to another, who thereupon claims them as sold, any declarations made by the former, after such delivery of possession, and not in the presence of the latter, are not admissible as evidence in opposition to such claim. Givens *v.* Manns, 6 Munf. 191.

In an action on a bond against the surety thereof, the declarations of the obligee, not made in the presence of the obligors, that he had transferred the bond to the plaintiff, are hearsay, and inadmissible to prove title in the plaintiff. Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

Whether or not in a controversy between the obligee's administrator and a claimant of such bond as transferree from the obligee in his lifetime, the declarations of the obligee to the effect that he had transferred said bond to such claimant, would be admissible evidence to prove his title thereto, though made in the absence of the obligors. Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

4. Donor and Donee.

See the title GIFTS.

Declarations of the donor, after the gift, are inadmissible in evidence against his donee. Brock *v.* Brock, 92 Va. 173, 23 S. E. 224; Smith *v.* Betty, 11 Gratt. 752.

It was held, in Brock *v.* Brock, 92 Va. 173, 23 S. E. 224, that the declarations of a voluntary assignor after the assignment, are inadmissible in evidence against the assignee. See Barbour *v.* Duncanson, 77 Va. 76; Daily *v.* Warren, 80 Va. 512; Smith *v.* Betty, 11 Gratt. 752.

But in an action by the donor in a deed of gift to annul the same for fraud, proof of subsequent declarations and acts of the donor, though not admissible taken singly, may be received, under a total absence of testimony applying to the time of the contract, and in connection with corroborating circumstances, to show that the writing was misunderstood, or misrepresented at the time of the contract. Jones *v.* Robertson, 2 Munf. 187, cited with approval in Land *v.* Jeffries, 5 Rand. 211.

Want of Delivery.—It is well settled that the donor's declaration, that he had given the article in question, will not perfect a gift incomplete for want of delivery. Yancey *v.* Field, 85 Va. 756, 8 S. E. 721.

Gift or Loan.—When a father has declared that he has given a slave to a married daughter, and afterwards tells her to go and take possession of the slave, the declaration of the father's wife, in his absence, at the time the daughter takes possession, that she did not give, but only lent her, the slave, is of no effect to convert the father's gift into a loan, though the daughter receives the possession from the donor's wife, without complaining of her

qualification of the gift. Brown *v.* Handley, 7 Leigh 119.

Intention of Donor.—The acts and declarations of the husband which accompany the transaction, so as to be a part of the res gestæ, are admissible to show his intention in making the gift or settlement, and to raise a resulting trust. Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721.

Husband and Wife.—The declarations of a husband, who is free from debt at the time the declarations are made, are admissible to prove a gift in favor of the wife, and the act of 1897-1898, p. 753, declaring that "neither the husband nor the wife shall be competent to testify for or against each other in any proceeding by a creditor to avoid or impeach any conveyance, gift or sale from the one to the other on the ground of fraud or want of consideration," etc., has no application to such declarations. Bank of Richmond *v.* Holland, 99 Va. 495, 39 S. E. 126, 7 Va. Law Reg. 204. The case of Yancey *v.* Massey, 90 Va. 626, 19 S. E. 184, does not conflict with the decision in this case.

5. Assignor and Assignee.

It is well settled that the declarations of an assignor, after the assignment, are inadmissible in evidence against his assignee. Brock *v.* Brock, 92 Va. 173, 23 S. E. 224; Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 656; Barbour *v.* Duncanson, 77 Va. 76; Daily *v.* Warren, 80 Va. 512; Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217; Smith *v.* Betty, 11 Gratt. 752; Strother *v.* Mitchell, 80 Va. 149; Coldiron *v.* Asheville Shoe Co., 93 Va. 364, 25 S. E. 238; Hopkins *v.* Richardson, 9 Gratt. 485; Wilcox *v.* Pearman, 9 Leigh 147; Lewis *v.* Long, 3 Munf. 136; Ben *v.* Peete, 2 Rand. 539.

"And as respects the vendor of property, real or personal, or the assignor of a chose in action, there has been no case, so far as my information extends, allowing his declarations to be given in evidence against a party who had previously acquired his title. Indeed the propriety of rejecting such evidence would seem too obvious to require the support of authority. It would be manifestly of dangerous tendency to permit the vendor or assignor thus to defeat the right or title which he had conveyed or transferred to another; and unreasonable to deprive the latter of the protection to be derived from cross-examination. Nor is this rule of exclusion varied by the circumstances that the vendor or assignor is bound by a warranty, express or implied, to assure the title or interest which he has conveyed or transferred. Such contingent liability does not furnish a sufficient security against indiscretion or fraud, to the prejudice of the derivitive owner; there not being a complete identity of interest, and the former owner being divested, in a great measure, of the vigilance, circumspection and forethought incidental to the immediate ownership, enjoyment and control of the subject. It is from this consideration, doubtless, that we find the exclusion of admissions by a vendor or assignor, made after his sale or assignment, laid down in the books without exception or qualification; and that the rule has been applied in various cases notwithstanding the contingent liability of the vendor or assignor. Wilcox *v.* Pearman, 9 Leigh 144." Pettit *v.* Jennings, 2 Rob. 680.

A letter written by a distributee, after assigning his share of the estate, is not admissible as evidence for any purpose in a suit to settle the estate. Strother *v.* Mitchell, 80 Va. 149.

A legatee assigns his claim for the legacy by deed; the assignee brings suit for it against the executor and his surety, who produce in their defense, a receipt in full, signed by the legatee and bearing date before the deed of assignment. Held, such a receipt is no evidence against the assignee, without proof, that it was really executed before the assignment, nor is the date to

be taken as prima facie true. Wilcox *v.* Pearman, 9 Leigh 144.

Burden of Proof.—The acknowledgment, written or verbal, of the assignor of a claim, that the same has been paid to him, is no proof against the assignee, unless it be proved to have been made before the assignment; and the burden of proof lies on the debtor. Wilcox *v.* Pearman, 9 Leigh 144, cited in Pettit *v.* Jennings, 2 Rob. 676; Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 656.

6. Husband and Wife.

See the title HUSBAND AND WIFE.

The general rule is, that the declarations and admissions of the wife are inadmissible evidence against her husband. Wright *v.* Rambo, 21 Gratt. 158; Sheppard *v.* Starke, 3 Munf. 29.

Upon a motion by the defendant to abate an attachment which has been sued out against his property by the plaintiff, the admissions and declarations of the wife of the defendant are not admissible in evidence for the plaintiff to prove the intention of the defendant to move with his property from the state, unless they were a part of the res gestæ of an act which was evidence, and which they might reasonably tend to explain. "The case comes within the general rule, that a wife's declarations and admissions are inadmissible evidence against her husband, and not within any exception to that rule. The conversations and declarations which were offered in evidence in this case were not admissible as part of the res gestæ, for they did not accompany any act which was itself evidence and which they might reasonably tend to explain." Wright *v.* Rambo, 21 Gratt. 158.

In a contest between creditors and a wife claiming property levied upon as the husband's property under executions against him, declarations of the husband as to the ownership of the property are not admissible as evidence against the wife. "Used for and limited to impeachment purposes it was admissible; but not otherwise, for it is simply unsworn statement, hearsay, not at all binding on the wife. Glover *v.* Alcott, 11 Mich. 470, in just such a contest as this, holds that the declaration of the husband is not admissible against the wife. 2 Whart. Ev., § 1215; 1 Greenl. Ev., § 100." Trapnell *v.* Conklyn, 37 W. Va. 242, 16 S. E. 570.

The declarations of a wife at the time she executes a deed or at other times, that she has executed or does execute the deed, because her husband had promised that he would settle or because he had settled upon her certain property derived from her father's estate, is not sufficient evidence of a contract between them for such a settlement in consideration of her relinquishment of her right of dower in her husband's land, and thus to support such settlement if made, against creditors or incumbrancers, even to the extent of a reasonable compensation for the right of dower which she relinquished. Lewis *v.* Caperton, 8 Gratt. 149.

If a husband is incompetent to testify in behalf of his wife, it is clear that neither his verbal nor his written declarations can be plead in her behalf in a litigation between her and his creditors. Massey *v.* Yancey, 90 Va. 632, 19 S. E. 184. Compare First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 7 Va. Law Reg. 204.

7. Principal and Surety.

See the title SURETYSHIP.

In an action against a surety on a bond, evidence of the declarations of the principal obligor, not made in the presence of the surety, that the bond had not been paid, is hearsay and inadmissible against the surety. Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

But the acts, declarations and admissions of the principal obligor in a bond, done and made at the time of its delivery, are evidence against his sure-

ties on the bond, though he is dead, and therefore, not a party to the suit. Walker *v.* Pierce, 21 Gratt. 722.

8. Trustee and Cestui Que Trust.

See the title TRUSTS AND TRUSTEES.

C., tenant for life of slaves, remainder to her children who are of full age, sells one of them, and declares that she substitutes two of her own slaves, which are of greater value in place of the one sold, with the consent of the children. C. was trustee for her children. It was held, that if the specific application of the funds derived by the trustee from this slave could not be traced, they could prove it by the clear admissions of C., the trustee. Tabb *v.* Cabell, 17 Gratt. 160.

But the declarations to a third person, of a trustee in a deed of trust upon land, made to secure the payment of money due from the deed of trust debtor to his creditor, that the debt so secured has been paid, are admissible as evidence against the cestui que trust, as tending to prove the payment or nonexistence of the trust debtor for the purpose of stopping the cestui que trust from asserting his debt against the property covered by the deed of trust. Caldwell *v.* Prindle, 19 W. Va. 604.

9. Landlord and Tenant.

See the title LANDLORD AND TENANT.

The principle is elementary, and has received the repeated approval of this court, that when the relation of landlord and tenant has been once established, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or mediately; and the succeeding tenant is as much bound by the acts and admissions of his predecessor as if they were his own. Emerick *v.* Tavener, 9 Gratt. 224; Neff *v.* Ryman, 100 Va. 521, 42 S. E. 314.

10. Mortgagor and Mortgagee.

See the title MORTGAGES AND DEEDS OF TRUST.

Declarations by the mortgagee, under whom the defendant claims, that the mortgage was paid off, are admissible evidence on the part of the plaintiff. Walthall *v.* Johnston, 2 Call 275.

11. Vendor and Vendee.

See the title VENDOR AND PURCHASER.

The declarations, either oral or written, of a vendor of property, after sale, are inadmissible against the vendee thereof. Wilcox *v.* Pearman, 9 Leigh 146; Pettit *v.* Jennings, 2 Rob. 679; Ginter *v.* Breeden, 90 Va. 565, 19 S. E. 656.

D. DECLARATIONS OF ASSURED.

Declarations made by the insured, when the insurance is for the benefit of others, as to his having had at some previous time a severe attack of sickness, in contradiction of his statement in the application for the policy, whether these declarations were made before or after the issuing of the policy, are inadmissible as evidence against the plaintiffs, because they are mere hearsay evidence. "The insured, who made them, had no interest in the policy, most if not all these declarations having been made long before the policy was issued. Even if made afterwards, they were equally mere hearsay; he never did have any interest in the policy. He was not a witness in this case, so as to permit his evidence to be thus contradicted; nor were they declarations of a sick person relative to his condition at the time of the making of these declarations." Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

E. DECLARATIONS OF AGENTS.

In General.—The declarations and admissions of an agent, made while he is performing an act authorized by his principal, and made during the continuance of the agency, in regard to a transaction then depending et dum fervet opus, are admissible in evidence against the principal as part of res gestæ. If made after the transaction is

completed, it is merely hearsay and inadmissible. Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. 328; Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787; Jammison *v.* Chesapeake, etc., R. Co., 92 Va. 327, 23 S. E. 758; Norfolk, etc., R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. 737; Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 628; Fisher *v.* West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655; Gibbons *v.* Jackson, 10 Leigh 364; Kelly *v.* Board of Public Works, 75 Va. 263; Sample *v.* Consolidated Light, etc., Co., 50 W. Va. 472, 40 S. E. 694; Smith *v.* Betty, 11 Gratt. 752.

The acts and declarations of the agent of a corporation, within the scope of his employment and in the performance of his duties, are admissible in evidence against the corporation. Blair *v.* Security Bank, 103 Va. 762, 50 S. E. 262.

A corporation can only speak through its officers and agents, and their declarations, admissions and representations made in the course of their employment, and relating to the immediate transactions in which they are engaged, are always competent against the corporation. White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290.

It is otherwise if these declarations are made after the transaction has been completed. Lawrence *v.* DuBois, 16 W. Va. 443, citing Hawker *v.* Baltimore, etc., R. Co., 15 W. Va. 637; Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. 350.

Authority of Agent.—In an action by a brakeman for an injury received in a collision, evidence of the result of an investigation by an agent of the railroad into the causes of the accident, is inadmissible, where it does not appear that the agent had authority to conduct the investigation, nor that its result would have any binding force upon any one, nor that the rules of evidence were complied with in conducting the investigation. Eastburn *v.* Norfolk, etc., R. Co., 34 W. Va. 681, 12 S. E. 819. See Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

Particular Agents Considered.

Declarations of deputy, made during the levy, are admissible in evidence against principal. Garrett *v.* Hutchinson, 86 Va. 872, 11 S. E. 406.

Marine Officers.—In Holladay *v.* Littlepage, 2 Munf. 316, the plaintiff offered in evidence the deposition of Francis Irvine, who stated that in a conversation with Mr. Haywood, the owner, and Captain Meredith, the master of the ship, in which the testator of the defendant sailed for Europe, they both said that the plaintiff had paid the passage of defendant's testator. It was held, that the deposition should be read. The court says: "The acknowledgment in question having been made at or about the time of the said testator's sailing for Europe and being the admission of those who were competent to charge themselves with the receipt of the passage money by an ordinary receipt or acquittance, the court is of opinion, that the said testimony on these grounds and not on that assigned by the court below was properly received by the court." The ground upon which the court below had admitted the testimony was that the captain was dead, but the court of appeals held, that the testimony was admissible, whether he was dead or not. Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299.

Insurance Agents.—See the title INSURANCE.

As an insurance company can transact its business only through its officers and agents, their acts and declarations, made within the scope of their employment, will bind the principal. Muhleman *v.* Nat. Ins. Co., 6 W. Va. 509; Continental Ins. Co. *v.* Kasey, 25 Gratt. 268.

Declarations of Bank Cashier.—And the declarations of the cashier of a bank, made after the acceptance of a

note by the bank, touching the conditions upon which the note was delivered to the bank, are irrelevant and immaterial, where it appears that he was not present when the negotiations took place. Greever *v.* Bank, 99 Va. 547, 39 S. E. 159.

Admissions of General Manager of Corporation.—The testimony of a witness that in a conversation with the general manager of a defendant company in a libel suit, such general manager admitted that his company had no right to stop the plaintiff's money, and that the purpose of the alleged libelous letter was to injure the plaintiff's business, is hearsay, and inadmissible. Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358. See American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319, Brannon, J., dissenting.

The admission of the manager of a telephone company, made while in the performance of his duties, that a wire which caused a personal injury was the wire of his company, is admissible in evidence against the company in an action brought against it to recover damages for the injury. Lynchburg Tel. Co. *v.* Booker, 103 Va. 594, 50 S. E. 148. See White Hall Co. *v.* Hall, 102 Va. 284, 46 S. E. 290.

Fraud — Declarations before and after Transactions.—Declarations of a person who has been the agent in procuring a deed for another, made either before the negotiation for the deed was commenced, or after the execution of the deed is completed, are incompetent evidence against the grantee in the deed, to show that provisions, which were intended to be inserted in the deed, have been fraudulently omitted. But acts and declarations of such person made while the negotiation was pending, or the deed was in process of execution, are competent evidence against the grantee to show fraud. Smith *v.* Betty, 11 Gratt. 752.

Declarations of Agent to Prove Agency.—See the title AGENCY, vol. 1, p. 248.

But neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another. Poore *v.* Magruder, 24 Gratt. 197; Fisher *v.* White, 94 Va. 236, 26 S. E. 573; Rosendorf *v.* Poling, 48 W. Va. 621, 37 S. E. 555, following Poore *v.* Magruder, 24 Gratt. 197; Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222, citing Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582 (Syl., pt. 2); Deitz *v.* Providence, etc., Ins. Co., 33 W. Va. 526, 11 S. E. 50; Bank *v.* Loar, 51 W. Va. 542, 41 S. E. 901.

Declarations or acts of an alleged agent can not be accepted to prove his agency. That fact must be proved by other evidence, and must be first established before his declarations or acts are admissible as evidence. But declarations and acts tending to establish the agency, said or done by the alleged agent in the presence of the principal, and not repudiated by him, are admissible in evidence as tending to prove the agency. Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291.

According to the rule that the declarations and admissions of an agent are inadmissible until the fact of agency is proved, it is error to allow a witness to testify that he heard G. tell S. that the defendants desired him to testify in the case and that they might give him some money, where there is no proof that G. is the defendant's agent. Myers *v.* Trice, 86 Va. 835, 11 S E. 428.

F. DECLARATIONS OF TESTATOR.

See the title WILLS.

As to Testamentary Capacity.—The declarations of a testator or grantor, made either before or after the execution of the instrument, are admissible evidence, when offered to show the mental capacity of the testator or grantor, or undue influence exerted upon him at the time the instrument was executed. But such evidence is inadmissible either to control the con-

struction of the instrument, or to support or destroy its validity. Dinges *v.* Branson, 14 W. Va. 100; Thompson *v.* Updegraff, 3 W. Va. 629.

On the trial of an issue to try the validity of a will, the contestants, who were defendants in the issue, were permitted to prove that the testator said after the will in controversy was made, that one of the devisees, who was a plaintiff, did not want him to give certain other parties, children of a deceased son of the testator, anything, which evidence was stated to be for the purpose of proving the declaration of the devisee. The court below held, that the declarations of any of the plaintiffs in the issue were proper evidence to be offered. Held: 1. That the evidence was improperly admitted for the purpose stated, being hearsay in its character. 2. That the declarations of the testator were admissible for the purpose of showing the state and the condition and operations of the mind of the testator at the time he made the will, and for no other purpose; and to lay the foundation of other and more direct testimony showing that improper influences were exerted on him. Thompson *v.* Updegraff, 3 W. Va. 629.

As to Validity or Construction of Will.—Parol declarations of the testator can not be admitted to control the construction of a will, except where the terms used in the will apply indifferently and without ambiguity to each of several different subjects or persons, in which case evidence may be received as to which of the subjects or persons so described was intended by the testator. Wootoon *v.* Redd, 12 Gratt. 196: Skipwith *v.* Cabell, 19 Gratt. 758; Roy *v.* Rowzie, 25 Gratt. 599; French *v.* French, 14 W. Va. 507.

Parol evidence of declarations of the testator can not be received to explain the intention of the bequest. Evidence to prove the situation of the property may be admitted. Puller *v.* Puller, 3 Rand. 83, is cited with approval on the subject in Minor *v.* Dabney, 3 Rand. 208; Miars *v.* Bedgood, 9 Leigh 368, 377. See French *v.* French, 14 W. Va. 459.

Upon the trial of an issue devisavit vel non to set aside a will for mistake of the testator in executing it, declarations of the testator made before or after the execution of the will, are inadmissible to prove the mistake; Couch *v.* Eastham, 27 W. Va. 796, citing and distinguishing Dinges *v.* Branson, 14 W. Va. 100; Thompson *v.* Updegraff, 3 W. Va. 629, on the ground that in the latter case the declarations were admitted solely to show that the testator was mentally incompetent to make it, and not as in this case to prove the truth of such declarations or to affect the validity of the will. Such declarations are rejected upon the principle that they are hearsay and not under the sanction of an oath. But if made at the time the instrument is executed, they should be admitted as part of the res gestæ.

As to Status of Negro.—In a suit for freedom, the declarations of the testator of the defendants, made some fourteen or fifteen years before the trial, that the plaintiffs were then free, and declarations made some twenty odd years before the trial, that they would be free at the age of twenty-eight years, are competent evidence for the plaintiffs. And this, though the testator had but a temporary interest in the negroes. "The declarations in such case do not confer freedom; do not change the status of the plaintiff; but merely tend to show what that status is, to wit, that he is a free person, however his freedom may have been acquired. He may have acquired it in a variety of ways, and otherwise than by will or deed; as for example, by being born of a free mother. He and his material ancestors may always have been free. In many cases he might be unable to produce any muniment of his freedom; either because such muniment never existed, or because it has been

lost, or is not in his possession or power. And an admission of his freedom by the party detaining him as a slave, may be the best, if not the only evidence of the fact which can be produced. Such an admission is competent evidence in any suit for freedom; its weight being dependent on the circumstances of each case, and being a matter for the consideration of the jury." Fulton *v.* Gracey, 15 Gratt. 314.

G. DECLARATIONS AND ADMISSIONS OF PARTNERS.

See the title PARTNERSHIP.

"Admissions, or acknowledgments," says Mr. Minor in his Institutes, vol. 3, 734, "made in good faith by one partner, after dissolution, are evidence against his copartners, provided they relate to transactions of the partnership whilst it was in operation, and do not impose fresh liabilities." Davis *v.* Poland, 92 Va. 225, 23 S. E. 292; Wilson *v.* McCormick, 86 Va. 995, 11 S. E. 976.

In Davis *v.* Poland, 92 Va. 226, 23 S. E. 292, it is said, after dissolution of a partnership, one partner can not by his own act bind his copartners, against their consent, so as to fix upon them a new liability, nor revive an old liability barred by the statute of limitations. Woodson *v.* Wood, 84 Va. 478, 5 S. E. 277. His admission or declaration can not be received as the only evidence of the existence of a debt against the partnership; such debt must be first proved by other testimony or admitted by the pleadings. Shelton *v.* Cocke, 3 Munf. 191; Rootes *v.* Wellford, 4 Munf. 215; Brockenbrough *v.* Hackley, 6 Call 51.

The admissions of one partner after dissolution of the partnership, are no evidence against the other partners whether the partners be defendants or plaintiffs. Munford *v.* Overseers of Poor, 2 Rand. 319, citing Shelton *v.* Cocke, 3 Munf. 191; Rootes *v.* Wellford, 4 Munf. 215. To the same point Shelton *v.* Cocke, 3 Munf. 191, is cited in Dade *v.* Madison, 5 Leigh 405; Henrico Justices *v.* Turner, 6 Leigh 127; Bispham *v.* Patterson, 3 Fed. Cas. 456.

Although the acknowledgment of a debt by one or more of the partners of a mercantile firm, after the dissolution thereof, is competent to do away the bar of the act of limitations, in an action brought against the firm; the existence of the debt being first proved by other testimony or admitted by the pleadings; yet such acknowledgment is not proper evidence of the existence of the debt, so as to charge the other partners. Shelton *v.* Cocke, 3 Munf. 191.

After dissolution of a partnership, one partner can not, by his sole act, bind his copartner against his consent, so as to impose a new liability, or to revive one barred by the statute of limitations. Nor can his declarations or admissions be received as the only evidence of the existence of a debt against the partnership. But if there is other evidence of the existence of the debt, or it is admitted by the pleadings, such declarations or admissions, though made after dissolution, may be received in evidence, provided they relate to transactions of the partnership whilst in existence, and do not impose any fresh liability. Davis *v.* Poland, 92 Va. 225, 23 S. E. 292.

Though a partnership is dissolved, and one partner sells his interest to the other, who undertakes to pay the partnership debts, an account rendered by the acting partner or his clerk, after the dissolution, showing a balance due from the partnership, is binding on the retiring partner. Garland *v.* Agee, 7 Leigh 362, citing Brockenbrough *v.* Hackley, 6 Call 51.

If there be several partners, and one of them, after the copartnery is dissolved, assumes a partnership debt, but afterwards pleads the act of limitations jointly with the other partners, the assumpsit may be given in evidence; for the plea of nonassumpsit admits that the defendants did once assume. Brockenbrough *v.* Hackley, 6 Call 51.

IV. Self-Serving Declarations.

In General.—It may be stated generally, that a party's declarations are not admissible as evidence in his own favor, unless they form a part of the res gestæ. Garnett *v.* Sam, 5 Munf. 542; M'Alexander *v.* Harris, 6 Munf. 465; Scott *v.* Shelor, 28 Gratt. 891; Sprouse *v.* Com., 81 Va. 374; Crite *v.* Com., 1 Va. Dec. 423; Repass *v.* Richmond, 99 Va. 508, 39 S. E. 160; State *v* Abbott, 8 W. Va. 743; Corder *v.* Talbott, 14 W. Va. 277; Deck *v.* Tabler, 41 W. Va. 332, 23 S. E. 721, 56 Am. St. Rep. 837.

Self-serving declarations of a party are not admissible for himself or his estate, where it is a declaration in his own behalf. A declaration must be against the interest of the party making it. Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927; Masters *v.* Varner, 5 Gratt. 168.

Illustrative Cases.—Declaration of a deceased person, claiming ownership of specific property, are not competent evidence in favor of his administrators, or others claiming title under him, whether such declarations of ownership were made before or after the title of the adverse claimant commenced. Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927, citing Masters *v.* Varner, 5 Gratt. 168.

The declarations of a deceased person as to his ownership of specific land, are not competent evidence in favor of a party claiming under the title of that person; though the declarations were made before the title of the adversary claimant commenced. Masters *v.* Varner, 5 Gratt. 168.

Sheriff's Return.—The sheriff can not make his return evidence that he has paid money levied under an execution to the plaintiff, yet such return may be used against him in an action for not paying over the money. Nor can the officer's return be evidence of any fact which would go to excuse him for not having performed his duty, except, as has been seen, such facts be official acts done in the ordinary and usual course of proceedings under such process. Thus a return to an action that goods levied on had been casually destroyed by fire after the levy, will not be competent evidence for the sheriff in an action against him for not collecting the moneys on such execution. Shannon *v.* McMullin, 25 Gratt. 211.

Report of County Commissioners.—Where an action is brought for breach of contract made by commissioners of a county court with the plaintiff, a report made by these commissioners to the county court, that the contractor had failed to comply with his contract, is improper evidence. "The court refused to admit this evidence, and we think properly. It was, in effect, the county court giving its own declaration as to the breach of the contract, as evidence in its own behalf. The issue was whether the work had been done according to contract, and the commissioners could give their evidence before the jury like other witnesses, and be subject to cross-examination. But it certainly would have been subversive of the elementary rules of evidence to have permitted their statements, made at another time and place, in the absence of the plaintiff, to go in evidence in behalf of their employers." Kinsley *v.* Monongalia County, 31 W. Va. 464, 7 S. E. 445.

A book containing entries in the defendant's handwriting, of payments by him to the payee in her lifetime, on a note in action, is not admissible evidence in defendant's favor. Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21. See Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

Auctions—Terms of Sale.—In an action of debt upon a bond given for the purchase of land at auction, it is not competent for the plaintiff to prove his declarations not in the hearing of the defendant, prescribing different terms of sale from those set forth in the advertisement and publicly

announced on the day of sale, unless shown to have been communicated to him. Effinger *v.* Kenney, 24 Gratt. 116.

Declarations of Donee.—It has been held, that the declarations of an alleged donee of a gift causa mortis, made while the donor is still alive, to the effect that the gift had been made by him to her, are admissible in evidence in her favor to rebut other testimony tending to prove that at a later day she did not claim the making of such gift. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848.

Petitioner in Bankruptcy. — Where petitioner in bankruptcy appends to inventory of his property a declaration that one parcel had been bought with trust money, though it stood in his name, such declaration is unauthorized by the federal statute, and constitutes no notice of such trust to purchasers at the sale under the bankrupt proceedings. Such declarations to be admissible must have been made when declarant had no interest to make them, and not when made in favor of his own family against his creditors, by one who is not only insolvent, but in bankruptcy. Moorman *v.* Arthur, 90 Va. 455, 18 S. E. 869.

Construction of Contracts.—See the title CONTRACTS, vol. 3, p. 397.

The verbal declarations of the parties can not be looked to for aid in giving a construction to the language of a written contract on its face ambiguous. Titchenell *v.* Jackson, 26 W. Va. 460; Crislip *v.* Cain, 19 W. Va. 438.

When the language of a written agreement is susceptible of more than one interpretation, that is to say, is on its face ambiguous, the courts will look at the surrounding circumstances existing when the contract was made, at the situation of the parties and the subject matter of the contract, and will even call in aid the acts done by the parties under it as affording a clue to the intention of the parties; but the court never resorts in such a case to the verbal declarations of the parties either before, at the time or after the execution of the contract to aid it in giving construction to its language. Crislip *v.* Cain, 19 W. Va. 441; Titchenell *v.* Jackson, 26 W. Va. 460.

W. H. S. executes his bond to F. S. for four thousand dollars, payable four years after date. At the time and immediately after W. H. S. signs the bond, F. S. endorses on the back thereof as follows: "Memorandum. If I do not collect the money due on the within note of my nephew, W. H. S., during my life, then it is never to be collected; and I give it to him, F. S." The endorsement being equivocal in its character, all the circumstances attending the transaction, the cotemporaneous conduct and declarations of the parties, evidence of their purposes and motives, may be looked to as showing what kind of instrument was within their contemplation and design. And held this endorsement a part of the bond and irrevocable without destroying the bond. Smith *v.* Spiller, 10 Gratt. 318.

Relevancy.—But to come within the terms and operation of the general rule stated above, the declarations must accompany and explain an act done, which is a fact in issue, or is relevant to the issue. Accordingly, it has been held that the declarations of a party in his own favor ought not to be received as evidence, though it be a part of the res gestæ of a collateral fact introduced in the case, merely to contradict a witness on the other side, but which fact is in no way otherwise connected with the material enquiry involved in the case. Scott *v.* Shelor, 28 Gratt. 891; Corder *v.* Talbot, 14 W. Va. 277; Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

V. Declarations against Interest.

A declaration made by a stranger to the controversy, now dead, and against his pecuniary interest, may be admitted

as evidence to show the existence of a fact relevant in such controversy, as an exception to the rule excluding hearsay. Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21; High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

The admissions of a person who could not be compelled to testify, and whose declarations are against his own interest, ought to be received as if he were dead. Per Tucker, P., p. 713. Harriman *v.* Brown, 8 Leigh 697.

Illustrative Cases. — Subsequently to a bailment of a slave for hire, the bailee, being about to carry the slave with him on a voyage down the Ohio and Mississippi rivers, acknowledges to third persons, that he has no authority to do so, and that he will be liable in case the slave be lost. Held, such admissions of the bailee are competent evidence against him, in an action brought by the owner to recover damages for the loss of the slave, who was drowned in the course of the voyage. Spencer *v.* Pilcher, 8 Leigh 565.

In a suit to set up a lost deed made a century ago, a memorandum in the handwriting of the grantee's attorney, found amongst the papers of the grantee, stating that the lands had been granted to the grantor, and by him and wife conveyed with general warranty to the grantee, is not admissible as a declaration against interest in a suit where no relief is sought against the attorney, or his representatives. "It is claimed that the memorandum of Washington is admissible as a declaration against his interest, because he thereby admits the possession of the deed, receipts to James Wilson for it, and charges himself with its custody. If this were a controversy between James Wilson and Bushrod Washington, or those claiming under him, there might be force in this contention, but not under the circumstances of this case. Neither Bushrod Washington, nor any person in privity with him, is in any degree concerned in this litigation, or can in any degree be benefited or prejudiced by his admission as such; and, as is pointed out by counsel for appellee in their brief, the memorandum does not in point of fact admit the possession of the deeds to be in Washington." Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

Declarations of a former owner of land, now dead, are not competent to prove that he had title, or to prove possession. High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Acknowledgment of Receipt of Money.—The receipt, or even the verbal statement, of a person entitled to receive money, that he has received it, can be given in evidence as to the fact of payment in a controversy between other parties as to that payment, whether the declarant is dead or not. Lee *v.* Virginia, etc., Co., 18 W. Va. 299, citing Holladay *v.* Littlepage, 2 Munf. 316.

Interest Must Exist at the Time.—The declarations of one interested in a matter of controversy, and operating against his own interest, may be given in evidence; but if his interest arose after the declarations, they can not be received as evidence. Burton *v.* Scott, 3 Rand. 399.

Nature of Interest Required.—And it is well settled that where an entry is offered in evidence upon the ground that it is against the interest of the declarant, it must be of a pecuniary or proprietary nature. The declaration in such cases derives its value exclusively from the fact that the person has made an entry or charge which it is against his interest to make, and the effect of which will be to render him pecuniarily liable to some third person. Tate *v.* Tate, 75 Va. 522.

VI. Declarations by Third Persons.

And the declarations of a third person, not a party to the suit, and made in the party's absence, are hearsay and inadmissible. French *v.* Chapman, 88

Va. 317, 13 S. E. 479; Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454, 20 Am. St. Rep. 718; Hopper *v.* Com., 6 Gratt. 685; Thompson *v.* Updegraff, 3 W. Va. 629; Valley Mutual Life Ass'n *v.* Teewalt, 79 Va. 421.

In an action on the case, a statement or account in writing by a third person, showing the amount for which the defendant is liable, is not evidence, although that person was the agent employed by the defendant, in procuring the performance of the contract. Pasteur *v.* Parker, 3 Rand. 458.

Likewise, a declaration, not upon oath, by a person not a party to the cause, that he committed the trespass for which the suit is brought, can not be given in evidence to exculpate the defendant. Penner *v.* Cooper, 4 Munf. 458.

Statements of insured, some time before his application for a policy, are not admissible evidence to disprove representations of his age contained in the application; and the same is true quoad statements of insured to company's agent several months after policy issued. "The statements of the insured, made seventeen or eighteen years before he obtained the policy, clearly are not admissible as evidence to disprove the statement made as to his age in his application for membership. They were the declarations of a stranger, who was neither a party to the action, nor at the time of making them the agent of the party. Bliss on Life Ins., § 372. On this subject the supreme court of Kansas, in a late case says: 'The contract is between the assured and the insured. * * * The party insured is not party to the record, and therefore her declarations are not admissible on that ground; she is not a party in interest, as the whole benefit and interest inures to the assured; she is not the agent and authorized to speak for him, nor does she come within any other rule by which her declarations can be received against him.' Washington Life Ins. Co. *v.* Haney, 10 Kans. 525. Such statements certainly constitute no part of the res gestæ, and can not be regarded as admissions against interest, and can not therefore be admitted. The question therefore was properly rejected. These observations apply with even greater force to the fourth exception of the defendant, where the attempt was made to introduce the declarations of the insured made to an agent of the company some eight months after this policy was issued. For, in addition to the objections which have already been stated, it would tend to render utterly insecure this important class of contracts, by placing it within the power of insurance companies to avoid them upon the slippery recollections of a class of persons whose interests make it impossible that they should be entirely disinterested." Valley Mutual Life Ass'n *v.* Teewalt, 79 Va. 421.

Parent and Child.—Declarations of defendant's mother, though she was entitled to dower in the land alleged to have been omitted from the deed by mistake, which were made in his absence, are hearsay and inadmissible. French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

Declarations of mother of injured child passenger immediately after accident, are mere hearsay, and no more binding estate of child than would declarations of a stranger. Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 13 S. E. 454.

Principal and Surety.—In action on a bond against a surety, evidence of the declarations of the principal obligor not made in the presence of the surety, that the bond had not been paid, is hearsay and inadmissible against the surety. Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

In action on bond in name of administrator of obligee for benefit of administrator of assignee against administrator of surety thereon, the beneficial plaintiff offered as evidence of his intestate's title to the bond, the

declarations of the obligee, not made in the presence of the obligors, that he had transferred the bond to the beneficial plaintiff's intestate. Held, the evidence was mere hearsay and inadmissible. Hodnett *v.* Pace, 84 Va. 873, 6 S. E. 217.

But a written communication not received by the person for whom it is intended, stands on no higher ground as evidence than a verbal declaration made not in the presence of one who is sought to be affected by it. They can not be treated as admissions in either case. Both are hearsay. Payne *v.* Com., 31 Gratt. 855.

Relevancy.—It is not error to exclude evidence as to statements made by persons who are not parties to the suit, concerning the interests such persons have in the claim, when not pertinent to the issue before the jury. Vandiver *v.* Hyre, 5 W. Va. 414.

VII. Mode of Proof.

When the admission of a party is the foundation of a claim asserted against him, the whole of his statement must be taken together. Perkins *v.* Lane, 82 Va. 59.

The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount. Quarles *v.* Littlepage, 2 Hen. & M. 401, 3 Am. Dec. 637.

VIII. Weight and Sufficiency of Admissions.

In General. — An admission is not conclusive. Penn *v.* Penn, 88 Va. 361, 13 S. E. 707, citing 1 Greenl. on Ev., § 212; Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

The general rule with respect to verbal admissions, is that they ought to be received with caution. Yet, when they are deliberately made, and precisely identified, they afford evidence of the most satisfactory nature. Horner *v.* Speed, 2 Pat. & H. 616; Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974; Snodgrass *v.* Com., 89 Va. 679, 17 S. E. 238; Phelps *v.* Seely, 22 Gratt. 573.

Evidence as to confessions of parties is to be received with great caution, no matter how pure the source from which it is derived, because of the liability of witnesses to mistake or misunderstand the admission when made, and to remember inaccurately or misrepresent it afterwards. Such evidence is intrinsically weak, and is inconclusive to establish a fact, without the aid of other testimony. Horner *v.* Speed, 2 Pat. & H. 616.

Illustrative Cases. — The admissions of parties given in open court are not only admissible evidence, but are evidence of the most satisfactory character, to establish the payment of a debt, or the satisfaction of a lien. Little *v* Slemp, 2 Va. Dec. 545.

Declarations as Part of Res Gestæ. —The weight of declarations of a party made at the moment of doing an act, does not depend on the credit of the witness, but on its connection with the circumstances. Claytor *v.* Anthony, 6 Rand. 285.

But admissions made in a loose, casual conversation are intrinsically weak, and are inconclusive to establish a fact, without the aid of other testimony. Horner *v.* Speed, 2 Pat. & H. 616; Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

Loose, casual declarations made by a party to a suit to third persons, especially if the declarant was worried and excited at the time, are entitled to little weight. Cunningham *v.* Cunningham, 46 W. Va. 1, 32 S. E. 998.

Deliberate admissions and acts are also competent evidence of the validity of a marriage, under the lex loci contractus. The admissions, however, must not be casual, but deliberate. Womack *v.* Tankersley, 78 Va. 242.

Loose verbal declarations of a parent that he meant an existing debt by bond to be considered as an advance-

ment, are not sufficient to cancel the debt or defeat the recovery of it by the parent's executor. Such intent, to be of avail, must be evidenced by writing or by such acts as are sufficient to cancel the debt. Arnold *v.* Barrow, 2 Pat. & H. 1.

Loose expressions of an executor are not sufficient to raise an assumpsit. For this proposition Henderson *v.* Foote, 3 Call 248, is cited in Lewis *v.* Bacon, 3 Hen. & M. 105. See also, Quarles *v.* Littlepage, 2 Hen. & M. 401; Fisher *v.* Duncan, 1 Hen. & M. 563.

If the answer denies imposition, and is supported by the report of the commissioner and the acknowledgments of the plaintiff that the debt is just, it will not be set aside by loose conversation. Harris *v.* Magee, 3 Call 502.

Vague and indefinite declarations and admissions long after the fact, have always been regarded, with good reason, as unsatisfactory and insufficient. Phelps *v.* Seely, 22 Gratt. 573.

Proof of Resulting Trust.—See the title TRUSTS AND TRUSTEES.

Evidence of grantee's declarations in favor of the resulting trust, offered when not susceptible of contradiction, must be taken with allowance. Donaghe *v.* Tams, 81 Va. 132, citing Phelps *v.* Seely, 22 Gratt. 573; Kane *v.* O'Conners, 78 Va. 76.

Repetition of Oral Statements.—Evidence consisting of the mere repetition of oral statements—and especially when made to and proved by persons having no interest in the subject of the conversation—is of the weakest and most unreliable character, and should be received with the greatest caution. And unless corroborated by other proof, or aided by surrounding circumstances, it must be held insufficient to establish any material fact. Vangilder *v.* Hoffman, 22 W. Va. 1.

Declarations of Wife.—Declarations of the wife at the time of executing a deed, or at other times, that it was executed in consideration of a promise of the husband to make a settlement upon her, or because he had made such a settlement, are not sufficient evidence of a contract to support such a settlement if made, even to the extent of a reasonable compensation for the right of dower relinquished. William & Mary College *v.* Powell, 12 Gratt. 384; Perry *v.* Ruby, 81 Va. 325; Lewis *v.* Caperton, 8 Gratt. 149, all citing Blow *v.* Maynard, 2 Leigh 29.

Statements in Answers.—In a suit against parties claiming under C., plaintiff's reply to statements in the answer of C. in another case. The parties claiming under C. are not estopped by these statements; but they have only the effect of admissions or declarations, not made in the pleadings in the cause, and their weight is to be ascertained by the circumstances connected with them. Tabb *v.* Cabell, 17 Gratt. 160.

Judicial Sales—Rents and Profits.—Upon a bill by a judgment creditor to subject the lands of the principal debtor and his sureties to satisfy the judgment, before there can be a decree for a sale of the lands, it must be made to appear to the court that the rents and profits of the lands in five years will not discharge the judgment. This may be shown by the pleadings, by the admissions of the parties, by evidence taken, or by the report of a commissioner on an inquiry ordered. Horton *v.* Bond, 28 Gratt. 815.

Province of Jury.—The weight to be attached to an admission is within the province of the jury. Powell *v.* Tarry, 77 Va. 250.

DECLARED.—See ACKNOWLEDGE, vol. 1, p. 104.

DECLINED.—In Riggs *v.* Parsons, 29 W. Va. 522, 2 S. E. 82, it is said: "But the order sustaining the demurrer in this case shows that the plaintiff **declined** to amend. The language of the order is, 'and, the plaintiff not desiring to amend his said declaration,' the court gave judgment for the defendant. It thus appears that the circuit court offered the plaintiff an opportunity to amend, and he **declined** to do so."

In Mitchell *v.* Evans, 29 W. Va. 569, 2 S. E. 84, it is said: "It seems to me that the meaning and fair interpretation of the words, 'the defendant not asking further time,' etc., construed in connection with the purpose of the statute, and the fact that the defendant has appeared and was there present by counsel in court, must be considered as equivalent to the words, 'the defendant not desiring further time to answer the bill; 'and these latter words we have, in another case decided at this term, held to mean that the defendant **declined** to answer. Rigg *v.* Parsons, ante, 81." See also, the title AMENDMENTS, vol. 1, p. 352.

Decree of Confirmation.

See the title JUDICIAL SALES.

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CROSS REFERENCES.

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I. Definition and Purposes.

A. DEFINITIONS.

"In its technical legal sense dedication is the appropriation of land for a public use, as for a highway, a common, or the like, but may be effectual it seems when made to a pious or charitable use though not distinctly a public one." Benn *v.* Hatcher, 81 Va. 25.

Dedication is an appropriation of land by its owner for the public use. Buntin *v.* Danville, 93 Va. 204, 24 S. E. 830, cited in Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

Anderson's Law Dictionary defines dedication as "the appropriation to public uses of some right or property, as the dedication of a highway, land-

ing, square, park, land for school purposes," etc. "The act of giving or devoting property to some public use, an appropriation of realty by the owner to the use of the public, and the adoption thereof by the public, as the dedication of soil for a highway, has respect to the possession of the land, not to the permanent estate; express when explicity made by oral declarations, deed, or vote; implied when there is acquiescence in a public use." Quoted in Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532.

Dedication is the act of devoting or giving property for some proper object and in such manner as to conclude the owner. Harris *v.* Com., 20 Gratt. 833.

B. PURPOSES.

1. In General.

Dedication is for the use of the public generally. By the common law it was confined to the purpose of highways, but in this country the doctrine has a wider application, and its limit has been judicially defined to extend to public squares, common lots, burying grounds, school lots, and lots for church purposes and pious and charitable uses generally, and in many cases where the use was either expressly or from the necessity of the case limited to a small portion of the public. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532, citing 5 Am. & Eng. Ency. Law (1st Ed.) 416.

It may, it seems, be effectual when the purpose is pious or charitable though not strictly public. Benn *v.* Hatcher, 81 Va. 25.

2. Bridges.

See the title BRIDGES, vol. 2, p. 623.

Bridges are proper subjects of dedication to either counties or towns. Sampson *v.* Goochland Justices, 5 Gratt. 241; Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566.

3. Common Lots.

It has been judicially decided that dedication will extend to common lots. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532; Mayo *v.* Murchie, 3 Munf. 358; Skeen *v.* Lynch, 1 Rob. 186.

4. Culverts.

See the title DRAINS AND SEWERS.

It has been held, that a culvert may be dedicated as an essential part of a city's sewer system. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

5. Pious or Charitable Uses.

See the titles CHARITIES, vol. 2, p. 790; RELIGIOUS SOCIETIES.

a. In General.

It has been judicially decided that dedication will extend to lots for church and pious and charitable uses generally. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532.

b. Cemetery Purposes.

See the title CEMETERIES, vol. 2, p. 731.

It has been held, that a valid dedication may be made of land to be used as a burial ground even though it is not to be a public one. Benn *v.* Hatcher, 81 Va. 25.

Tomb.—In 1789, with the consent and approval of the owner, the body of Mary Washington was interred in a burial lot, and forty-two years later a monument was erected over her grave by an association organized for that purpose. The corner stone was laid with civic and military ceremonies by the president of the United States. Since then no one has claimed any private ownership over this spot of ground. Held, this constituted a complete dedication of the tomb to public uses. Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246.

6. Public Squares.

See the title PARKS AND PUBLIC SQUARES.

The same rules of law are applicable to the dedication of public squares to be used for county buildings, standing room for wagons, etc., as to the dedication of highways. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532;

Board of Supervisors *v.* Winchester, 84 Va. 467, 4 S. E. 844

7. School Lots.

It has been judicially decided that dedication will extend to school lots. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532.

8. Springs.

Springs are proper subjects of dedication to the public use. Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599; Supervisors *v.* Ellison, 8 W. Va. 308.

II. Parties to Dedication.

A. THE OWNER.

1. In General.

It is too well settled to require citation of authorities that any owner of land who is competent to alienate the same may dedicate it to the public. See Taylor *v.* Com., 29 Gratt. 780; Harris *v.* Com., 20 Gratt. 833; Richmond *v.* Poe, 24 Gratt. 149; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Vaughan *v.* Lewis, 89 Va. 187, 15 S. E. 525; Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532; Pierpont *v.* Harrisville, 9 W. Va. 215.

2. Corporations and Corporate Officers.

a. Corporations.

It is a well-settled rule that private corporations may dedicate land to the public use, so it does not interfere with the purposes for which it was incorporated. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title CORPORATIONS, vol. 3, p. 510.

b. Corporate Officers.

Agents.—An engineer deputed by a private corporation to lay off a town has sufficient authority to make a valid dedication of streets and alleys. Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Directors.—A dedication by a railroad corporation, to bind the corporation beyond revocation, must be made by the directors, or recognized by them in some way, or be expressly ratified by them, or by such public use for such time and under such circumstances as to justify the inference of such ratification. The mere act of officers and agents making such dedication without authority from the directors, will not make a valid dedication, unless by such express or implied ratification. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title RAILROADS.

3. Grantor in Deed of Trust.

It is not within the power of the grantor of land in a deed of trust to secure the payment of money to dedicate to the public use a portion of the land conveyed, so as to destroy or release the trust lien of the cestui que trust thereon, without the concurrence of the latter clearly established. Walker *v.* Summers, 9 W. Va. 533.

4. Holder under Prior Deed of Trust.

A purchaser of land subject to a prior deed of trust which has been duly recorded can not dedicate any portion of it to a public street to the prejudice of the creditor secured, or a purchaser under the deed of trust. Such trust creditor or purchaser under the deed of trust has the right to rely on his recorded title as notice to all the world of his rights. Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566, citing Gate City *v.* Richmond, 97 Va. 337, 33 S. E. 615.

B. THE PUBLIC.

The second party to a dedication is necessarily the public, who may be represented by the state, county or town government. Taylor *v.* Com., 29 Gratt. 780; Com. *v.* Kelly, 8 Gratt. 632; Richmond *v.* Stokes, 31 Gratt. 713.

III. Essential Requisites.

A. DEDICATOR'S INTENTION.

1. Necessity for Intention.

Where there has been no public use of a street, sidewalk, park, square or road, the owner may dedicate his land to the public for such use by acts and declarations, but the vital principle of dedication being the intention to dedicate such acts and declarations must be

deliberate, unequivocal and decided, manifesting a positive and unmistakable intention to permanently abandon his property to such public use. Pierpont *v.* Harrisville, 9 W. Va. 215; Boughner *v.* Clarksburg, 15 W. Va. 394; Walker *v.* Summers, 9 W. Va. 533; Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Skeen *v.* Lynch, 1 Rob. 186; Harris *v.* Com., 20 Gratt. 833; Richmond *v.* Poe, 24 Gratt. 149; Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830, cited in Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Gate City *v.* Richmond, 97 Va. 337, 33 S. E. 615.

2. Evidence to Prove Intention.

See post, "Evidence of Dedication," V.

The intention may be manifested by writing, by declaration, or by acts. If not in writing the acts and declarations of the landowner indicating the intention to dedicate his land to the public use, must be unmistakable in their purpose and decisive in their character; to have that effect the intention may be presumed from circumstances connected with a long and uninterrupted user by the public; but this presumption may be rebutted by circumstances showing that an appropriation of the property to the use of the public was not intended. Harris *v.* Com., 20 Gratt. 833; Richmond *v.* Poe, 24 Gratt. 149; Skeen *v.* Lynch, 1 Rob. 186; Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

Illustrations.—Where the owner of land, surveyed, laid out, and platted the same into lots, streets and alleys, as and for a town, made a map thereof, and sold the lots with reference to said map; it has been held, that such act and conduct on the part of the owner constituted prima facie evidence of the intent on his part to dedicate such streets to public use. Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

Where an engineer, deputed by a private corporation to lay off a town, stake off streets, such action is binding to show an intent on the part of the corporation to dedicate. Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

3. Evidence to Rebut Intention.

Where the owner occupies and pays taxes on the tract of land in question, such acts will constitute sufficient evidence to rebut the presumption of an intention on his part to dedicate the land to the public. Vaughn *v.* Lewis, 89 Va. 187, 15 S. E. 525.

B. ACCEPTANCE.

1. Necessity for Acceptance.

To constitute a valid dedication there must not only be an intention on the part of the owner, but it is absolutely essential that there be an acceptance express or implied on the part of the public. Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 739; Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566; Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685; Harris *v.* Com., 20 Gratt. 833; Pierpont *v.* Harrisville, 9 W. Va. 215; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

Limitation. — "While acceptance by formal adoption by public authorities or by public user is necessary to impose on the public the duty to keep in repair a dedicated highway or street, still that is not necessary to the consumation of the dedication so as to cut off the owner from the power of retraction, or to subject the dedication to the public use, wherever, in the estimation of such authorities, the wants

or convenience of the public require it for the purpose for which it was originally given." Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275, citing Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

2. Evidence of Acceptance.

a. In General.

Acceptance will be presumed where it appears that the property has been set apart for the public use, and the public has had exclusive, uninterrupted and adverse use thereof for over twenty years, and public and private rights have been acquired with reference to its use and enjoyment. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

b. By Mere User by the Public.

The mere user by the public of the locus in quo will not of itself constitute an acceptance, without regard to the character of the use and the circumstances and length of time under which it was claimed and enjoyed. Richmond *v.* Stokes, 31 Gratt. 713; Harris *v.* Com., 20 Gratt. 833; Com. *v.* Kelly, 8 Gratt. 632; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673; Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

c. By Acts of the Legislature.

An act of the legislature establishing a town as laid off into lots and streets has been held to constitute an acceptance on the part of the public of the streets thus dedicated. Taylor *v.* Com., 29 Gratt. 780; Mayo *v.* Murchie, 3 Munf. 358; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130; Depriest *v.* Jones, 2 Va. Dec. 109.

Acceptance by Reincorporation.—An act of the general assembly reincorporating a town "as the same has been or may be laid off in lots, streets, and alleys" has been held full proof of the acceptance by the public of the streets and alleys as they had been theretofore laid off. Depriest *v.* Jones, 2 Va. Dec. 109.

d. By Records of the County Court.

See the title COURTS, vol. 3, p. 696.

Acceptance Must Appear on Records.—To constitute dedication of a county road the acceptance thereof, express or implied, as the division of the same into precincts or the appointment of an overseer by the county court, must be evidenced by some act of record showing that the court regards the road as a highway. Com. *v.* Kelly, 8 Gratt. 632, cited in Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

Formal Acceptance Unnecessary.—It seems to be a well-established rule that formal acceptance is not necessary to constitute a complete dedication. If a county exercise acts of ownership and control over a way, such acts will be presumed to be a clear acceptance. Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673; Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Com. *v.* Kelly, 8 Gratt. 632; Clarke *v.* Mayo, 4 Call 374.

Repairing Does Not Constitute Acceptance.—Where a bridge has been built by an individual without authority although such bridge be on a public road, and used by the public, an order of the county court directing the bridge to be repaired or rebuilt is not sufficient to establish the same as a public bridge, unless the record shows that the court was properly organized for that purpose. Samson *v.* Justices, 5 Gratt. 241.

e. By Acceptance by the Municipality.

In General.—It is not necessary in the dedication of streets and alleys for the county court to accept the same.

As to them the acts of the corporation officers may have the same effect as the acts of county courts. Com. *v.* Kelly, 8 Gratt. 632, cited in Richmond *v.* Stokes, 31 Gratt. 713, also cited in Harris *v.* Com., 20 Gratt. 833; Richmond *v.* Poe, 24 Gratt. 149; Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130; Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178. See the title ORDINANCES.

Acceptance Presumed. — To constitute a valid acceptance of an easement in a town it is not necessary that there be any distinct act of recognition by the corporate authorities of such town. Richmond *v.* Stokes, 31 Gratt. 713; Harris *v.* Com., 20 Gratt. 833.

Where property in town is set apart for public use, and is enjoyed as such, public and private rights having been acquired with reference to it and to its enjoyment, the law presumes acceptance on the part of the public. Richmond *v.* Stokes, 31 Gratt. 713; Harris *v.* Com., 20 Gratt. 833; Skeen *v.* Lynch, 1 Rob. 186; Richmond *v.* Poe, 24 Gratt. 149.

Illustrative Cases.

Contract to Repair.—Where a town makes a contract with a railroad company releasing the company from liability to keep in repair a bridge within the city limits, such contract constitutes a complete and formal acceptance of the bridge for the use of the town. Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

Recognition of Plat.—Recognition of a plan of an addition to a town (dedicated thereto by the owners of the land) by the authorities of such town, by an ordinance adopted and published, naming the streets and alleys, and opening and using a part of such streets and alleys, is an acceptance thereof. Jarvis *v.* Grafton, 44 W. Va. 453, 30 S. E. 178.

Acceptance of Bridges.—See the title BRIDGES, vol. 2, p. 623.

A bridge erected by an individual for the public benefit or for his own purposes, and dedicated by him to the public use, may be accepted by the county court as a public bridge. Samson *v.* Justices, 5 Gratt. 241.

IV. Mode of Dedication.

A. IN GENERAL.

There is no particular form of ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land and the fact of its being used for the public purposes intended by the appropriation. Sturmer *v.* Randolph County Court, 42 W. Va. 724, 26 S. E. 532; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148; Boughner *v.* Clarksburg, 15 W. Va. 394; Walker *v.* Summers, 9 W. Va. 533; Pierpont *v.* Harrisville, 9 W. Va. 215; Beach *v.* Frankenberger, 4 W. Va. 712; Colbert *v.* Shepherd, 89 Va. 401, 16 S. E. 246; Harris *v.* Com., 20 Gratt. 833; Skeen *v.* Lynch, 1 Rob. 186; Mayo *v.* Murchie, 3 Munf. 358. See post, "Evidence of Dedication," V.

Statute of Frauds Inapplicable.—It is well settled that a dedication may be as effectually and validly done by verbal declarations or acts showing use and occupation on the one side and acquiescence on the other as by deed or other writings, since it does not lie within the statute of frauds. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830, cited in Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Benn *v.* Hatcher, 81 Va. 25; Skeen *v.* Lynch, 1 Rob. 186; Richmond *v.* Stokes, 31 Gratt. 713; Beach *v.* Frankenberger, 4 W. Va. 712; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title FRAUDS, STATUTE OF.

B. BY AGREEMENT OR PRESCRIPTION.

Dedication and acceptance of an easement may be by express grant or agreement, or by prescription requiring an uninterrupted enjoyment for use immemorially or for twenty years, to the extent of the easement claimed,

from which user a grant is implied. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

Where a covenant was made between the grantor and purchasers of lots, that a certain street should be "kept open for their use, in the same manner as a public street," the court said: "This in itself is a complete dedication to public use, and one which the lot owners could enforce if it was in any manner disturbed." Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

By Contract.—It has been held, that a dedication may be made by the parties to a contract, agreeing that a certain lot should not only be excepted out of a deed but that it should be devoted in the future to a family as a place of burial for its dead. Benn *v.* Hatcher, 81 Va. 25.

Where a town enters into a contract with a railroad company releasing such company from all liability to keep in proper order a bridge situated within the city limits, such contract constitutes a dedication of the bridge by the railroad company to the town for public use. Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

C. BY ACTS OF OWNERSHIP AND ACQUIESCENCE.

If a county court lays off a road before used, into precincts or appoints overseers, surveyors or like officers over such road or over a public square, thereby claiming such road or square as a public one, and if after notice of such claim the owner of the soil permits the land or square to be passed over and used for any longer continuance, such user and permission will constitute sufficient acceptance and dedication. Com. *v.* Kelly, 8 Gratt. 632; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Board of Supervisors *v.* Winchester, 84 Va. 467, 48 S. E. 844; Clarke *v.* Mayo, 4 Call 374; Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

D. BY MAPS AND DEEDS.

A person having laid off the land comprised within certain limits into lots and streets, and made a map of the town or part thereof, so laid off, showing the lots and streets and having sold lots with reference to said map, all the streets designated on such map were thereby dedicated to the public throughout their entire length and width. Taylor *v.* Com., 29 Gratt. 780; Mayo *v.* Murchie, 3 Munf. 358; Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444; Newport News, etc., R. Co. *v.* Lake, 101 Va. 334, 43 S. E. 566; Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400; Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831; Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275; Edwards *v.* Moundsville Land Co. (W. Va.), 48 S. E. 754; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491.

V. Evidence of Dedication.

See ante, "Evidence to Prove Intention," III, A, 2; "Evidence of Acceptance," III. B. 2.

A. BY OWNER'S ACTS.

The dedication and acceptance are to be proved, or disproved by acts of the owner. Both are questions of intention. The owner's acts and declarations should be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use. If they be equivocal and do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication. Pierpont *v.* Harrisville, 9 W. Va. 215; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Harris *v.* Com., 20 Gratt. 833.

Illustration.—Where a railroad company occupies a street which is a public

highway in an unincorporated village, and acquires a lot with intent to open through it a way in place of the street, but does nothing more to evince a dedication than to tear down the fence around the lot and allow its use by the public for a way, this does not constitute an irrevocable dedication. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title RAILROADS.

B. BY OCCUPATION AND ACQUIESCENCE.

To establish the dedication of land for the use of the public, it is not necessary to show that such dedication to the public has been by a deed or due process of law; it will be sufficient to show occupation on the one side and acquiescence on the other side. Beach *v.* Frankenberger, 4 W. Va. 712.

C. BY PRESUMPTION.

The use of property by the public with the assent of the owner, will, under particular circumstances, justify the presumption of a dedication, provided the use has contained so long that private rights and the public conveniences might be materially affected by an interruption of the enjoyment. But any acts of ownership would repel the presumption. Skeen *v.* Lynch, 1 Rob. 186, cited in Richmond *v.* Stokes, 31 Gratt. 716; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37.

Illustrations. — Where the city of Richmond had held uninterrupted and exclusive use of a culvert as an essential part of its sewer system for over fifty years, had extended it under resolution of its council, had appropriated money for its repair and had exacted money for the use of it as to other sewers, such culvert was presumed to have been dedicated. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

A city street having been used according to a certain line for several years and having been graded and paved by the city authorities without any objection or claim by the owners of the soil on which the street was laid, its dedication to the public will be presumed. Richmond *v.* Stokes, 31 Gratt. 713.

D. BY MAPS, DEEDS AND RECORDS.

1. Platting and Selling Land.

When an owner of real estate within the corporate limits of a town lays off and plats the same into town lots, streets, and alleys, and sells the lots with relation to such streets and alleys, granting to the purchasers the use of such streets and alleys, the same as though they were public streets and alleys in all respects, and throws them open to the use of the public, he will be considered to have dedicated the same to public use. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831; Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155. See the title DOCUMENTARY EVIDENCE.

Recorded Map.—Where a map of a town as laid out has been recognized by legislative enactment, and admitted to record by the municipality, such map will constitute evidence of the dedication of the streets and alleys, as are shown on such recorded map. Taylor *v.* Philippi, 35 W. Va. 554, 14 S. E. 130.

Words Written on Map — Illustration.—Where the founder of a town reserve a lot for the public, marking on the plat thereof "R" "Pro Bono Publico," at a point where a spring is situated, such words will indicate a dedication of the spring to the use of the public. Supervisors *v.* Ellison, 8 W. Va. 308.

Land Unmarked on Plat. — If the owner of the track of land situated on a river undertake to establish a town on such land, and dispose of lots therein and in pursuance of such scheme makes a plat of the proposed town, leaving an unmarked place lying along the river, parol testimony is admissible in

aid of the inference deducible from such circumstances to establish proof of dedication to the inhabitants of the town of a piece of ground between the river and the lots actually laid off. Mayo *v.* Murchie, 3 Munf. 358; Skeen *v.* Lynch, 1 Rob. 186.

2. Express Grant.

Dedication and acceptance of an easement can be shown by proof of an express grant or agreement, or by prescription requiring an uninterrupted enjoyment or use immemorially, or for twenty years, to the extent of the easement claim, for which user and grant is implied. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877. See the title DEEDS.

Deed—Construction by the Court.—Where the proof of dedication depends on the construction of a deed, it is within the province of the court to determine the question of dedication and it is clearly error to submit the decision of such construction to a jury. Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685.

3. Records.

Loss of Records—Effect.—A dedication of a road to the public use, or the acceptance on the part of the proper authorities, can not be presumed merely because records have been lost or destroyed. The effect of such loss or destruction is simply to change the mode of proof of the contents of the records, and to admit secondary evidence in the place of an exemplification of the record. Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Brander *v.* Justices, 5 Call 549. See the title RECORDS.

When Corner Stones — Maps—Records — Insufficient.—In a controversy between the city of Richmond and P., the owner of a lot on F. street, as to the northern line of said street, P. and those under whom he claims having been in possession by actual enclosure, for more than sixty years, and there being no proof of actual dedication by R., the original owner of the land, such dedication can not be shown by proof of the existence of stones on the corners of the cross streets on the line claimed by the city; it not appearing by whom they were placed there, or that R., recognized them as marking the line; nor by maps of the ground laid off by R., copied by order of the city, from an old map in the county court clerk's office, since lost; it not appearing that R. had any knowledge of said old map; nor by the records of the proceedings of the council of the city, reciting an acknowledgment by a previous owner of the lot, that his enclosure encroached upon the street, and giving him permission to continue it for the present. Richmond *v.* Poe, 24 Gratt. 149.

E. BY LONG AND UNINTERRUPTED USER.

Presumption Arising.—Long and uninterrupted possession of land by the public, with claim of ownership for public use, and user by the public, will raise a presumption of a dedication by the proper owner for such public use. Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599; Clarke *v.* Mayo, 4 Call 374; Skeen *v.* Lynch, 1 Rob. 186; Harris *v.* Com., 20 Gratt. 833. See post, "When Dedication Revocable," VI, A.

Illustration. — Possession and claim of ownership by Virginia and West Virginia for 119 years has been held sufficient to constitute dedication of land containing property known as "Berkeley Springs" to the public use. Smith *v.* Cornelius, 41 W. Va. 59, 23 S. E. 599.

Time Required to Raise Presumption.—No user of less than twenty years has been held sufficient to warrant the presumption of dedication and acceptance. Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

User with Owner's Permission.—A mere permission to the public by the owner of land, to pass over a road upon it is to be regarded simply as a license and the user of such road by the public for however long a time, will

not constitute a dedication. Com. *v.* Kelly, 8 Gratt. 632; Harris *v.* Com., 20 Gratt. 833; citing Com. *v.* Kelly, 8 Gratt. 632; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

Permission Will Be Presumed.—Although there may have been a long and uninterrupted user of the land by the public, the presumption of law is that such user by the public was not adverse, but with the permission and consent of the owner, thus constituting a mere license. Harris *v.* Com., 20 Gratt. 833; Com. *v.* Kelly, 8 Gratt. 632.

No Dedication by Mere User in West Virginia.—But it has been held in West Virginia that mere user of a road will not constitute a complete dedication under § 31, ch. 43, W. Va. Code, 1887, which provides that every road used and occupied as a public road shall be taken and deemed to be a public road in all courts and places wherever the establishment thereof shall come in question. The user must be accompanied either by an order of the county court or municipal corporation recognizing it in some way as a road, or the road must be worked by an overseer as such. Dedication by the landowner, though accompanied by public user, will not make it a public road, unless the dedication be accepted by either the county court in its order book, or by a surveyor's working it. Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48; Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

Conclusiveness of Presumption.—Long and uninterrupted use and occupation has been held to constitute presumptive but not conclusive evidence of complete dedication. Holleman *v.* Com., 2 Va. Cas. 135; Harris *v.* Com., 20 Gratt. 833.

F. BURDEN OF PROOF.

See the title PRESUMPTIONS AND BURDEN OF PROOF.

If an incorporated town attempt to open streets or alleys, through the land of a person against his consent, claiming that the land sought to be taken has been dedicated to the use of said town, the burden of alleging and proving such dedication is upon the municipality. Mason City, etc., Co. *v.* Mason, 23 W. Va. 211; Miller *v.* Aracoma, 30 W. Va. 606, 5 S. E. 148.

If the authorities of a city have treated a place as a public street, taking charge of it and regulating it, as they do other streets, and an individual is injured in consequence of the negligent and careless manner, in which this is done, the corporation can not, when it is sued for such injury, throw the party upon an inquiry into the regularity of the proceedings, by which the land became a street, or into the authority, by which the street was originally established. Wilson *v.* Wheeling, 19 W. Va. 325.

VI. Revocation.

A. WHEN DEDICATION REVOCABLE.

It is a recognized rule that a dedication of land to the use of the public, whether express or implied, may be revoked before it has been formally accepted by competent authority, or others have upon the faith of it been induced so to act as to render its revocation unjust. Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020.

There Must Be No Interest Acquired.—Where no public or private interests have been acquired upon the faith of a supposed dedication, the mere user by the public of a supposed street or alley, although long continued, is revocable at the pleasure of the owner. Harris *v.* Com., 20 Gratt. 833; Norfolk

v. Nottingham, 96 Va. 34, 30 S. E. 444; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830.

Mere User Regarded as a License.—Where no public or private interest has been acquired upon the faith of a supposed dedication, the mere user by the public of the supposed street or alley, although long and continued, should be regarded as a mere license revocable at the pleasure of the owner; unless there be evidence of an express dedication; or unless in connection with such long-continued user the way has been by the proper town authority recognized as a street so as to give notice that a claim to it as an easement was asserted. Harris *v.* Com., 20 Gratt. 833; Com. *v.* Kelly, 8 Gratt. 632; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

B. WHEN DEDICATION IRREVOCABLE.

When a dedication is complete it is irrevocable. An estoppel arises which precludes the owner from revoking the same; for the law considers it would be in violation of good faith, and in some instances even sacrilegious to reclaim property which has been devoted to the use of the public, or in furtherance of some charitable or pious object. No obstruction of the subject of dedication or encroachment upon it by the original owner of the soil or by any one holding under or through him will impair the right of the public to its benefits unless the land so dedicated has been abandoned by the public or by the proper authority. Taylor *v.* Com., 29 Gratt. 780; Depriest *v.* Jones, 2 Va. Dec. 109; Benn *v.* Hatcher, 81 Va. 25; Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37; Boughner *v.* Clarksburg, 15 W. Va. 394; Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8; Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Edwards *v.* Moundsville Land Co. (W. Va.), 48 S. E. 754. See the title ESTOPPEL.

When land has been dedicated for a public highway and it has been accepted by long use by the general public, so that retraction would be hurtful to the public, the dedication can not be retracted, though no county or municipal order or action has accepted the dedication, and it is a valid highway as between the dedicator and his alienees and the public. Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275; Edwards *v.* Moundsville Land Co. (W. Va.), 48 S. E 754; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

VII. Effect of Dedication.

A. RIGHT OR TITLE ACQUIRED.

In land dedicated for public use, the public do not hold the title in fee. It may be in the original owner, the abutting lot owners, the municipality, or state, and there rests in abeyance as long as the land is needed by the public, who hold only an easement therein. Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326; Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446; Benn *v.* Hatcher, 81 Va. 25; Petersburg R. Co. *v.* Burtons, 1 Va. Dec. 397.

Illustration.—If a lot on which there is a spring of water, in the plan of a town, be reserved for public use by the founder of the town, who owned the land on which the town is laid out, such reservation, though it may amount to a dedication of the lot for the public use, by the owner, does not vest the legal title thereto in the county or supervisors of the county, or necessarily vest the county or supervisors thereof with the equitable right to demand a conveyance from such owner or his alienee to the county or the supervisors thereof. Supervisors *v.* Ellison, 8 W. Va. 309.

B. LIABILITY FOR REPAIRS.

To Make County Liable.—To render a dedication of land for a highway valid to create a highway as to a county, so as to charge it with mainte-

nance and repair, there must be an acceptance of the dedication by the proper public authority. Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155.

Failure of Court to Accept—Liability.—The county court is not bound to repair or maintain a bridge, erected by an individual, and dedicated by him to the public use, and actually used by the public, and if on a public road, unless it has been adopted by the county court in the mode prescribed by the statute. Sampson *v.* Justices, 5 Gratt. 241.

Effect of Dedication Improperly Accepted.—Where in West Virginia to establish a public road the statute requires that acceptance be in a particular manner, the county or municipality is not liable to keep in repair highways, which have not been accepted in the prescribed manner, although there may have been a clear intention on the part of the owner to dedicate, and a general user on the part of the public. Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48.

Extent of Liability.—The acceptance by a city of a culvert as a part of its sewer system renders the city liable for its maintenance in the same manner and to the same extent as if it had been originally built by the city. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

Bridge.—The acceptance by a city of a bridge built within its limits, will render the city liable for the repair of such bridge. Hicks *v.* Chesapeake, etc., R. Co., 102 Va. 197, 45 S. E. 888.

C. VENDOR AND PURCHASER.

See the title VENDOR AND PURCHASER.

Estoppel.—The sale of lots in accordance with a map vests in the purchasers the right to the use of the streets appearing upon such maps, and the right so vested can not be defeated by the act of the vendor because by the sale under such circumstances a complete dedication is consummated and he is estopped to deny or impeach the right thus acquired. That the sale operates by way of estoppel is fully established by the authorities. Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444, cited in Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566; Hast *v.* Piedmont, etc., R. Co., 52 W. Va. 396, 44 S. E. 155; Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491; Edwards *v.* Moundsville Land Co. (W. Va.), 48 S. E. 754. See the title ESTOPPEL.

Limitation.—Such an estoppel, however, operates only in favor of him who has been misled to his injury, and he alone can set it up. It does not operate in favor of a city or county which has acquired no rights thereunder. Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444, cited in Newport News, etc., Co. *v.* Lake, 101 Va. 334, 43 S. E. 566.

Dedication Binding on Purchaser.—If a person dedicate land to the public use, and there is the proper acceptance and subsequently the dedicator alienate the land thus dedicated, the grantee will be as completely subject to the dedication as the grantor himself. Buntin *v.* Danville, 93 Va. 200, 24 S. E. 830; Taylor *v.* Com., 29 Gratt. 780; Ralston *v.* Weston, 46 W. Va. 544, 33 S. E. 326.

Where land has been reserved and dedicated for use as a burial ground, no title can pass to the dedicated ground by subsequent conveyances of the tract out of which the reservation was made, though such conveyances be without reservation. Benn *v.* Hatcher, 81 Va. 25.

Where at the time of a purchase of real estate, there is a road so long used that there may be a presumption of dedication to the public, the purchaser takes his land subject to such right, and he is not protected even by a deed of warranty against incumbrances. Deacons *v.* Doyle, 75 Va. 258, cited in Patton *v.* Quarrier, 18 W. Va. 447.

Rights of Third Parties.—"It is not only those who buy the land or lots

abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road; but where streets and roads are marked on a plat and lots are bought and sold with reference to that plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon, and may force the dedication." Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491. See the title ABUTTING OWNERS, vol. 1, p. 60.

When Easement Vests.—When land is thus dedicated by map, the rights of the lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys, but he is at once entitled to have all such streets and alleys opened for his use, necessary to the enjoyment of his property. Cook *v.* Totten, 49 W. Va. 177, 38 S. E. 491; Edwards *v.* Moundsville Land Co. (W. Va), 48 S. E. 754.

D. MISUSER OR ALIENATION.

General Rule.—After a complete dedication and acceptance of land to be used for certain purposes, the county court or municipality to which such dedication is made can not use such property for any other purpose inconsistent with the use to which it was originally dedicated, nor can the property be sold for private purposes. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532; Pence *v.* Bryant, 54 W. Va. 263, 46 S. E. 275.

Illustration.—Where a square was dedicated to the public and used for county buildings, hitching posts, and standing room for horses and wagons, from the time of the formation of the county, and before the city wherein it lies was incorporated, it has been held, that such dedication was for such special purpose only, and the city would not be permitted to alter a part of the square nor would a deed of conveyance made to the justices of the county and the mayor and aldermen of the city for the said square, subsequent to such dedication, confer upon the city the exclusive right to direct the uses to which the square should be applied, but only conferred a joint ownership in the mere legal title. Supervisors *v.* Winchester, 84 Va. 467, 4 S. E. 844.

Conditional Dedication. — Where a dedication of land for streets or sidewalks is on condition, the terms of the dedication must be strictly complied with. Otherwise an injunction will lie against the corporation, restraining it from using such street or sidewalk. Boughner *v.* Clarksburg, 15 W. Va. 394.

Rights of Dedicator and Abutting Lot Owners.—The dedicator of land, abutting lot owners or parties who have acquired rights upon the faith of a dedication may maintain a suit alone or in conjunction with the local authorities to restrain its misuse or misappropriation to foreign uses. Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532; Norfolk *v.* Nottingham, 96 Va. 34, 30 S. E. 444; Edwards *v.* Moundsville Land Co. (W. Va.), 48 S. E. 754. See the title ABUTTING OWNERS, vol. 1, p. 60.

E. PARTIAL DEDICATION.

The owner of a private right of way may grant it, subject to the use of particular persons, but there can not be a dedication to part of the general public. Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685.

Dedimus Potestatem.

See the title DEPOSITIONS.

Deed of Conveyance.

See the title DEEDS.

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CROSS REFERENCES.

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As to when deeds absolute upon their face will be construed as mortgages, see the title MORTGAGES AND DEEDS OF TRUST. As to tax sales and tax deeds, see the title TAXATION.

I. Definitions and Distinctions.

A. DEFINITIONS.

1. Deeds.

"A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed." American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

A deed is the method by which the title of real estate is transferred from one person to another. American Net, etc., Co. *v.* Mayo, 97 Va. 186, 33 S. E. 523.

Coke's definition of a deed is, in substance, a writing sealed and delivered. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

A paper purporting to be a deed executed under hand and seal, and stating "that the grantor has agreed to make a deed for a certain tract of land to the grantee, and that in consideration thereof, the grantee desiring the deed, the grantor makes a quitclaim deed for such land to the grantee describing the land by metes and bounds," but containing no other granting clause is no deed but simply an acknowledgment that the grantee has an equitable title to the land. Weinrich *v.* Wolf, 24 W. Va. 299.

A contract to make a "good deed" is not simply a contract to execute a deed in legal form with proper warranty, but obliges the promisor to convey a good title. Christian *v.* Cabell, 22 Gratt. 82. See the title VENDOR AND PURCHASER.

A mortgage is a deed, and a recital in that instrument is as much a recital under seal as a recital in a deed of trust. Wolf *v.* Violett, 78 Va. 62.

See the title MORTGAGES AND DEEDS OF TRUST.

2. Deed Indented.

A deed beginning "this indenture" is a deed indented to every legal purpose. Currie *v.* Donald, 2 Wash. 58.

3. Deed Inter Partes.

A deed inter partes is an agreement under seal between two or more persons executing the same, and entering into reciprocal obligations with each other. It is a solemn declaration that all the covenants comprised in the intrument, are intended to be made between those parties and none others. Jones *v.* Thomas, 21 Gratt. 98.

4. Deed Poll.

A deed poll on the other hand, is the act of a single party, and is in the nature of a declaration made by him of his intentions or obligations to some other person. Jones *v.* Thomas, 21 Gratt. 98.

5. Deed of Lease.

No set form of words is necessary to constitute a deed of lease. The nature and effect of the instrument must be determined in accordance with the intentions of the parties as gathered from the whole instrument. Upper Appomattox Co. *v.* Hamilton, 83 Va. 319, 2 S. E. 195; Mickie *v.* Lawrence, 5 Rand. 571. See the title LANDLORD AND TENANT.

6. Deed of Partition.

A deed which contains no clause of conveyance, but recites that the parties thereto have made partition and division between them of the lands therein mentioned of which they were seized in fee, and declares what part each is to have, and covenants that neither of them, nor any person claiming under either shall disturb the other in the possession and enjoyment of the part allotted to him, is a mere deed of partition. Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958. See the title PARTITION.

B. DISTINCTIONS.

1. Deeds and Wills Distinguished.

The rule of construction for determining whether an instrument is a will or a testamentary paper or a deed is that, if it passes a present interest, though the right to possession or enjoyment does not accrue until the death of the maker, it is a deed or contract, but, if it does not pass any interest or title whatever till his death, it is a will or testamentary paper, and is not valid as a deed or contract. In determining whether an instrument is a testamentary paper, or a deed meant to take effect in presenti, the courts do not allow language peculiar to either class of instrument, nor even the belief of the maker as to the character of the instrument, nor the name he gives it, to inflexibly control its construction. But giving due weight to these circumstances, courts look further, and, weighing all the circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will give effect to the manifest intention of its maker. Lauck *v.* Logan, 45 W. Va. 251, 31 S. E. 986. See the title WILLS.

An instrument in form and name a deed of conveyance, acknowledged as such, and delivered to the grantee, whereby for a consideration the grantor purported to convey a tract of land, closed with this clause: "It is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said grantor shall depart this life, and not sooner." This was held to be a valid deed conferring a vested remainder on the grantee, to come into enjoyment upon the death of the grantor. Lauck *v.* Logan, 45 W. Va. 251, 31 S. E. 986. See also, Pollock *v.* Glassell, 2 Gratt. 439.

Where a deed is irrevocable by the grantor it is not to be considered a will in disguise on the ground that nearly all of his personal estate is conveyed thereby, and that he reserves to himself the possession and control of the property during his life. Lightfoot *v.* Colgin, 5 Munf. 42.

An instrument which purports on its face to be a deed, is signed, sealed, acknowledged before a notary public, and admitted to record, and which grants, bargains, sells, and conveys absolutely, and without reservation or condition, all of the stocks, bonds, and other evidences of debt of the grantor to a trustee to be held for the benefit of the grantor (who is an unmarried woman, but who is shortly thereafter married), for the term of her natural life, without the further provision that, at the death of the grantor, the property conveyed shall pass to her children, if any, and if none, to her heirs at law, as though the same were real estate, is a deed, and is not a power of attorney, nor a will, nor a writing partaking of the double nature of power of attorney and will, and therefore is not revocable. Claiborne *v.* Radford, 91 Va. 527, 22 S. E. 348. See the title POWERS.

2. Deeds Distinguished from Contracts to Convey.

Whether an instrument is a deed or merely a contract for a conveyance is a question of intention to be determined from the instrument itself. Words of present grant and assurance create a presumption that an executed conveyance was intended, but this presumption may be overcome by other words in the instrument showing that a future conveyance is contemplated. If, taken as a whole, it appears that a mere agreement for a conveyance was all that was intended, the intent shall prevail, for the intent, and not the words, is the essence of every agreement. Mineral Co. *v.* James, 97 Va. 403, 34 S. E. 37. See the title VENDOR AND PURCHASER.

In Jones *v.* Neale, 2 Pat. & H. 339, a written agreement, not under seal and unrecorded, between two partners, that certain real estate belonging to the concern should be assigned to one of the partners as his separate property, was held to be merely executory, and incapable of passing the legal title to the property. And the partners subsequently divesting themselves of their title by the execution of a deed to third persons, thereby annulled the agreement.

A party agreed to sell a tract of land, parcel of a larger tract held by him, to consist of equal quantities of bottom and hill land, the boundaries of the bottom being fixed, but its quantity unknown. The grantor by deed conveyed a tract of land within specified bounds supposed to contain equal quantities of bottom and hill land, with a proviso, inserted after the conveying part of the deed, that if the specified bounds contained less, or contained more, hill than bottom, in the one case, one of the lines described in the deed should be drawn in so as to exclude the excess of hill land, and in the other case, that the same line should be thrown out so as to include as much of hill as bottom. It was found by survey that the lines described in the deed contained seventy-six acres less of hill than bottom, so that the line specified in the proviso was thrown further out to include the seventy-six acres of hill. It was held, that the proviso was not a mere contract to convey the additional seventy-six acres of hill land, but that the seventy-six acres of hill land were conveyed by the deed, and that with sufficient certainty. Richards *v.* Mercer, 1 Leigh 125.

3. Deeds Distinguished from Acknowledgments of Title.

A paper purporting to be a deed executed under hand and seal, and stating "that the grantor has agreed to make a deed for a certain tract of land to the grantee, and that in consideration thereof, the grantee desiring the deed, the grantor makes a quitclaim deed for such land to the grantee describing the land by metes and bounds," but containing no other granting clause, is no deed but simply an acknowledgment that the grantee has an equitable title

to the land. Weinrich *v.* Wolf, 24 W. Va. 299.

II. Forms and Modes of Conveyancing.

A. COMMON-LAW CONVEYANCES.

1. Original or Primary Conveyances.

a. Feoffment.

"In England, at common law, a feoffment—including livery of seisin—was the ordinary conveyance used to transfer an estate in fee, vested in possession, in land, from the holder, in his lifetime; to another not already having an estate or interest in the land, or possession of it." Ocheltree *v.* McClung, 7 W. Va. 234.

"This conveyance was effectual to vest a fee simple, or a fee limited to continue till the happening of a contingent event and thereupon of itself to determine; or a fee conditioned so as, upon a contingency to be, by the entry of the feoffor or his heirs, determinable; and, in either case, such qualified or conditional fee to revert to the feoffor or his heirs. But the feoffment was not adequate, upon such determination of an estate in fee, either with or without entry, to vest the estate in a stranger; or, without a previous estate, to vest an estate in future in any person." Ocheltree *v.* McClung, 7 W. Va. 234.

"In Virginia, I believe, the feoffment was the only conveyance not statutory in its operation, that was used to transfer an estate in fee. But, for many years this has been but seldom, if at all employed." Ocheltree *v.* McClung, 7 W. Va. 234.

Feoffment operated on the possession. Kellam *v.* Kellam, 2 Pat. & H. 366.

b. Grant.

Grant was the conveyance applicable to reversion, rents and incorporal hereditaments generally. Kellam *v.* Kellam, 2 Pat. & H. 366; Ocheltree *v.* McClung, 7 W. Va. 232.

But in England before 1845, and in Virginia before 1850, a grant was not effectual to transfer an estate in fee in land in possession. Ocheltree *v.* McClung, 7 W. Va. 232.

At the common law a grant operated on the estate or interest which the grantor had in the estate granted and which he could lawfully convey. Kellam *v.* Kellam, 2 Pat. & H. 366.

c. Lease.

See the title LANDLORD AND TENANT.

d. Exchange.

See the title EXCHANGE OF PROPERTY.

e. Partition.

See the title PARTITION.

2. Derivative or Secondary Conveyances.

a. Surrender.

A surrender is defined to be a "yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them." Scott *v.* Scott, 18 Gratt. 150.

When the transfer of the whole interest in an estate for life or for years is made to the person holding the immediate reversion or remainder in fee, the estate transferred is extinguished by merger, and the transfer operates as a surrender. Scott *v.* Scott, 18 Gratt. 150.

Every surrender for value is in effect a sale; or, perhaps, more properly speaking, is the consequence of a sale. A sale by a particular tenant to the remainderman amounts to a surrender, and operates as a merger of the term, unless there be some good cause for the continued separation of the term and the remainder. Scott *v.* Scott, 18 Gratt. 150.

E. owns an estate for her life in property, both real and personal, including slaves; and S. owns the remainder in fee therein; and E. and her trustee enter into a contract called by the par-

ties a lease, by which they convey to S. the life estate of E. in the whole of the property, and S., in consideration thereof, undertakes to pay E. annually for her life seven hundred dollars as rent, and to pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S. was put into possession of the property, and held and treated it as his own. It was held, that though the instrument was called a lease, and the sum reserved was called a rent, the contract was a surrender, and the life estate of E. was merged in the estate of S. Scott *v.* Scott, 18 Gratt. 150.

"As there was no deed in this case, the contract not being under seal, it was not a case, as to the land, of express surrender, because, under our statute, a deed is necessary to convey a life estate in land by surrender as well as in other cases. But the contract was an agreement for a surrender, which was carried into effect by the parties by the delivery of possession and the payment of money under it, and it had, therefore, all the legal effect of an express surrender by deed. Taylor on Landlord and Tenant, §§ 507-509." Scott *v.* Scott, 18 Gratt. 160. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

b. Assignment.

An assignment of an estate for life or for years is a transfer of the whole interest of the assignor to some one other than the immediate reversioner or remainderman holding an estate which is larger than that of the assignor. The estate assigned remains as an estate distinct from that of the reversioner or remainderman, and vests in the assignee, who stands, for most purposes, in the shoes of the assignor. Scott *v.* Scott, 18 Gratt. 150.

c. Release.

A release was, and is, appropriate to vest an estate or right of one person, in another person already having an estate less than a fee simple in land, or having possession with claim of title. Ocheltree *v.* McClung, 7 W. Va. 232.

Since the year 1850, a deed of release may have more extensive application. Ocheltree *v.* McClung, 7 W. Va. 232.

Under the provisions of § 2439 of the Virginia Code of 1887 a release deed is effectual to convey all the right, title, and interest of the grantor in the premises released, whether he were at the time in the possession of the premises or not. Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601. See the title RELEASE.

d. Defeasance.

See the title MORTGAGES AND DEEDS OF TRUST.

B. CONVEYANCES OPERATING UNDER STATUTE OF USES.

See the title TRUSTS AND TRUSTEES.

1. In General.

Statutory Provision.—"By deed of bargain and sale, or by deeds of lease and release, or covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, the possession of the bargainor, releasor, or covenantor shall be deemed heretofore to have been, and hereafter to be, transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person hath or shall have in the use, as perfectly as if such bargainee, releasee, or person entitled to the use had been enfeoffed with livery of seisin of the land intended to be conveyed by such deed or covenant." Ch. 62, 12 Hen. Stat. 157; Va. Code, 1887, § 2426; Ocheltree *v.* McClung, 7 W. Va. 232.

"This provision has been at different times re-enacted, and, as a separate section it yet remains in force. It is the only statute of uses that was ever enacted in Virginia." Ocheltree *v.* McClung, 7 W. Va. 232.

2. Bargain and Sale.

Definition.—"A bargain and sale of lands may be defined a real contract on a valuable consideration, for passing or

transferring them from one to another." Claiborne *v.* Henderson, 3 Hen. & M. 322.

"This is no more than a bargain (which our statute of conveyances requires shall be under seal, Va. Code, 1887, § 2413), whereby, for valuable consideration, the owner of the freehold agrees to stand seized to the use of the intended grantee for such estate (whether for years, for life, or in fee simple) as may be designated. The use thereby raised in the grantee is executed by the statute so as to vest in him the possession of the lands for the estate or interest which he had in the use." 2 Min. Inst. (4th Ed.) 213. See also, Claiborne *v.* Henderson, 3 Hen. & M. 321.

Consideration Necessary to Support.—Any valuable consideration, however small, is sufficient to support this conveyance; and the acknowledgment in the deed, of the payment, is conclusive of the fact, so far as to give effect to the conveyance. Ocheltree *v.* McClung, 7 W. Va. 232.

For What Purpose Conveyance May Be Made.—The deed of bargain and sale was, and is, adequate to vest an estate in fee in land, in one person, and afterwards, upon a contingency, to divest it out of him and vest it in another person, though the latter was not ascertained or in existence at the date of the deed. But such shifting and revesting of an estate must be limited to take effect, if at all, within the time prescribed to prevent the creation of perpetuities. Ocheltree *v.* McClung, 7 W. Va. 232.

This deed may be employed to convey an estate and reserve or confer a power of appointment, upon the execution of which the deed will vest the estate in the appointee. In such case, the appointment is the event upon which the declaration in the deed operates to create the use, and, under the statute on the subject, to transfer the estate to the appointee. Ocheltree *v.* McClung, 7 W. Va. 232.

A deed of bargain and sale might be employed by a woman in contemplation of marriage, with the consent of the intended husband, effectually to convey and limit the legal estate in land to a trustee in fee; in trust for herself till the marriage; and to allow the husband to occupy the land till the death of the one of them who should first die; and, if she should survive, then to convey to her; but if she should die, the husband surviving then to such person as the wife, notwithstanding the coverture, might, by last will, published in the presence of three witnesses, appoint; and in default of such appointment, the estate in the trustee to terminate—so as to revert to her heirs. Ocheltree *v.* McClung, 7 W. Va. 232.

Construction of Deed.—The prevailing intent in each deed, properly manifest, will control its effect, as to whether the estate vested in the immediate bargainee, either for his own benefit or in trust, in a fee determinable, which, on the happening of the contingency or execution of the appointment, determines in him and shifts to another, or reverts to the bargainor; or, on the other hand, the legal estate in the trustee is a fee absolute and remains in him, while a mere equitable interest is limited to an ultimate beneficiary. Ocheltree *v.* McClung, 7 W. Va. 232.

Status of Conveyance.—In Virginia, though the feoffment—including livery of seisin—and deed of lease and release, and the covenant to stand seised to a use, were sometimes used, the deed of bargain and sale was the ordinary conveyance of land that prevailed before the Code of 1849 took effect in 1850. Ocheltree *v.* McClung, 7 W. Va. 232.

Deeds of bargain and sale are still good, as before the form given in the Code. Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 769.

3. Covenant to Stand Seized.

A covenant to stand seized "differs

from bargain and sale only in the consideration. Bargain and sale is for value, not necessarily money, as was formerly thought, but anything of value. Covenant to stand seized is in consideration of natural love and affection; e. g., for a child, nephew, cousin or wife. It consists simply of a covenant (under seal necessarily in Virginia, Va. Code of 1887, §§ 2413, 2414), in consideration of natural love, etc., to stand seized of the land to the use of the covenantee, which the statute executes as before." 2 Min. Inst. (4th Ed.) 214.

A covenant to stand seized was merely an agreement founded on a good meritorious consideration, and the statute of uses executed the agreement. Marling *v.* Marling, 9 W. Va. 81.

"A covenant to stand seized to a use, as a conveyance, required a consideration of blood or marriage between the covenantor and the person to take the title. Such a consideration would not support a deed by a covenantor, so as to vest the title in a trustee not by blood or marriage related to him, for the benefit of his wife, child or other relation." Ocheltree *v.* McClung, 7 W. Va. 232.

A deed, defective as a feoffment, for want of proof of livery of seisin, may operate as a covenant to stand seised to use, and as such pass the title to the grantee, for the use is executed into possession by the force of the statute of uses. See Rev. Code, ch. 90, § 14, p. 159. Rowletts *v.* Daniel, 4 Munf. 473.

4. Lease and Release.

A deed of lease and release "is merely a modification of the bargain and sale, the lease taking effect under the statute, and the release operating at common law, by way of enlargement." 2 Min. Inst. (4th Ed.) 214.

"In England, under the statute of uses, the deed of lease and release was generally used, not only to transfer a fee from one person to another for his own benefit, but to vest the estate in a trustee, and declare any uses, present or future, certain or contingent, which it was intended should, by the pervasive efficacy of the statute, be transmitted into legal estates. In Virginia these deeds were never much used. Whether, under the operation of the limited statute of uses in force, they were effectual to transfer the estate to any person other than the lessee, need not now be considered." Ocheltree *v.* McClung, 7 W. Va. 232.

If tenant for life by deeds of lease and release, under the statute of uses, conveys the fee, it creates no forfeiture. Pendleton *v.* Vandevier, 1 Wash. 381.

C. STATUTORY FORMS.

In both Virginia and West Virginia, statutes provide a form for deeds of conveyance. Va. Code, 1904, § 2437; W. Va. Code, ch. 72, § 1; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

The deeds provided for by the statutes do not supersede the deed of bargain and sale. They are still good, as before the statute. Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

III. Requisites and Validity.

A. COMPETENT PARTIES.

1. Grantor.

a. In General.

It is an elementary principle that every deed must have a grantor. Adams *v.* Medsker, 25 W. Va. 127; American Net, etc., Co. *v.* Mayo, 97 Va. 186, 33 S. E. 523.

b. Who May Be Grantor.

(1) Infants.

See generally, the title INFANTS.

(a) In General.

An infant, by reason of his general inability to make a valid contract, does not possess the requisite legal capacity to make a valid deed of conveyance. The deed of the infant, however, is not absolutely void, but only voidable, and it may be ratified or disaffirmed by him after attaining his majority. Birch *v.* Linton, 78 Va. 584; Darraugh *v.* Black-

ford, 84 Va. 509, 5 S. E. 542; Mustard *v.* Wohlford, 15 Gratt. 329; Wilson *v.* Branch, 77 Va. 65; Thomas *v.* Gammel, 6 Leigh 12; Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97; Gillespie *v.* Bailey, 12 W. Va. 70.

Where an infant sells his tract of land, puts the purchaser in possession, and executes a bond in a penalty with condition to make the title, the contract is voidable but not void. Mustard *v.* Wohlford, 15 Gratt. 329; Gillespie *v.* Bailey, 12 W. Va. 70.

An infant feme covert, joining her husband in a deed of lands, and acknowledging the same before justices, upon privy examination, duly made, certified and recorded, according to the statute of 1792, 1 Old Rev. Code, ch. 90, § 6, is nowise bound by such deed. Thomas *v.* Gammel, 6 Leigh 9.

(b) Ratification of Affirmance after Majority.

It is well settled that ratification or affirmance of a deed made during infancy, after the grantor has attained his majority, renders the deed as valid and binding upon him as if he had possessed the requisite capacity at the time it was made. Birch *v.* Linton, 78 Va. 584; Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542; Mustard *v.* Wohlford, 15 Gratt. 329; Thomas *v.* Gammel, 6 Leigh 9; Wilson *v.* Branch, 77 Va. 65; Gillespie *v.* Bailey, 12 W. Va. 70.

What amounts to an affirmance by an infant of his deed, seems still to be a subject of dispute, as to which there is a considerable conflict of authority. The prevailing opinion, however, seems to be not only that acts which would be insufficient to avoid a deed may amount to an affirmance of it, but that mere silence, for any length of time less than the statutory period, which would bar an action of ejectment, when unaccompanied by some act of a confirmatory nature, will not suffice for that purpose. Birch *v.* Linton, 78 Va. 588; Wilson *v.* Branch, 77 Va. 65; Gillespie *v.* Bailey, 12 W. Va. 70.

When a woman becomes of full age and discovert she may ratify a deed made while an infant. Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542.

The ratification may be implied, as by accepting a compensation allowed by a deed to which she, or her counsel for her, had consented. Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542.

(c) Disaffirmance after Majority.

aa. Right to Disaffirm.

On the other hand it is well settled that the deed of an infant may be avoided by his disaffirming it upon attaining full age. Birch *v.* Linton, 78 Va. 584; Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542; Mustard *v.* Wohlford, 15 Gratt. 329; Wilson *v.* Branch, 77 Va. 65; Thomas *v.* Gammel, 6 Leigh 9; Gillespie *v.* Bailey, 12 W. Va. 70.

An infant, who has sold his interest in land to a tenant in common with him, may bring a suit, after he has attained his majority, to set aside his contract of sale, and at the same time to partition the land in the same suit. Gillespie *v.* Bailey, 12 W. Va. 70.

bb. Time of Disaffirmance.

In General.—A disaffirmance of a deed made by an infant must be made within a reasonable time after attaining his majority. What is a reasonable time will depend upon the circumstances of the particular case. Wilson *v.* Branch, 77 Va. 65.

Infant Feme Covert.—If an infant, who is a married woman, makes an instrument voidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after coverture ended. Wilson *v.* Branch, 77 Va. 65; Thomas *v.* Gammel, 6 Leigh 9; Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542.

Where an infant executed a deed, and then married, and eighteen months after the death of her husband, and thirty-two years after attaining her majority she disaffirmed the deed, this was held a valid disaffirmance under

the circumstances of the case. Wilson *v.* Branch, 77 Va. 65.

M., an infant, conveys her land, and then marries, September, 1857, and with husband leaves the state. She comes of age April, 1858. She and her husband bring ejectment for her land September, 1876. She had been inert and silent, but absent, while grantee occupied and improved the land. Defendant relied on the statute of limitations. It was held, that she was entitled to disaffirm the deed after attaining majority, and her action was sufficient notice of disaffirmance. Without affirmance the deed was not valid. Mere silence or inertness did not affirm it. Considering her claim accrued September, 1857, it was not barred when asserted by her in September, 1876, as she was entitled to fifteen years plus the period from April 17th, 1861, to March 2d, 1866, within which to enter or sue. Birch *v.* Linton, 78 Va. 584.

Instructions suggesting that Va. Code, 1873, ch. 146, §§ 4, 5, curtails infant's time of making entry on, or of suing for land, from fifteen to ten years, is erroneous. Those sections enlarge such time, by giving fifteen years in any event or ten years from disability removed. Birch *v.* Linton, 78 Va. 584.

cc. Necessity of Notice of Disaffirmance.

No notice of disaffirmance is required by the infant. Birch *v.* Linton, 78 Va. 584.

dd. What Constitutes a Disaffirmance.

Entry or Action.—Entry or action by the infant after majority is a sufficient disaffirmance. Birch *v.* Linton, 78 Va. 584.

Sale to Another Person after Majority.—Where the infant on coming of age, sells the land to another person, and executes to him a bond in a penalty with condition to make the title, this is an avoidance of the first contract. Mustard *v.* Wohlford, 15 Gratt. 329.

The effect of the sale after coming of age, is to render the first contract void; to extinguish any interest in law or equity which the first purchaser may have acquired under it; and to entitle the vendor or the second purchaser in his name to recover possession of the land at law; and hold it free from any equity of the first purchaser. Mustard *v.* Wohlford, 15 Gratt. 329.

Though the second purchaser purchase with knowledge of the first purchase from the infant, he is not affected thereby; the same having been disaffirmed and avoided by the second sale. Mustard *v.* Wohlford, 15 Gratt. 329.

ee. Effect of Disaffirmance.

Right of Infant to Recover Property.—If an infant after coming of age disaffirm a sale made by him whilst an infant, he becomes reinvested with the title to the property, and may demand and recover it not only from his vendee, but from any other person who may have it in possession, though he be a purchaser from his vendee. Mustard *v.* Wohlford, 15 Gratt. 329.

Right of Purchaser to Recover Consideration.—If an infant after coming of age avoids his contract for the sale of his property, and sues to recover it, the purchaser is entitled to recover the consideration received by the infant, or so much of it as may then remain in his hands in kind. Mustard *v.* Wohlford, 15 Gratt. 329.

But in case of a contract executory on his part, if he has during infancy wasted, sold or otherwise ceased to possess the consideration, and has none of it in his hand in kind on his arrival at age, he is not liable therefor; and may recover the property sold by him without accounting for the consideration received. Mustard *v.* Wohlford, 15 Gratt. 329.

Accounting by Purchaser for Rents and Profits.—Though under certain circumstances a person, who had

bought land of an infant, might be entitled to have the purchase money paid by him to the infant refunded, when the contract is avoided by the infant, after he attains his majority; yet as he would have to account to the infant for the rents and profits of the land while in his possession, if the record discloses that such rents and profits must greatly exceed the purchase money paid and interest, and the vendor does not ask for the settlement of such account, though ordered, the purchaser can not in the appellate court assign as error, that the court below did not take an account charging him with the rents and profits, and crediting by such purchase money (an order, too, which had remained unexecuted twenty-two years), before it rendered a final decree vacating the sale and putting the vendor in possession, as the vendee is not prejudiced by such failure to settle such account. Gillespie *v.* Bailey, 12 W. Va. 70.

(d) Evidence of Infancy.

Where the issue was whether a married woman who had executed a deed was at the time a minor, she may, under § 27, ch. 63, W. Va. Code, introduce in her own behalf an abstract of her marriage license which sets forth her age at that time. Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

(2) Persons of Weak or Unsound Mind.

See generally, the title INSANITY.

(a) In General.

It has been said that it requires more capacity to make a valid deed, than it does to make a valid will. Jarrett *v.* Jarrett, 11 W. Va. 584.

Where legal capacity is shown to exist in the grantor, and he has sufficient understanding to clearly comprehend the nature of the business, and consented freely to the special matter upon which he was engaged, no fraud or undue influence appearing, the validity of the deed cannot be impeached. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made, with the full assent of the grantor, that must control the judgment of the court. Jarrett *v.* Jarrett, 11 W. Va. 627; Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516.

But although the grantor or testator may labor under no legal incapacity to do a valid act or make a contract, yet if the whole transaction taken together with all the facts, mental weakness being one of them, shows that the particular act was not attended with the consent of his will and understanding, it is void. Greer *v.* Greers, 9 Gratt. 330.

In Greer *v.* Greers, 9 Gratt. 330, two deeds were made by an old man shortly before his death, by which he conveyed the whole of his property, which he had not before disposed of, to one of his sons. It was held, that the principles which are applicable to last wills, in respect to the state of mind and degree of capacity sufficient to make a valid devise, were equally applicable to the case of this grantor; and the grantor not laboring under a total or temporary deprivation of reason, was of legal capacity to make a valid disposition of his property, if he was capable of recollecting the property which he was about to dispose of, the manner of distributing it, and the objects of his bounty.

Deed of a Weak-Minded Grantor to a Child for Benefits Received.—The rule is well settled that a court of equity will not avoid a conveyance when made by one, who though weak and in feeble health, is not of unsound mind, where he deliberately disposes of his property to a child in consideration of the latter's undertaking to provide for his support, if it appears that he was aware of the consequences of his act, and that it could not be recalled. The fact that the act was done by reason of the influence resulting from affection and attachment, or the

mere desire to gratify the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

(b) When Capacity Must Exist.

The point of time to be looked to by the court or jury, in determining the competency of a grantor to make a deed, is that when the deed was executed. Anderson *v.* Cranmer, 11 W. Va. 562; Jarrett *v.* Jarrett, 11 W. Va. 584; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Nicholas *v.* Kershner, 20 W. Va. 251; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246; Beckwith *v.* Butler, 1 Wash. 224; Beverley *v.* Walden, 20 Gratt. 147.

(c) Presumption as to Capacity.

It is a familiar and well-settled rule of law that the legal presumption is that all men are sane and the burden of proof is on him who alleges unsoundness of mind in an individual. It is therefore presumed that the grantor in a deed was sane and competent to execute it, until the contrary is shown. Miller *v.* Rutledge, 82 Va. 867, 1 S. E. 202; Porter *v.* Porter, 89 Va. 118, 15 S. E. 500; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Snodgrass *v.* Knight, 43 W. Va. 294, 27 S. E. 233; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Eakin *v.* Hawkins, 48 W. Va. 373, 37 S. E. 622.

"This presumption is universal, and is not defeated by common report or reputation, or the imputation of friends or relatives or the old age or feebleness of the subject, or, in short, by any cause except controlling evidence produced." Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383.

Shortly after his liberation from lunatic asylum "as restored," grantor, a childless man, granted his entire property to his wife, to whom he attributed his success, and was much attached. This he did according to his previously declared intentions and repeated subsequent references. Ten years afterwards he committed suicide. The evidence as to his mental condition conflicted; but there was no evidence of any incompetency at the time he executed the deed. Eccentricities were proved; but many of the witnesses thought him sane and capable. It was held, that, as the evidence does not show any continuous and chronic insanity, but only a temporary derangement, from which the records of the asylum show he had recovered, the burden of proof is on the party attacking the deed, to prove insanity at the time the deed was executed, and that has not been done. Cropp *v.* Cropp, 88 Va. 753, 14 S. E. 529.

If, however, a previous state of insanity has been established, the burden of proof is shifted to him, who claims under the deed. Anderson *v.* Cranmer, 11 W. Va. 562; Jarrett *v.* Jarrett, 11 W. Va. 584; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

(d) Rule as to Old Age and Eccentricities.

Old age is not of itself sufficient evidence of incapacity to make a deed. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Jarrett *v.* Jarrett, 11 W. Va. 584; Kerr *v.* Lunsford, 31 W. Va. 661, 8 S. E. 493; Anderson *v.* Cranmer, 11 W. Va. 562; Hiett *v.* Shull, 36 W. Va. 563, 15 S. E. 146.

A grantor in a deed may be extremely old, his understanding, memory and mind enfeebled and weakened by age, and his actions occasionally strange and eccentric, and he may not be able to transact any affairs of life, yet, if age has not rendered him imbecile so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it. Buckey *v.*

Buckey, 38 W. Va. 168, 18 S. E. 383; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

(e) Capacity of Uneducated Deaf Mute.

In Morrison *v.* Morrison, 27 Gratt. 190, the deed of an uneducated deaf and dumb man acknowledged before a justice and recorded, was sustained upon proof that the deed was explained to him, and that he was believed to understand it; there being no evidence of any fraud on the part of the grantee.

(f) Capacity of Habitual Drunkard.

A person reduced to a state of mental imbecility by habitual intoxication, makes a voluntary and irrevocable deed of gift of his whole estate, to a cousin german, to the disherison of his half sisters, reserving the use to the donor for life, without any reasonable motive assigned for such an act. It was held, that fraud and imposition may be inferred from the circumstances, and from the very nature of the contract; and this deed of gift is fraudulent and void. Samuel *v.* Marshall, 3 Leigh 567.

In such cases, drunkenness, if produced by the donee, or if so extreme, that the party did not know what he was about, is a material circumstance in deciding on the validity of the contract; and imbecility of mind, however produced, combined with other ingredients, and particularly, with the absence of consideration, has always an important influence on the question of the validity of contracts. Samuel *v.* Marshall, 3 Leigh 567.

An habitual drunkard died from brain softening shortly after executing certain deeds. His physician, landlord, neighbors and intimates testified that he was mentally incapable of transacting business. Witnesses, relatives and friends, living at a distance, merely expressed opinion to the contrary without giving reasons. The beneficiaries, his most trusted friends, assisted him in executing the deeds; one was his own cousin, possessing over him unbounded influence. There was no consideration, and existence of the deeds was cancelled from grantor's family and counsel. It was held, that the deeds should be cancelled. Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792. See the title DRUNKENNESS.

(g) Evidence as to Capacity.

See the title EVIDENCE.

Evidence of Witnesses Present at Execution of Deed.—"The evidence of witnesses present at the execution of a deed is entitled to peculiar weight." Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. 383; Jarrett *v.* Jarrett, 11 W. Va. 584; Anderson *v.* Cranmer, 11 W. Va. 562; Nicholas *v.* Kerchner, 20 W. Va. 251; Beverley *v.* Walden, 20 Gratt. 147; Beckwith *v.* Butler, 1 Wash. 224; Gilliam *v.* Perkinson, 4 Rand. 325; Fransworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246.

A party sought to set aside a deed made by him, alleging that he was of unsound mind at the time of making the deed, and was therefore incapable of making a valid contract. It was held, that the testimony of witnesses who were present at the making of the deed, and the written acts of the party attesting his capacity, were more to be considered and relied upon than the opinions of the witnesses, based upon facts which might have been true, and yet which might not have been the result of unsoundness of mind. Beverley *v.* Walden, 20 Gratt. 147.

The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight, in considering the grantor's capacity. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

Testimony of Grantor's Physicians.—The evidence of physicians, especially those who attended the grantor, and who were with him considerably during the time it is charged that he was of unsound mind, is entitled to great weight. Next to physicians and those who were present at the execution of the deed, are those whose intimacy in

the family has given them an opportunity of seeing the party at all times, and watching the operations of his mind. Jarrett *v.* Jarrett, 11 W. Va. 584.

Declarations of Grantor.—The declarations of a testator, or grantor, made either before, or after the execution of the instrument, are admissible evidence, where the issue involves the mental capacity of the testator, or grantor, at the time the instrument was executed, or undue influence exerted over him at that time. Dinges *v.* Branson, 14 W. Va. 100.

If under any circumstance such a declaration should be rejected because too remote from the execution of the instrument, before they would be rejected, the record would have to show when, and the circumstances under which, they were made. Dinges *v.* Branson, 14 W. Va. 100.

Where a father has made a voluntary conveyance to his son of a part of his estate, and a contest arises subsequent to the father's death, as to the competency of the father to make the deed, and as to whether undue influence was exerted over him by the grantee to induce him to make it, the declaration of the grantor, both before and after the execution of the deed, are admissible, the same as if the contest was about a will devising the same estate. Dinges *v.* Branson, 14 W. Va. 100.

Opinions of Nonexperts.—Evidence of nonprofessional witnesses is admissible in such cases. Cropp *v.* Cropp, 88 Va. 753, 14 S. E. 529.

But mere opinions of witnesses, not expert, as to sanity and competency to do a given act, are of little weight, unless based on facts which give good reason for such opinions; and, if the facts are frivolous or unimportant, the opinions of such witnesses, based upon them, are of little weight. Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246; Jarrett *v.* Jarrett, 11 W. Va. 584. See the title EXPERT AND OPINION EVIDENCE.

(3) Husband and Wife.

See the titles HUSBAND AND WIFE; SEPARATE ESTATE OF MARRIED WOMEN.

(a) Capacity of Married Women.

aa. At Common Law.

At common law the execution of a deed by a married woman was entirely inoperative. Laughlin *v.* Fream, 14 W. Va. 333.

Conveyances between Husband and Wife.—In consequence of the unity of person between the husband and wife, neither could grant to the other an estate to take effect in possession during the coverture. Lit., § 168. But although such conveyance was void at law, a court of equity was not precluded under certain circumstances, from giving effect to it. Jones *v.* Obenchain, 10 Gratt. 262. See the title HUSBAND AND WIFE.

bb. Under Statutes.

aaa. Former Statutes.

At an early date, statutes were enacted in Virginia, permitting a married woman to convey her real estate, by her husband joining in the deed, and upon compliance with certain statutory provisions as to the method of acknowledgment. It was held, that the mode prescribed by statute, whereby married women might part with real estate, or any interest therein, was specific, imperative and indispensable, allowing of no deviation; and no defective execution of a deed of a feme covert could be set up, cured or affected, by a court of equity. Wynn *v.* Louthan, 86 Va. 947, 11 S. E. 878; Hairston *v.* Randolph, 12 Leigh 445; Bolling *v.* Teel, 76 Va. 487. See also, First Nat. Bank *v.* Paul, 75 Va. 594; Grove *v.* Zumbro, 14 Gratt. 501; Withers *v.* Carter, 4 Gratt. 414; Rorer *v.* Roanoke Nat. Bank, 83 Va. 589, 4 S. E. 820.

Where by deed of July 31, 1875, which was defective in execution and acknowledgment, married woman sold and conveyed her maiden land, and after her death, her heirs recovered it

in an action wherein the deed was adjudged to be void, it was held, that the purchaser can not compel either specific performance, or a return of the purchase money, by her heirs. Wynn *v.* Louthan, 86 Va. 946, 11 S. E. 878.

As to acknowledgment of deeds by married women, see the title ACKNOWLEDGMENTS, vol. 1, p. 112.

Necessity for Husband to Join in Deed.—It was held, that the deed of a feme covert, to be valid, must be executed by the husband also. Sexton *v.* Pickering, 3 Rand. 468; George *v.* Hess, 48 W. Va. 534, 37 S. E. 564.

A married woman, not living separate and apart, but with her husband, undertook, by deed dated April 20, 1878, to sell and convey a certain tract of land, part of her real estate, to two of her sons, without her husband joining in such deed. It was held, that said pretended deed was wholly ineffectual to divest the grantor, of her ownership of such land, and did not pass any interest therein, legal or equitable, to the said grantees. Austin *v.* Brown, 37 W. Va. 634, 17 S. E. 207.

It was held, that if it appeared by sufficient evidence, that the deed was executed by a feme covert, it would be completely valid as to her, if it appears by the testimony of even a single witness, that it was executed by the husband also. Sexton *v.* Pickering, 3 Rand. 468.

bbb. Present Statutes.

It is provided by statute, in Virginia, that "a married woman may contract and be contracted with, sue and be sued, in the same manner and with the same consequences as if she were unmarried, whether the act or liability asserted by or against her shall have accrued before or after the passage of this act." (Acts 1899, 1900, p. 1240.) Augusta Nat. Bank *v.* Beard, 100 Va. 697, 42 S. E. 694.

(b) Necessity of Joinder of Wife in Deed Conveying Husband's Land.

The effect of a wife uniting with her husband in a deed is not to vest any estate in the grantee, separate and distinct, from that conveyed by the husband, but simply to relinquish a contingent right in the nature of an encumbrance upon the land conveyed, which if not so relinquished, would attach and be consummate upon the death of her husband. Corr *v.* Porter, 33 Gratt. 278; George *v.* Hess, 48 W. Va. 534, 37 S. E. 564. See the title DOWER.

Necessity for Wife's Name to Appear in Granting Clause.—If a deed be signed and sealed by a married woman and her husband, and the certificate of her acknowledgment is in due form, yet if she is not on the face of the deed one of the grantors therein, such deed is inoperative to convey any interest she may have in the real estate conveyed thereby, or to relinquish her contingent right of dower in the lands therein named. Laughlin *v.* Fream, 14 W. Va. 322.

Effect of Deed of Husband and Wife Void as to Wife.—When a husband unites in a deed though it may be void as to the wife for a fatal defect in the certificate, yet the grantee may elect to take the husband's interest in the land in full satisfaction of the contract, unless it can be shown for some other cause that the deed is also void as to the husband. Watson *v.* Michael, 21 W. Va. 568.

(c) Conveyance of Wife's Separate Estate.

A deed from a married woman for her separate real estate signed and acknowledged by the husband, is good, though he is not named as a grantor or otherwise in the body of the deed; but it is not good unless acknowledged by both. Morgan *v.* Snodgrass, 49 W. Va. 387, 38 S. E. 695. See the title SEPARATE ESTATE OF MARRIED WOMEN.

(4) Agents and Attorneys.

See the titles AGENCY, vol. 1, p. 240; POWERS.

Manner of Conferring Authority.—It is a general rule that one acting under a power of attorney can not execute a deed for his principal unless the power of attorney be sealed. The authority must be equal in dignity and solemnity with the things to be done. Preston *v.* Hull, 23 Gratt. 600; Hotchkiss *v.* Middlekauf, 96 Va. 649, 32 S. E. 36; Campbell *v.* Fetterman, 20 W. Va. 398; Coker *v.* Wynne, 1 Va. Dec. 305.

But it has been held, that a blank in a deed left for grantee's name may be filled by agent under authority given by parol by the maker of such deed. Lafferty *v.* Lafferty, 42 W. Va. 783, 26 S. E. 262.

A deed purporting to be made by an attorney in fact of a husband and wife for them, but whose power of attorney was defectively acknowledged as to the wife, was nevertheless held a valid deed as to the husband. Shanks *v.* Lancaster, 5 Gratt. 110.

Construction of Authority.—Powers of attorney are to be construed strictly, and though the intention of the parties is to be considered in construing the language used, the authority of the attorney is never to be considered greater than warranted by the language of the instrument or indispensable to the effective operation of such authority. Therefore, a power of attorney which simply authorized the attorney to demand and receive all real and personal property of the principal, was held not to confer authority upon him to sell the real estate of the principal and make a deed for the same. Such deed was held void. Hotchkiss *v.* Middlekauf, 96 Va. 649, 32 S. E. 36.

Manner of Signing.—No particular form of words is necessary in the signature of a deed by an attorney in fact, provided the act be done in the name of his principal. It was therefore held to be immaterial whether the attorney signed it "B. W., attorney for R. C.," or "R. C. by B. W., his attorney." Jones *v.* Carter, 4 Hen. & M. 184.

Execution of a deed by an attorney in fact for his principal is sufficient, if he sign the name of the principal with the seal annexed, stating it to be done by him as attorney for the principal; or if he sign his own name with a seal annexed, stating it to be done for the principal. Shanks *v.* Lancaster, 5 Gratt. 110; Bryan *v.* Stump, 8 Gratt. 241.

A deed made by an attorney in fact for his principal, and properly executed as a deed, of his principal, was held a deed of the principal, although in the body of the deed the attorney warranted the land, but did so for, or on the part of, and by the authority of his principal, as conferred by his power of attorney. Shanks *v.* Lancaster, 5 Gratt. 110.

A deed for the conveyance of land, purporting to be made by A., attorney in fact for B., witnessed "that the said attorney in fact, A., for and in consideration, etc., doth release and quitclaim," etc., and concluded, "in testimony whereof the said B. hath hereunto set his hand and seal," but it was signed with the name of A. (not styled attorney), the scroll being annexed to the signature. It was held, that this was not the deed of B., and did not convey his title to the land. Martin *v.* Flowers, 8 Leigh 158.

Whether Deed Must Recite Agent's Authority.—In making a deed in execution of, or in pursuance of a power, it is not always necessary to recite the power therein, but it is the better and safer practice to do so. Smith *v.* Henning, 10 W. Va. 596.

Effect of Express Power to Agent to Delegate Authority.—Where a power of attorney is given to appoint other attorneys, the second attorney must be authorized to act in the name of the original donor of the power, and not in the name of the first attorney. Where the second attorney is only authorized to act in the name of the first, a deed for land belonging to the donor of the power,

made by him, is not valid to pass the land. Stinchcomb *v.* Marsh, 15 Gratt. 202.

Effect of Excess of Authority as to Warranty to Be Inserted.—A deed executed by an attorney in fact, purporting to convey real estate with general warranty, under a power of attorney authorizing only a quitclaim deed, has the effect to quitclaim on the part of the principal although he is not bound by the warranty. Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

Presumption as to Authority after Lapse of Time.—A deed having been executed by a person professing to act under a power of attorney from the owner of the land conveyed, and a sufficient time having since elapsed to bar a writ of right, without any claim having been made by the original owner or his heirs, it was held, that a presumption amounting to full proof arose, that the person professing to act under the power was duly authorized to execute the deed. Goodwin *v.* McCluer, 3 Gratt. 291.

Effect of Death as Revoking Power.—A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is a power of sale coupled with an interest and is, therefore, incapable of being revoked by the death of the grantor. McNeill *v.* McNeill, 43 W. Va. 765, 28 S. E. 717.

(5) Partners.

See the title PARTNERSHIP.

In General.—One partner can not in general bind his copartner by deed, so as to make it operative in law as a deed. McCollough *v.* Sommerville, 8 Leigh 415.

Lease by One Partner.—A deed of lease with covenants, was executed by one partner in the partnership name. It was held, that though the deed was not obligatory upon his partners, yet, the agreement for the lease for the use of the partnership, of which the deed was intended as evidence, was binding on the partnership, and was not extinguished by the deed. Kyle *v.* Roberts, 6 Leigh 495.

Deed of Assignment under Seal.—It has been held, that an assignment by one partner of the effects of a firm, which would be lawful if there were no seal, will not be allowed in equity to be defeated by the circumstance of a seal being annexed to the instrument. McCollough *v.* Sommerville, 8 Leigh 415.

Conveyance of Partnership Realty to Secure Firm Debt.—A conveyance by one partner of an undivided moiety of real estate owned by the partnership, in trust to secure a creditor of the partnership, passes a good title both at law and in equity to such moiety, and such creditor is entitled to priority over all other creditors of the firm. Jones *v.* Neale, 2 Pat. & H. 339.

Conveyance of Partnership Realty to Secure Individual Debt.—But when such property is conveyed by one partner in trust to secure his individual creditors, the property remains subject to the payment of the partnership debts. Jones *v.* Neale, 2 Pat. & H. 339.

(6) Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS.

A testator having a leasehold estate producing a yearly rent, bequeaths to his father $50 per annum during his life, to be paid out of the rent, and to his wife one half, and to his daughter the other half, of the rent remaining after paying the legacy to his father. The wife is appointed executrix, and qualifies as such. Afterwards she sells the leasehold estate, and makes a deed in her individual name (not calling herself executrix) transferring to the purchaser all her right, title, interest and property in the premises. On a bill by the daughter against the purchaser, it was held, that the execution of the deed by the executrix in her individual name does not prove that the act was done in the character of legatee, and she must be considered as holding as

executrix at the time of the deed, unless there be evidence establishing that she had previously taken as legatee. Burchard *v.* Wright, 11 Leigh 463.

(7) Trustees.

Where a deed in its body shows that the grantor conveys in the character of trustee, the deed is good as a deed from such trustee, though his signature has not added to it the word "trustee." Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

A testator appointed one of his sons a trustee to receive and hold for the wife and children of another son the share of the estate which would go to that son. Subsequently a suit was instituted in a county court for the purpose of having a partition of the lands of the testator, and with the additional prayer that if deemed advisable the parcel of said wife and children be sold and the proceeds reinvested. Acting under decree of the county court the trustee sold the land of the wife and children for a fair price, conveyed it to the purchaser, and transmitted the money to Missouri, where the wife and children resided, and invested it in a tract of land which was conveyed to them—the husband and father of the children having meanwhile died. The grantees knew that the Missouri land was purchased with the proceeds of the sale of the Virginia land. The trustee acted in good faith in making the sale and conveyance. Eighteen years after receiving the deed to the Missouri land and nearly four years after the youngest child had become of age, and after the trustee had become insane, and the Virginia lands had been aliened to various persons who had greatly improved them and erected costly buildings thereon, this suit was instituted by the widow and children to recover the lands, without offering to return the money invested in the Missouri land. It was held, that without passing on the effect of the proceedings in the county court, the deed from the trustee passed the legal title to the purchaser, and was a voidable, and not a void, transaction, and capable of being validated by subsequent acquiescence and ratification of those interested. The parties in interest have acquiesced in, and ratified the transaction, and can not now ask to have the same set aside. McClanahan *v.* Ronanoke Iron Co., 95 Va. 552, 28 S. E. 955. See the title TRUSTS AND TRUSTEES.

Trustee in Deed to Secure Debts.—A deed made by a trustee under a power of sale in a deed of trust, conveys, an absolute estate in a court of law, whether the conditions of the trust deed have been complied with or not. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Taylor *v.* King, 6 Munf. 358; Harris *v.* Harris, 6 Munf. 367.

The burden of proof is on a purchaser from the personal representative of a trustee in a deed of trust to show that the conditions made a prerequisite to the exercise of the power of sale have been complied with. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232. See the title MORTGAGES AND DEEDS OF TRUST.

(8) Guardians.

See the title GUARDIAN AND WARD.

The deed of a guardian conveying the real estate of his ward is of no obligatory force upon the ward. It is void on its face. An infant can not empower an agent or attorney to act for him in the conveyance of his lands; nor can he, on coming of age, affirm what one has assumed to do for him, for he can not ratify a void act, or one that he could authorize. Dellinger *v.* Foltz, 93 Va. 729, 25 S. E. 998.

(9) Joint Tenants and Tenants in Common.

See the title JOINT TENANTS AND TENANTS IN COMMON.

Effect of Former Joint Tenants Joining in Deed with Others.—A person who once had an interest as joint ten-

ant with others in land, and whose interest has passed from him, can not effectually unite with his former cotenants in a deed of partition; and such deed, for want of mutuality and consideration, will not bar the representative of such cotenant from afterwards having a partition under the law. Patterson *v.* Martin, 33 W. Va. 494, 10 S. E. 817.

Conveyances between Joint Tenants.—A release, and not a feoffment, is the proper form of conveyance by one joint tenant to another. Buchanan *v.* King, 22 Gratt. 414.

Conveyance by One of Several Tenants in Common.—A tenant in common has power to convey his undivided interest and a deed from a tenant in common carries to the grantee only an undivided interest in the property, no matter by what description the property is conveyed. Woods *v.* Early, 95 Va. 307, 28 S. E. 374; Worthington *v.* Staunton, 16 W. Va. 208; Parker *v.* Brast, 45 W. Va. 399, 32 S. E. 269; Boggess *v.* Meredith, 16 W. Va. 1; Talbott *v.* Woodford, 48 W. Va. 449, 37 S. E. 580; Robinett *v.* Preston, 2 Rob. 273; Cox *v.* McMullin, 14 Gratt. 82.

It is well settled that a conveyance by metes and bounds of part of an estate held in common, though valid against the grantor, can not prejudice the rights of the cotenants, unless followed by entry and adversary possession. The grantee becomes thereby merely a tenant in common with the cotenants of his grantor; his possession is in presumption of law, the possession of all, and is to be deemed in support and not in derogation of the common title. Buchanan *v.* King, 22 Gratt. 414; Robinett *v.* Preston, 2 Rob. 273; Hannon *v.* Hannah, 9 Gratt. 146; Worthington *v.* Staunton, 16 W. Va. 208.

A deed from a cotenant for part of land held in common, can not in any way operate to the prejudice of the other tenants in common. They have the right to have the land partitioned unaffected by such deed. Such deed will become operative and pass the land to the grantee, if the other tenants in common confirm and ratify it before partition, or after the partition if that portion is allotted to the purchaser thereof, and in either case such deed will be binding on both grantor and grantee. Worthington *v.* Staunton, 16 W. Va. 208.

C. and K. are joint tenants of land. C. purchases a large tract which includes the land held jointly, and takes the conveyance to himself; and he sells and conveys part of the large tract including the land held jointly. The gantee in this deed is tenant in common with the cotenant of his grantor; and his possession is in presumption of law, the possession of all, and is to be deemed in support; and not in derogation of the common title. Buchanan *v.* King, 22 Gratt. 414.

Conveyances between Tenants in Common.—A feoffment, and not a release, is the proper assurance between tenants in common. Buchanan *v.* King, 22 Gratt. 414.

(10) Corporations and Corporate Officers.

As to sealing, see post, "Sealing," III, D, 2.

In General.—Where the charter of a corporation provided that its real estate should only be conveyed as other real estate, it was held, that the legal title could only pass by deed from the corporation. Barksdale *v.* Finney, 14 Gratt. 338.

Execution by Officers and Agents.—The president of a corporation is the proper party to execute a deed for the corporation, and a deed executed by the president under the seal of the corporation is a valid deed. Merchants' Bank *v.* Goddin, 76 Va. 503.

Where the deed of a corporation was signed by the corporation, by its president, with the corporate seal affixed, and the certificate of the notary stated

that "Thomas L. Rosser, president, whose name is signed to the writing hereto annexed," acknowledged the same before him in his county, this was held a sufficient execution of the deed by the corporation. Banner *v.* Rosser, 96 Va. 238, 31 S. E. 67.

In Rauch *v.* Oil Co., 8 W. Va. 36, a paper which purported to be the deed of a corporation, and which recited the corporation as grantor, but which was signed and sealed by the president in his own name without the seal of the corporation being attached, was held not to be a valid deed of the corporation.

It is competent for a joint stock company to execute a deed by an agent duly empowered and authorized to do the act. Burr *v.* McDonald, 3 Gratt. 216.

(11) Persons Out of Possession.

See the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 773.

(12) Life Tenant Whose Seisin Is Barred.

The deed of a life tenant, whose seisin is barred by the statute of limitations, is inoperative, and conveys no title. Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121.

The reversioner or remainderman who takes such deed from the life tenant can not maintain a suit for the possession of the property involved during the continuance of the life tenancy. Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121. See also, the titles CHAMPERTY AND MAINTENANCE, vol. 2, p. 773; ESTATES.

2. Grantee.

To every grant it is essential that there should be a grantee, as well as a grantor; and the grantee must, when the grant is made, be in esse and capable of receiving; otherwise the grant is void. Blankenpickler *v.* Anderson, 16 Gratt. 61; American Net, etc., Co. *v.* Mayo, 97 Va. 182, 33 S. E. 523.

If the grantee in a patent for land was dead at the time the grant issued, the patent is void. Blankenpickler *v.* Anderson, 16 Gratt. 59.

Where in suit in chancery a special commissioner was directed by decree to make a deed of conveyance to "the purchasers or their vendees," one of whom was dead at the time, and in pursuance thereof the deed was executed, it was held, that in action of ejectment, the deed was properly admitted in evidence in behalf of one claiming under the deceased grantee. Pugh *v.* McCue, 86 Va. 475, 10 S. E. 715.

B. CONSIDERATION.

1. Effect of Want of Consideration.

A defendant being party or privy to a deed, can not avoid it, in a court of common law, by parol evidence, on the ground of want of consideration; for he is estopped from averring such matter against a specialty. Taylor *v.* King, 6 Munf. 358.

2. What Constitutes a Sufficient Consideration.

a. Adequacy of Consideration in General.

Mere inadequacy of consideration, in the absence of fraud, will not invalidate a conveyance. Tebbs *v.* Lee, 76 Va. 744; Mayo *v.* Carrington, 19 Gratt. 74; George *v.* Richardson, Gilmer 230; Jarrett *v.* Jarrett, 11 W. Va. 584; Dryden *v.* Stephens, 19 W. Va. 1; Deem *v.* Phillips, 5 W. Va. 181.

When a sale has been made under a deed of trust, and the grantee under the deed from the trustee has sold the land to an innocent purchaser for value, the sale will not be set aside, on the ground that the price, for which it was sold, was grossly inadequate. Dryden *v.* Stephens, 19 W. Va. 1.

It was held, that any valuable consideration, however small, was sufficient to support a deed of bargain and sale. Ocheltree *v.* McClung, 7 W. Va. 232.

Inadequacy Must Be so Gross as to Shock the Conscience.—The well-established doctrine is that, where there

is no actual fraud, and no confidential or fiduciary relations between the parties, mere inadequacy of consideration is not sufficient to rescind a sale, unless it be so great as to shock the moral sense of mankind. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Mayo *v.* Carrington, 19 Gratt. 74.

Inadequacy Must Exist at Date of Deed.—The inadequacy must be established as of the date of the contract, and if there were not at that date such inadequacy as has been described, none can be considered which may arise from subsequent enhancement, depreciation or change of circumstances. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

Contracts of Hazard.—In reference to contracts of hazard, the factor of risk and hazard is such a disturbing element in the estimation of value that courts of equity, when inadequacy alone is in question, will refuse to interfere. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

Inadequacy of Consideration Coupled with Unfair Advantage.—Inadequacy of price, whether it be so gross as to be per se proof of fraud or not, if attended by circumstances evincing unconscientious advantage taken by vendee of improvidence and distress of vendor, will avoid the contract in equity, though it be a contract executed. McKinney *v.* Pinckard, 2 Leigh 149.

Whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside, since from these circumstances, imposition or undue influence will be inferred. Fishburne *v.* Ferguson, 84 Va. 87, 4 S. E. 575.

While mere inadequacy of price or consideration is not of itself sufficient to set aside or annul a contract, yet such consideration may be so completely and grossly so, that a court of equity will grant relief against it by rescinding it altogether. The degree of adequacy to produce such a result is not well defined or easy to determine, and the precise boundary between the two classes of cases is not well settled. It has been said that to induce a court of equity to annul a deed or contract on account of inadequacy of consideration, it must be so gross that upon first blush it "shocks the conscience" and produces an exclamation of surprise and reprobation in different persons. Deem *v.* Phillips, 5 W. Va. 181.

"We have before us the case of a man in his extreme old age, physically and mentally impaired by age and disease, and tending, to say the least, strongly to mental and bodily imbecility, making a contract by which, without any necessity, and to the disinheritance of his other children and heir, he sells his whole estate in fee simple, worth, as we see, some six thousand dollars, the consideration being maintenance and support for the very few brief years remaining to him; while it is shown that the use or income of the estate contracted to be sold was fully equivalent to such maintenance and support, the same being the only consideration paid or to be paid by the grantee of such estate. It seems to me, if such a case should fail to shock the senses and to produce exclamations of surprise and reprobation in different persons, it would be difficult to suggest one that could produce such a result. Upon the whole case, therefore, I must concur in the opinion of the learned judge of the circuit court, in holding that such a case as the one before us ought not to be approbated or permitted to stand in a court of conscience." Deem *v.* Phillips, 5 W. Va. 181.

b. Valuable Consideration.

(1) "One Dollar."

One dollar, viewed as a consideration, is as much a valuable consideration as a million dollars. This is not the case of a deed purporting to be for a good consideration only. Harvey *v.* Alexander, 1 Rand. 233; Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 800; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

(2) Support and Maintenance.

See the title CONTRACTS, vol. 3, p. 369.

A conveyance of property in consideration of an agreement to support the grantor is not regarded in law as merely voluntary. As it is impossible to foretell how long the grantor may live, or what expense the grantee may necessarily incur in maintaining him, the courts will not undertake to pronounce the consideration inadequate; unless indeed it is manifest that the services to be rendered and the expense to be incurred are grossly disproportionate to the value of the property. Such agreements are therefore treated as founded upon a valuable consideration. And consequently they are only fraudulent so far as the grantee is concerned, when mala fides is justly attributable to him. No rule is better settled than that both parties must concur in the fraudulent intent. The fraudulent design of the grantor, if unknown to the grantee, will not infect the latter with a want of good faith. Henderson *v.* Hunton, 26 Gratt. 933.

A bona fide deed, in consideration of future support, though voidable at the suit of creditors, is not void. The legal title vests in the grantee by operation of the deed, good against all the world, except creditors; subject to be divested by them if they impeach it in due time. But the title remains in the grantee until the deed is vacated; and when vacated, it is not void ab initio, but only from the time of the decree. Henderson *v.* Hunton, 26 Gratt. 933, holding that where the amount paid by the grantee is so near the value of the property, the bill should be dismissed.

"An agreement for future support, while it is a valuable consideration, is not sufficient to sustain a conveyance, when to do so will operate to the prejudice of the grantor's existing creditors." Hanna *v.* Charleston Nat Bank, 55 W. Va. 185, 46 S. E. 920.

Effect of Restraint on Alienation by Grantee.—Among others, a deed from a father to a daughter conveying her his property, contains the following stipulations: "The further consideration of this deed is that the party of the second part, shall not dispose of said property during the lifetime of the party of the first part, without the written consent of the party of the first part, and that the party of the second part will furnish to the party of the first part a comfortable and proper support and maintenance during his natural life." Such stipulation renders such deed in law prima facie a nullity and void as to existing creditors, and it can not be sustained unless it is shown that the grantor retained a sufficient amount of property to satisfy his debts. Hanna *v.* Charleston Nat. Bank, 55 W. Va. 185, 46 S. E. 920.

"In the present case on the face of the deed itself, the future support is made a part of the consideration thereof and it is rendered thereby prima facie void as a matter of law. This can only be overcome by the grantee showing that the grantor reserved a sufficient amount of property to pay all his existing debts, the best evidence of which as heretofore said, is that all existing debts have been satisfied. The void character of the deed can not be cured by showing that the grantee had afterwards assumed and paid debts to the full value of the property conveyed." Hanna *v.* Charleston Nat. Bank, 55 W. Va. 190, 46 S. E. 920.

Effect of Agreement as Creating a Lien.—It is a well-settled rule that

where land is conveyed in consideration of the future support of the grantor, or in consideration that the grantee will pay him an annuity for life, such agreement as to the consideration, does not create a lien upon the land so conveyed. Brawley *v.* Catron, 8 Leigh 522; McCandlish *v.* Keen, 13 Gratt. 615; Crim *v.* Holsberry, 49 W. Va. 667, 26 E. E. 314.

Effect of Failure of Grantee to Support and Maintain.—See post, "Breach of Agreement to Support and Maintain Grantor," III, B, 4, c.

(3) Assumption of Grantor's Debts.

A wife, acting bona fide, may purchase property of her husband, and as a part of the consideration may assume the payment of his debts charged as liens on the property purchased. In the absence of fraud apparent on the face of the deed, or necessarily inferred from its terms, fraud will not be presumed, but must be proved with clearness and certainty. If it is charged that the price paid for the property is so inadequate as to amount to fraud, the burden of proving such inadequacy is on the party alleging it. In the case at bar the evidence does not establish fraud on the part of the wife. Stonebraker *v.* Hicks, 94 Va. 618, 27 S. E. 497.

A worthless husband, indebted to insolvency, in pursuance of an agreement that his wife would abandon her purpose to sue for a divorce, and that she and her sons would pay certain specified debts of the husband, which he asserted and they believed were all he owed, amounting to over $800, conveyed to a third person, who on the same day conveyed to the wife, real estate worth from $600 to $800. The wife and sons at the time assumed to pay, and afterwards, in good faith and without notice of any fraud, did pay off said debts. It was held, that the said conveyance is valid as against the creditors of the husband whose debts existed prior to and at the time of the conveyance, but of which the wife had no notice. Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799.

F. and his wife, I., conveyed 211 acres of land to W., their son, in consideration of love and affection, and the further consideration that he pay to R. J. M. $300, to A. M. $100, and to I. M. $100, and that he pay off and discharge all debts remaining against the grantors at the time of their death, or either of them, which deed W. accepted, and took possession of, and held the land thereunder. It was held, that W. was personally liable for the debts of the grantors, and that the land so conveyed to W. while held by him would be subjected by a court of equity to pay the debts of the grantors. Matheny *v.* Ferguson, 55 W. Va. 656, 47 S. E. 886.

(4) Release of Dower Interest.

A deed to a wife in consideration of a release of a right of dower will be sustained to the extent of the value of the interests she conveys. William & Mary College *v.* Powell, 12 Gratt. 372; Harvey *v.* Alexander, 1 Rand. 219; Payne *v.* Hutcheson, 32 Gratt. 812. See the title CONTRACTS, vol. 3, p. 352.

"It is not questioned by me that the dower interest of the wife may constitute a valuable consideration that will support a postnuptial settlement, and that such settlement, made in consideration of the conveyance or surrender of such dower interest, may be supported against the claims of creditors." Harrison *v.* Carroll, 11 Leigh 476; Blow *v.* Maynard, 2 Leigh 29; William & Mary College *v.* Powell, 12 Gratt. 386. See the title DOWER.

(5) Release of Wife's Equity.

There being a contest among the heirs and distributees of B. over a paper offered for probate as his will, they enter into an agreement for the adjustment of their respective interests in his estate, and by deed bearing date the 26th of September, 1866, they con-

vey the whole property, real and personal, to T. in trust, setting out the interest which each was to take; and among them was W. and his wife, A., who was a daughter of B., W. and A. taking a certain part of the real estate and all the personalty. By deed dated the 27th of September, 1866, reciting what had been agreed upon and the recitals in the previous deed, and a promise by W. to B. that he would settle on A. her share of the estate to the separate use of A., W. and A. convey the property to T. for the separate use of A. It was held, that the deeds must be construed together; and A.'s equity is a valuable consideration for the settlement; and there being no fraud in the transaction, the settlement is valid against creditors of W., whose debts were contracted before the death of B. Walden *v.* Walden, 33 Gratt. 88. See the titles CONTRACTS, vol. 3, p. 369; HUSBAND AND WIFE.

(6) Marriage.

See the titles CONTRACTS, vol. 3, p. 363; FRAUDULENT AND VOLUNTARY CONVEYANCES; MARRIAGE CONTRACTS AND SETTLEMENTS.

(7) Services.

Services performed by a son for his father without any contract for or expectation of payment, furnishes no valuable consideration for a deed conveying real estate, as against the father's creditors. King *v.* Malone, 31 Gratt. 158. See the titles IMPLIED CONTRACTS; MASTER AND SERVANT.

(8) Surrender of Earnings by Infant to Father.

The earnings of a minor child, who has not been emancipated, while laboring for another without the consent and appropriation of the father, belong to the father; and, if received either directly or indirectly by the father, they do not constitute a valuable consideration for a deed by the father to the child. Halliday *v.* Miller, 29 W. Va. 424, 1 S. E. 821.

(9) Surrender of War Bounty by Infant to Father.

A bounty paid by the United States government, or by a state, city or county, to a minor, a citizen of the United States, during a war, as well as his pay, belonged to the minor, and not to his father; and, if such bounty and soldier's pay are received by the father from the son, they constitute a debt due to the son from the father, unless intended as a gift to the father by the son, and the father may satisfy such debt by a conveyance of land to the son, and such a conveyance should be regarded as made for a valuable consideration, and not a voluntary conveyance. Halliday *v.* Miller, 29 W. Va. 424, 1 S. E. 821. See the title BOUNTIES, vol. 2, p. 611.

(10) Payment of Money on Account of Grantor.

Where a father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest, the son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year and such agreement and payment constitute a valuable consideration for the deed. Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812.

An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances. Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812. See the title TENDER.

c. Good Consideration.

It has been held, that a deed in which an estate for life is given the husband made by husband and wife of the wife's lands to a trustee, will pass the estate although no consideration be

expressed therein, particularly if the verdict finds that it was for the purpose of settling it in the wife's family. Ware *v.* Cary, 2 Call 263.

A conveyance operating under the statute of uses by way of a covenant to stand seized can only be supported by a meritorious consideration of natural love and affection. Ocheltree *v.* McClung, 7 W. Va. 232; Marling *v.* Marling, 9 W. Va. 81.

3. Legality of Consideration.

A deed, even if the consideration was confederate money, if within the scope of legitimate contract and not in aid of rebellion, regularly acknowledged before and recorded by proper officers of the state government, then under the power of the Confederate States government, is good. Henderson *v.* Alderson, 7 W. Va. 217.

It was held, that it was irregular and error for the court, upon motion of a person not a party to the suit, and the record not showing that he had an interest in the subject matter of the suit, to order a commissioner to ascertain and report whether the consideration of the deed was confederate money or good money; or whether the consideration of the deed was legal or illegal. Henderson *v.* Alderson, 7 W. Va. 217. See the titles CONFEDERATE STATES, vol. 3, p. 53; ILLEGAL CONTRACTS.

4. Failure of Consideration.

See the title CONTRACTS, vol. 3, p. 379.

a. In General.

If a tenant in common convey with covenant of general warranty a part of the common subject by metes and bounds, and upon partition afterwards made a material part of the land so conveyed is allotted to other tenants in common, so that the purchaser does not obtain the substantial inducement to his contract of purchase, upon the prayer of such purchaser a court of equity will cancel and annul such deed, and place the parties in statu quo. Worthington *v.* Staunton, 16 W. Va. 208. See the title JOINT TENANTS AND TENANTS IN COMMON.

b. Where Purchase Price Is Secured by Notes.

(1) Injunction against Collection of Notes.

Equity may enjoin an action at law on notes given for the purchase price of real estate, where there has been a total failure of consideration. Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191.

(2) Cancellation of Notes.

There is jurisdiction in equity to cancel promissory notes, given for the purchase price of land, where there has been a total failure of consideration. Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191.

Though one to whom land has been conveyed with general warranty deed, and who has lost the land by a decree cancelling both the deed vesting title in his grantor and also the deed to such purchaser, on account of the fraud of such grantor in procurement of the deed to him, has conveyed the land away, yet such purchaser will not be compelled to pay notes given to his grantor for purchase money, whether such purchaser has been made liable or not to his grantee on account of his own warranty, and in such case equity will order the note cancelled in an action brought for that purpose. Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191.

A purchaser of land under general warranty deed will not be compelled to pay notes given for purchase money when there has been a decree cancelling the deed vesting title in his grantor because of fraud in such grantor in procuring such deed, and also cancelling, for such fraud, the deed in such purchaser from such grantor. Womelsdorf *v.* O'Connor, 53 W. Va. 314, 44 S. E. 191. See the title RESCISSION, CANCELLATION AND REFORMATION.

c. Breach of Agreement to Support and Maintain Grantor.

(1) In General.

A deed made in consideration of maintenance, where there has been a failure to furnish maintenance, will be set aside, more especially where it has a clause of forfeiture for such failure. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

(2) Forfeiture of Estate by Grantee.

Conditions subsequent are not favored in law because they tend to destroy estates. When relied upon to create a forfeiture they must be created by express terms, or clear implication. Language will not be held to create an estate upon condition if it will admit of any other reasonable interpretation. Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17.

The owner of a tract of land conveys it to his nephew in fee, subject to the maintenance and support of the grantor and his sister. The deed contains a covenant by the grantee for such maintenance and support, and declares that the land is to be bound therefor, into whose hands soever it may come. But the deed does not state that it is upon condition that such maintenance and support be furnished, nor is there any clause providing for a re-entry by the grantor. Held, the provision for maintenance and support constitutes merely a charge upon the estate, which may be enforced in equity, not a condition for breach of which the grantor can re-enter as of his former legal estate. Pownal *v.* Taylor, 10 Leigh 172.

(3) Remedies of Grantor in Equity.

(a) In General.

The remedy at law to enforce the provisions of a deed made in consideration of the support and maintenance of the grantor is not adequate, and for this reason, courts of equity have jurisdiction. What relief equity will grant, will depend on the facts and circumstances of the particular case. Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285; Pownal *v.* Taylor, 10 Leigh 172.

(b) Appointment of Receiver.

Where the grantee faithfully performed her contract until she died, leaving infant children, who were unable further to perform, the proper relief is for a court of equity to take charge of the property as a trust asset, and administer it through the hands of a receiver, with due regard to the ultimate rights of the infants as well as the paramount rights of the grantor to a support. Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285.

(c) Rescission.

Bill by W. charges that W. and wife had conveyed to his son, E., a tract of land on the consideration that E. should provide for and take good care of W. and his wife so long as they may live, in a comfortable manner, both in sickness and health, and should build a comfortable dwelling house for them on the land, and that he utterly failed and refused to comply with his agreement. And that these promises were fraudulently made by E. for the fraudulent purpose of obtaining said deed, and that plaintiff relied on said promises and would not have executed said deed if they had not been made; and that said deed was obtained by means of said fraud so practiced upon him by E. upon demurrer to the bill. It was held, that W. did not have an adequate remedy at law for the failure to perform either of the considerations stated in the bill, and equity had jurisdiction to relieve him; that as bill charged a fraud by E. in procuring the deed, equity has jurisdiction to give relief that equity may, upon these facts, if sustained, rescind the contract, set aside the deed, and put the parties in the same position they were in before the contract was made and the deed executed. Wampler *v.* Wampler, 30 Gratt. 454.

"The cases of Wampler *v.* Wampler, 30 Gratt. 454, and Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17, are relied on as decisive of the contention that, where the consideration of a deed for

maintenance and support has failed, the only remedy that can be applied is a rescission of the contract and a restoration of the grantor to his original status. We do not understand these cases to establish the hard and fast rule contained for that in every case of a conveyance in consideration of maintenance and support, where the consideration fails, that rescission follows. Those cases primarily establish the right and duty of a court of equity to take jurisdiction in this class of cases, because the remedy is manifestly inadequate at law." Keister *v.* Cubine, 101 Va. 768, 45 S. E. 285.

A bill, filed by the grantors, to set aside and cancel their deed, conveying to their grantees certain real and personal property, in consideration of their maintenance and support secured to them by said deed, is properly dismissed at the hearing, where the proof wholly failed to sustain the allegations of the bill. McCartney *v.* Bolyard, 22 W. Va. 641; Lipscomb *v.* Love, 38 W. Va. 546, 18 S. E. 733.

5. Extrinsic Evidence in Regard to Consideration.

See the titles CONTRACTS, vol. 3, p. 382; MARRIAGE CONTRACTS AND SETTLEMENTS; PAROL EVIDENCE.

Proof of Other Consideration than That Expressed.—No rule is more firmly established than that the parties are not concluded by the recital of the consideration in a deed. It is competent always to show by any relevant evidence the real nature and character of the consideration. Summers *v.* Darne, 31 Gratt. 804; Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692; Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558; Duval *v.* Bibb, 4 Hen. & M. 113, 4 Am. Dec. 506; Click *v.* Green, 77 Va. 827.

When a deed is assailed by third parties on the ground of fraud, it is admissible to show, in addition to the consideration expressed in the deed, that a substantial and valuable consideration was paid, or the converse. Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 799; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

Where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar," parol proof may be admitted of other valuable considerations. Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519.

A sister agrees to convey to her brother a certain tract of land, and, in consideration thereof, the brother agrees to support their aged father and mother during their natural lives, and that he will bind himself thereto by written contract after the conveyance shall have been made. The sister conveys the land to him, with recital of the receipt of a money consideration of $50. It was held, that it is competent to show by parol evidence what was the contract between the parties, and what was the real additional consideration for the conveyance of the land, as what the grantee was to do was collateral to the conveyance, and it contained no recital inconsistent with such collateral undertaking or contradictory thereof. Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730.

Deed Expressing Love and Affection as Consideration.—Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it. Eppes *v.* Randolph, 2 Call 125.

Where the consideration expressed in a deed was natural love and affection, the grantee was allowed to aver and prove the real consideration to have been marriage, thereby giving a new and overreaching influence to the deed. Eppes *v.* Randolph, 2 Call 125; Hord *v.* Dishman, 5 Call 291; Duval *v.* Bibb, 4 Hen. & M. 121; Harvey *v.* Alexander, 1 Rand. 234.

Deed Expressing One Dollar as Consideration.—Where a deed, purporting to be for "love and affection," and for

"one dollar," is assailed as being fraudulent as to creditors, it can be supported by evidence showing that in addition to the one dollar expressed, full value was received by the grantor. Harvey *v.* Alexander, 1 Rand. 233.

"It is contended for the appellant that, because the deeds recite the consideration as one dollar, the grantee is estopped from showing that any larger consideration passed. It is true, even in equity, that a party claiming under a deed is bound by the general character of the consideration stated in the deed. He can not, for instance, as a part of his own case, if money be averred, prove natural love and affection; or, if natural love and affection be averred, prove money. But, when the deed is assailed by third parties on the ground of fraud, a larger field is opened, and, as relevant evidence to the issue of fraud, it is admissible to show, in addition to the consideration of affection expressed, a valuable consideration paid, or the converse. And when a deed recites no consideration, or an inadequate one, the party claiming under it may prove a substantial consideration, though, as against a third party contesting the deed, the onus of proving the consideration will rest upon the party claiming under it." Casto *v.* Fry, 33 W. Va. 449, 10 S. E. 800; Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

Evidence to Show Deed Expressing Valuable Consideration to Be Voluntary.—A deed which purports to have been made for a valuable consideration can not be shown to be voluntary in order to raise a trust in favor of the grantor, and if there was in fact no consideration, but the deed recites a pecuniary consideration even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and extrinsic evidence is not admissible to contradict the recital, and to show that there was in fact no consideration, except in cases of fraud or mistake. Eaves *v.* Vial, 98 Va. 134, 34 S. E. 978.

To Show Nonpayment of Consideration Expressed to Have Been Paid.—A vendor of land executes a deed of conveyance to the purchaser, in which he acknowledges receipt of the purchase money, and subjoins to the deed a receipt in full for the same; yet upon proof that in fact the whole purchase money was not paid, he is not concluded from claiming the balance due him in equity. Wilson *v.* Shelton, 9 Leigh 342.

A deed conveying land contains an acknowledgment on its face that the purchase money has been paid, though in truth no payment thereof has been made. In an action of assumpsit for the purchase money, the defendant, by way of estoppel, relies upon the acknowledgment in the deed; and the plaintiffs, believing that the estoppel will prevent their recovery at law, dismiss their action, and file a bill in equity against the purchaser. It was held, that they are entitled to the aid of a court of equity. Radcliff *v.* High, 2 Rob. 271; Wilson *v.* Shelton, 9 Leigh 342.

The vendor conveyed a tract of land by deed of absolute bargain and sale, in which there was a recital that the consideration had been fully paid. The vendor took the vendee's bonds for the amount of the purchase price, and continued to live on the land by virtue of parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with. Notwithstanding the recital in the deed, the vendor was held to have an equitable lien on the land against a purchaser from the vendee having actual notice of the parol agreement. Duval *v.* Bibb, 4 Hen. & M. 113.

In Bruce *v.* Slemp, 82 Va. 352, 4 S. E. 692, parol evidence was allowed to show that the real nature and character of the consideration of a deed and the

design of the grantor was to create an advancement for his daughter.

But the acknowledgment in a deed of bargain and sale of the payment of a valuable consideration is conclusive of the fact so far as to give effect to the conveyance. Ocheltree *v.* McClung, 7 W. Va. 232.

C. FORM AND CONTENTS.

1. Writing.

There can be no deed without writing. Hunt *v.* Brent, 1 Va. Dec. 261; Skipwith *v.* Cunningham, 8 Leigh 281; Thrift *v.* Hannah, 2 Leigh 300; Parsons *v.* Baltimore, etc., Loan Ass'n, 44 W. Va. 335, 29 S. E. 999.

2. Date.

A date is not essential to the validity of an instrument as a deed. Hunt *v.* Brent, 1 Va. Dec. 261, citing Skipwith *v.* Cunningham, 8 Leigh 281.

In general, a deed is to be taken as having been executed on the day of its date, unless it appear to have been on some other day. Colquhoun *v.* Atkinson, 6 Munf. 550. See post, "Presumption as to Date of Delivery," III, D, 4, e, (2).

3. Formal Parts and Clauses.

a. In General.

To make a good deed, a writing need not be in any particular form or words, so the intention thereof is clear, and it is signed, sealed and delivered. Parsons *v.* Baltimore, etc., Loan Ass'n, 44 W. Va. 335, 29 S. E. 999.

"The matter written must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement and bind the parties, which sufficiently must be left to the courts of law to determine; for it is not absolutely necessary in law to have all the formal parts that are usual drawn out in deeds, so as there be sufficient words to declare clearly and legally the parties' meaning." Parsons *v.* Baltimore, etc., Loan Ass'n, 44 W. Va. 335, 29 S. E. 999

b. Operative Words of Transfer.

In a deed it is not even necessary to use the technical operative words of any kinds of conveyance, although it is advisable to do so, in order to remove every doubt of the validity of the conveyance. Any words will be sufficient if they clearly manifest the intention to transfer the estate. Parsons *v.* Baltimore, etc., Loan Ass'n, 44 W. Va. 335, 29 S. E. 1000; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

"Any words in a deed indicating an intention to transfer the estate, interest, or claims of the grantor will be a sufficient conveyance, whether they be such as were generally used in a deed of feoffment, bargain and sale, or of release, irrespective of the fact of possession of the grantor or grantee, or of the statute of uses." Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

For instance, deeds generally require the word "grant," or the word "bargain and sell," or some technical word suitable to the character of the conveyance, but the word "convey" is now held to be equivalent to the word "grant" even at common law. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

"The word 'convey' means to transfer title from one person to another," giving the same legal effect to the word "convey" as "grant," which has "become a generic term applicable to the transfer of all classes of real property," and is equivalent in effect to the word "grant," suggested in § 1, ch. 72, W. Va. Code. Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

Where a deed contains the words "sold" and "conveyed," it is a deed of bargain and sale, good under the statute of uses, and not dependent on the word "grant." Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

c. Granting Clause.

A paper which purports to be a deed, but which lacks one of the es-

sential characteristics of a deed, such as a granting clause, is not valid as a deed. The effect of such paper is simply an acknowledgment that the grantee has an equitable title to the land. Weinrich *v.* Wolf, 24 W. Va. 299.

d. Habendum Clause.

"The office of the habendum is to determine what estate or interest is granted by the deed, although it may be, and generally is, stated in the premises, in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. In case of such irreconcilable repugnancy, the premises generally prevail, for the habendum can not divest an estate already vested by the premises." McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

"Chancellor Kent says that the habendum has degenerated into a mere useless form. Certainly with us it has practically fallen into disuse. In the case at bar the language relied on as an habendum can not strictly be so considered. It is so connected with the premises that no judicial exposition severing the two clauses would be warranted. The latter clause beginning with the words 'the condition of this deed,' etc., etc., shows clearly that it was intended to explain and qualify the preceding grant and thus become a part of it, not repugnant thereto, but explanatory of the grant." Temple *v.* Wright, 94 Va. 341, 26 S. E. 844.

Effect of Repugnancy between Habendum and Granting Clause.—The common-law rule that the habendum clause of a deed must yield to the granting clause, in case of repugnance between the two, has no application except where the repugnance is such that the intention of the grantor can not be determined with reasonable certainty from the whole instrument. Temple *v.* Wright, 94 Va. 338, 26 S. E. 844. See post, "Repugnant Clauses," IV, A, 8.

4. Designation of Parties.

Designation of Grantor.—Every deed must be executed by a competent grantor, who, by its terms, transfers to the designated grantee real estate therein described; and the identity of the grantor must appear by the deed. Adams *v.* Medsker, 25 W. Va. 127.

A deed, in which a number of persons are named as grantors, and which is signed and acknowledged as their deed by others not mentioned in it, was held not to be the deed of those not named therein. Adams *v.* Medsker, 25 W. Va. 127.

Designation of Grantee.—The grantee should be named and definitely pointed out in the premises to the deed. Adams *v.* Medsker, 25 W. Va. 127.

Thus it has been held, that where a deed in the granting clause, "granted and conveyed to A" the land therein described, and concluded, "to have and to hold to the said B," this deed was not sufficient to show title to the land in B. Cox *v.* Douglass, 20 W. Va. 175.

But it seems that a person not named in the premises may take an estate in remainder by the habendum, and that if no name whatever be mentioned in the premises then a person named in the habendum may take. Cox *v.* Douglass, 20 W. Va. 178.

Where a deed of exchange of land is made between two or more persons, and the name of the grantee of one of the parcels of land is omitted, the omission may be supplied and effect given to the deed, if, on inspection of the deed, enough shall appear to show in whom the title to that parcel vested. The deed should be so construed as to give effect to the true intent of the parties, as expressed in the deed, considered in all its parts, and construing the language used according to its common and usual acceptation. Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239.

In a deed of exchange of land, husband and wife are described as "parties of the second part;" it is declared

that they are seized of the land conveyed to the party of the first part; that the parties of the first and second parts being seized of their respective lots desire to exchange them, the one for the other, and the usual covenants of title are inserted. Apt words of conveyance are used and the party of the first part is named as grantee of one parcel of the land, but no grantee is named of the other parcel. It was held, that there is no ambiguity in the deed, and it alone can be looked to, in a court of law, as expressing the intention of the parties, and, looking to the deed alone, the husband and wife should be considered as grantees of the other parcel. If by mutual mistake the deed fails to express the intention of the parties thereto, the remedy is by bill in equity to reform the deed. Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239. See the title EXCHANGE OF PROPERTY.

5. Description of Property Conveyed. See generally, the title BOUNDARIES, vol. 2, p. 579.

Object of Description.—The main object of a description of the land sold or conveyed, in a deed of conveyance, is not in and of itself to identify the land sold—that it rarely does or can do without helping evidence—but to furnish the means of identification, and when this is done it is sufficient, under the maxim that "that is certain which is capable of being made certain." Thorn *v.* Phares, 35 W. Va. 771, 14 S. E. 399.

Necessity of Description by Metes and Bounds.—A description by metes and bounds is not necessary when the premises are well known by name, etc. Lennig *v.* White, 1 Va. Dec. 873; Snapp *v.* Spengler, 2 Leigh 1; Beverley *v.* Fogg, 1 Call 484.

As to description by metes and bounds, see the title BOUNDARIES, vol. 2, p. 579.

When General Description Prevails over Calls.—Where a deed contains a general description of the land conveyed which can be made certain by the proof of surrounding circumstances, or identified by reference to the land itself or other objects that more or less distinctly indicate or determine it, and such deed also contains courses and distances of the land, such general description will control, if it satisfactorily appears from the deed itself or any recital or writing referred to therein, that it was the intention of the grantor to convey the land so generally described, and the courses and distances, in so far as they limit or differ from such general description, will be disregarded. Adams *v.* Alkire, 20 W. Va. 480; Florance *v.* Morien, 98 Va. 26, 34 S. E. 890; Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189. See the title BOUNDARIES, vol. 2, p. 589.

Sufficiency of Description in General.—All that is required for description in a deed is reasonable certainty, and the deed need not be in itself fully capable of identification, because extraneous testimony, to apply the deed to the subject matter to which it relates, and thus identify it, may be admitted to help out the description of the deed. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268; Simpkins *v.* White, 43 W. Va. 125, 27 S. E. 361; Thorn *v.* Phares, 35 W. Va. 772, 14 S. E. 399; Warren *v.* Syme, 7 W. Va. 474.

Where a description of land in a deed consisted only of the words: "A piece of land near Bacon Quarter Branch," this was held too vague and indefinite a description to create any right of property in any particular parcel of land. George *v.* Bates, 90 Va. 839, 20 S. E. 828.

Description by Lot and Block Number.—When a deed describes the property thereby conveyed as real estate situated in a certain town and known on the plat of said town as lot No. 30, block 7, the identity of the plat may be shown by parol evidence, and, when

shown, the plat becomes a part of the deed as fully as if it were set out in it. Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

Description as "All Property Vested in Grantor."—A deed from a sheriff which conveyed all "the right, title and interest, vested in the sheriff by law, in and to certain property, conveyed by a debtor to his children" without specifically naming the property, was held sufficiently described to pass the title. The identity of the property is a matter of proof, and as soon as it is identified, the deed operates on it. Shirley *v.* Long, 6 Rand. 735.

Description as All of Grantor's Land in Certain County.—In a deed, the only description of the land conveyed, was, "all the lands of the grantor in the county of H." This was held sufficient description to pass the property included within such description. Vanmeter *v.* Vanmeters, 3 Gratt. 148.

Reference to Maps or Other Writings.—Where a map of land is referred to in a deed for the purpose of fixing its boundary, the effect is the same as if it were copied in the deed. State Sav. Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543.

A deed, for a description of the land, may refer to another deed or map, and the deed or map is considered as incorporated in the deed itself for description of the land. United States Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

Where a conveyance of lots refers to a certain plan of a town for complete description, the grantee is charged with knowledge of all the facts to be ascertained by an inspection of said plan. Depriest *v.* Jones, 2 Va. Dec. 109.

Presumption and Burden of Proof as to Land Intended to Be Embraced.—Where there is nothing on the face of a deed to indicate that it embraces or was intended to embrace land, the beneficial interest in which and the possession of which the grantor has previously parted with, the presumption is that it was not intended to be embraced in the deed. Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919.

Where the description of the subject matter of a deed is too vague and uncertain to be self explanatory, the burden rests upon those claiming under it to show to what it truly applies. Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919. See the title PRESUMPTIONS AND BURDEN OF PROOF.

Extrinsic Evidence to Explain Description.—Evidence aliunde is admissible in all cases where there is a doubt as to the true location of the survey, or a question as to the application of a grant to its proper subject matter. Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919.

Application of the description in a deed to the land is for the jury, and parol evidence is admissible to aid in making the application, but it can not be used to enlarge the description. Snooks *v.* Wingfield, 52 W. Va. 442, 44 S. E. 277. See the title PAROL EVIDENCE.

D. EXECUTION.

1. Signing.

At Common Law.—It has been said that at common law the signature of the party is not essential to the validity of a deed. Hunt *v.* Brent, 1 Va. Dec. 261, citing Skipwith *v.* Cunningham, 8 Leigh 281.

In Virginia and West Virginia.—In West Virginia, in at least one case, it has been held, that signing is indispensable to the validity of a deed. Adams *v.* Medsker, 25 W. Va. 127. And in American, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 323, Holt, J., said: "Among the essential elements of a deed, signing has come in as a new one, and sealing has degenerated, with us, unto a mere flourish with the pen."

Since seals, except by mere scrolls, have gone out of use, signing is better evidence of the execution of a deed

than sealing with a scroll, which may be at all times forged without the probability of detection. Tod *v.* Baylor, 4 Leigh 510.

It has been held, that a deed in which some of the persons named therein as grantors, and which is acknowledged by them as such, but was not signed by them, was held not to be the deed of those not signing it. Adams *v.* Medsker, 25 W. Va. 127.

When the privy examination of a feme covert is had before a court of record, the signing by her seems not to be required, yet when it is had before commissioners in the country, the signing may have been required as an indispensable guard against fraud. Tod *v.* Baylor, 4 Leigh 510.

Although the sealing and delivery of the deed is, by the common law, the essence of its execution, and though when the privy examination is before the court of record, that is all that is required by the statute; yet we can not intend, that sealing and delivery is all the statute requires, when the privy examination is had before commissioners in the country, against the express letter of the statute. It would be doing great violence to the language of the law, to dispense with signing by the feme covert. Tod *v.* Baylor, 4 Leigh 510.

Where the deed of husband and wife was first recorded as to the husband, then a commission for the privy examination of the wife was issued, and executed, and then the commission and privy examination of the wife were recorded, it was held, that the deed was thereby perfected as to the wife, though it did not appear that she had signed and sealed it at the time when it was recorded as to the husband. Langhorne *v.* Hobson, 4 Leigh 224.

2. Sealing.

See the title SEALS AND SEALED INSTRUMENTS.

a. Necessity of Seal.

In order for an instrument to be valid as a deed conveying real estate, it must be executed under the seal of the grantor. Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661; Shattuck *v.* Knight, 25 W. Va. 590; Pratt *v.* Clemens, 4 W. Va. 443.

Effect of Unsealed Deed of Trust.—When a paper purporting to be a deed conveying land to secure debts of the grantors appears to have been executed not under the seals of the grantors, it does not create a lien, so as to defeat a subsequent attaching creditor of the grantors. Such a paper is in substance nothing more than a contract for a lien upon the land to be created by a deed of trust. Shattuck *v.* Knight, 25 W. Va. 590.

When a paper purporting to be a deed of trust does not appear to have been executed under the seals of the grantors, it does not create a lien so as to defeat subsequent judgment creditors. And such paper does not come within the provisions of the fourth section of ch. 118, Code of Virginia, 1860, for while it might be technically a contract for a conveyance of the land, it is in substance nothing more than a contract for a lien upon the land to be created by a deed of trust. Pratt *v.* Clemens, 4 W. Va. 443.

If A attempts to convey land to B in trust for the use of C, but for want of seal the instrument is not a deed, and passess no legal title, still it vests an equitable estate in C, and assessment of the land in his name is good to save it to C from a tax sale in the name of A. Boggess *v.* Scott, 48 W. Va. 317, 37 S. E. 661.

b. Who May Affix Seals.

Where the deed of a corporation purports to be sealed with its corporate seal, and it is proven to be signed by the proper agents of the corporation, the presumption is that the seal was affixed by the proper authority, and such contract will be held valid until the contrary is shown. Ruffner *v.* Welton, Coal, etc., Co., 36 W. Va. 244, 15

S. E. 48; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

The presumption of authority to affix the corporate seal to a deed or contract will not be overcome by the mere fact that no vote of the directors authorizing it is shown. Ruffner *v.* Welton, Coal, etc., Co., 36 W. Va. 244, 15 S. E. 48; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180.

c. What Constitutes.

(1) Definition.

A seal at common law was defined by Lord Coke to be "an impression upon wax." Jones *v.* Logwood, 1 Wash. 42; 2 Min. Inst. (4th Ed.) 728.

"At common law and in early times, I have little doubt that a seal meant an impression made on wax, or other thing which would receive and retain an impression; for seals were introduced by the Normans, it is said, and used in fact as a signature, at a time when each man had his signet, and a certain coat of arms or engraving upon it designated the individual. Lord Coke says, a seal is wax with an impression. When this was the case, the question of seal or no seal, deed or no deed, was matter to be decided by inspection." Cromwell *v.* Tate, 7 Leigh 304.

(2) Necessity of Recognizing Seal in Body of Deed.

In Virginia it has been held that an actual seal of a corporation, affixed to an instrument not required by law to be under seal, must be recognized in the body of the instrument in order to be valid as a deed. Bradley Salt Co. *v.* Norfolk, etc., Co., 95 Va. 461, 28 S. E. 567.

As to necessity of recognizing scrolls used by way of seal in body of instrument, see post, "Use of Scroll by Way of Seal," III, D, 2, c, (4).

(3) Effect of More Seals than Signatures.

The validity of a deed is not affected by having on it an extra seal. Kyger *v.* Sipe, 89 Va. 507, 16 S. E. 627.

(4) Use of Scroll by Way of Seal.

In Virginia it is provided by statute that, "any writing, to which a natural person making it shall affix his scroll by way of seal, shall be of the same force as if it were actually sealed. Va. Code, § 2841.

The object of attaching a seal to a deed is to give solemnity to the act. There is no difference in point of solemnity, between the act of impressing wax, and that of making a scroll, therefore a scroll is of equal validity to constitute a deed, as an impression made by a seal on wax. Jones *v.* Logwood, 1 Wash. 42; Buckner *v.* MacKay, 2 Leigh 488.

A scroll affixed to an instrument has the force and obligation of a seal, when it appears by the instrument that the person making the same affixed the scroll by way of seal. Parks *v.* Hewlett, 9 Leigh 511.

Necessity of Recognizing Scroll in Body of Instrument.—Under this statute, when a scroll is affixed by way of seal, to an instrument not required by law to be under seal, it must be recognized in the body of the instrument, in order to be valid as a deed. Baird *v.* Blaigrove, 1 Wash. 170; Austin *v.* Whitlock, 1 Munf. 487; Anderson *v.* Bullock, 4 Munf. 442; Jenkins *v.* Hurt, 2 Rand. 446; Peasley *v.* Boatwright, 2 Leigh 195; Turberville *v.* Bernard, 7 Leigh 302; Cromwell *v.* Tate, 7 Leigh 301; Clegg *v.* Lemessurier, 15 Gratt. 108; Lewis *v.* Overby, 28 Gratt. 627; Buckner *v.* Mackay, 2 Leigh 488; Gover *v.* Chamberlain, 83 Va. 286, 5 S. E. 174.

But as to instruments which would be without legal effect unless sealed (as a conveyance of a freehold), it seems sufficient to affix a scroll without recognizing it in the body of the instrument. Ashwell *v.* Ayres, 4 Gratt. 283; Parks *v.* Hewlett, 9 Leigh 511; Clegg *v.* Lemessurier, 15 Gratt. 108; Smith *v.*

Henning, 10 W. Va. 596; Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739.

Where it is stated at the foot of an instrument of emancipation, that it was signed, sealed and acknowledged in presence of two attesting witnesses, and the instrument is afterwards duly proved by the witnesses in the county or corporation court, it sufficiently appears that the person making the instrument affixed the scroll by way of seal. Parks *v.* Hewlett, 9 Leigh 511.

Where the scroll attached to the signature of the grantor is not recognized in the body of the instrument, this informality is cured by the subsequent acknowledgment of the deed for recordation. Ashwell *v.* Ayres, 4 Gratt. 283; Cosner *v.* McCrum, 40 W. Va. 339, 21 S. E. 739; Smith *v.* Henning, 10 W. Va. 596.

Effect of One Scroll Where There Are Two or More Signatures.—W. and N. entered into a written agreement, which concluded with the words, "Witness the following signatures and seals," and had but one scroll which was placed opposite the name of W. as seal. N.'s name was signed immediately under W.'s name. The declaration described the said writing as "signed by the said defendant and said plaintiff, and sealed with the seal of said defendant and the said plaintiff." It was held, that on oyer of the agreement, and demurrer to the declaration for alleged variance between the agreement described, and the agreement itself, that there is no variance; and that the one scroll must be taken as the adopted scroll of both parties to said agreement. Norvell *v.* Walker, 9 W. Va. 447.

Deeds Executed by Corporations.—Public corporate bodies have a known and fixed seal; and it is necessary that their acts should be under that common seal. In that instance an impression may be necessary, to show that the act has been done in their corporate capacity. Jones *v.* Logwood, 1 Wash. 42.

(5) Question of Fact.

Where a copy of a paper purporting to be a deed of real estate was offered in evidence as a deed, and the copy did not disclose anything by way of trace, scroll, or device to show that the original was sealed, but the original, executed upwards of fifty years before purported to be under the hand and seal of the grantor, the attesting witnesses declared that it was sealed and delivered in their presence; the justices who took the acknowledgment declared that the grantor acknowledged the same to be his act and deed; it was admitted to record as a deed; possession of the land was taken under it by the grantee, and the taxes paid on it by him, it was held that it should be submitted to the jury to determine whether or not the original was a sealed instrument. Reusens *v.* Lawson, 91 Va. 326, 21 S. E. 347.

3. Stamps.

A deed though not stamped in accordance with an act of congress, is admissible in evidence; the act of congress not applying to proceedings in state courts. And it seems it is admissible in evidence in the United States courts, unless the omission to stamp it was with fraudulent intent. Hale *v.* Wilkinson, 21 Gratt. 75; Talley *v.* Robinson, 22 Gratt. 888. See the titles CONTRACTS, vol. 3, p. 307; REVENUE LAWS.

4. Delivery.

a. Definition.

Delivery is the final act, the formal declaration of the grantor's determination to complete the conveyance or enter into the contract. Skipwith *v.* Cunningham, 8 Leigh 281; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 216.

"First, there is a determination of the mind when a man designs to pass a thing by deed, and upon that the party causes it to be written, which is one part of deliberation; sealing is another, and delivery is the consummation of his resolution." Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 216.

b. Necessity of Delivery.

Delivery is an indispensable requisite to the validity of a deed. Frank *v.* Frank, 100 Va. 629, 42 S. E. 666; Skipwith *v.* Cunningham, 8 Leigh 281; Pollock *v.* Glassell, 2 Gratt. 456; Schreckhise *v.* Wiseman, 102 Va. 9, 45 S. E. 745; Hutchison *v.* Rust, 2 Gratt. 394; Hale *v.* Marshall, 14 Gratt. 489; Ewing *v.* Ewing, 2 Leigh 337; Hunt *v.* Brent, 1 Va. Dec. 258; Collup *v.* Smith, 89 Va. 264, 15 S. E. 584; Roanes *v.* Archer, 4 Leigh 567; Harman *v.* Oberdorfer, 33 Gratt. 497; Rootes *v.* Holliday, 6 Munf. 251; Raines *v.* Walker, 77 Va. 92; Hardy *v.* Norfolk, etc., Co., 80 Va. 404; Seibel *v.* Rapp, 85 Va. 31, 6 S. E. 478; Currie *v.* Donald, 2 Wash. 59; Com. *v.* Selden, 5 Munf. 160; Parsons *v.* Baltimore Bldg., etc., Ass'n, 44 W. Va. 335, 29 S. E. 999; Renick *v.* Ludington, 20 W. Va. 511; Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542; Newlin *v.* Beard, 6 W. Va. 110; Adams *v.* Baker, 50 W. Va. 251, 40 S. E. 356; Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 856; Furguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Delaplain *v.* Grubb, 44 W. Va. 617, 30 S. E. 201; Hogue *v.* Bierne, 4 W. Va. 671; Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213; American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

Without a complete delivery no deed can exist in law. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

"Although, among the essential elements of a deed, signing has come in as a new one, and sealing has degenerated, with us, into a mere flourish with the pen, yet the one essential element of delivery remains, as it always was, one of the essential requisites to the valid execution of a deed." American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

A deed was executed and acknowledged, ready for delivery, but was not delivered, but was laid away by the grantor where he kept his papers, together with his will executed at the same time. After the grantor's death the supposed deed and will were found among his papers. Such paper was held not to be a deed because of want of delivery. Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

Deed Takes Effect only from Delivery.—A deed takes effect only from delivery. Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213; Hutchison *v.* Rust, 2 Gratt. 394; Harman *v.* Oberdorfer, 33 Gratt. 497.

c. Time of Making Delivery.

The delivery must be in the lifetime of the grantor, and yet there may be an inchoate delivery in the grantor's lifetime which will become absolute on his death. Frank *v.* Frank, 100 Va. 629, 42 S. E. 666; Collup *v.* Smith, 89 Va. 264, 15 S. E. 584; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

But if the grantor parts with all dominion over it, and makes an absolute and unconditional delivery thereof to a third person, with direction to the latter to deliver it to the obligee on the death of the obligor, the delivery is good. In the case in judgment there was no condition imposed upon complete delivery except that the bonds were to be delivered to the obligees after the obligor's death. Frank *v.* Frank, 100 W. 627, 42 S. E. 666. See post, "To Hold until Grantor's Death," III, D, 4, d, (5), (b).

The testimony of the person who executed the deed, was received as fixing the time when it was executed, notwithstanding the testimony of two witnesses to his acknowledgment to the contrary when not on oath; he being entirely disinterested between the parties, and the falsehood of his evidence being not probable under the circumstances of the case. Colquhoun *v.* Atkinsons, 6 Munf. 550.

d. What Constitutes.

(1) In General.

To constitute a delivery of a deed, the grantor must by act or word, or

both, part with all right of possession and dominion over the instrument with the intent that it shall take effect as his deed. Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 856; American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 320; Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399.

"Delivery may be done by acts or words, or by both; by the grantor himself, or by another with the grantor's authority; to the grantee personally, or to a stranger with subsequent ratification, although it do not reach the grantee until after the death of the grantor." Frank *v.* Frank, 100 Va. 629, 42 S. E. 666; Hunt *v.* Brent, 1 Va. Dec. 258; Skipwith *v.* Cunningham, 8 Leigh 281.

"The delivery may be actual, as by manual tradition to the grantee, or to another for his use; or it may be constructive, as where it is placed within the power and control of the grantee. It may be proved by evidence express, or it may be inferred from circumstances. It may be inferred from the solemnities of signing, sealing, acknowledgment and attestation, though the custody of the instrument be retained by the grantor; but the inference is presumptive and prima facie, and may be repelled by proofs of a contrary intent." Baldwin, J., in Pollock *v.* Glassell, 2 Gratt. 456.

Where the parties meet to make a deed and read, sign and acknowledge it without reservation, this amounts to delivery. Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

It is not essential that the grantee should be present at the time. Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 216; Hutchison *v.* Rust, 2 Gratt. 394.

But so long as a deed is within the control, and subject to the dominion and authority of the grantor, there is no delivery without which there can be no deed. Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213; Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399.

(2) Dependent upon Intention of Parties.

Delivery of a deed depends on the intention of the parties. Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

The intention of the grantor is the true test of what constitutes the delivery. Hunt *v.* Brent, 1 Va. Dec. 258.

(3) Necessity of Words or Acts Evidencing Intention.

Where a deed was executed and acknowledged ready for delivery, but was not delivered by anything then said or done, was laid away in decedent's chest, among his private papers, although the grantees in said deed may have carried the keys and had access to said chest, some act or word indicating the grantor's intention to deliver said deed to them was necessary to constitute a delivery of the same, and make it effectual as a conveyance of the property therein described to the grantees. Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 856.

(4) Manual Delivery Unnecessary.

Manual delivery is not always necessary to effectuate a deed. Adams *v.* Baker, 50 W. Va. 251, 40 S. E. 356; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 216; Hutchison *v.* Rust, 2 Gratt. 394.

(5) Delivery to Third Person.

(a) In General.

It is a general principle, that where the grantor has parted with all control over the deed, the delivery is complete, though it be made to a third person. Roanes *v.* Archer, 4 Leigh 567.

A grantor has a deed of trust prepared, conveying all of his property to a trustee, named therein, to secure his creditors; the deed is acknowledged for recordation, and would have been recorded then, but for the war raging in the section where the deed was executed at the time. The deed is then, with the trustee's knowledge, depos-

ited with a niece of the grantor, who has other important papers of his, she is told by him of its importance, and to take care of it, and the paper remains in her possession until the grantor's death, when it is taken possession of by the trustee, admitted to record by him, and he files a bill for the proper execution of the deed and distribution of the fund. On a cross bill filed by creditors attacking the deed, on the ground that it is void for nondelivery, it was held, that delivery, to the third person, under the circumstances was sufficient, and the deed good. Hunt *v.* Brent, 1 Va. Dec. 258.

The grantor in a deed placed it in the hands of a third person, to be delivered at an indefinite time to the grantee. Before the delivery the deed was returned to the grantor who destroyed it. It was held, that the presumption of law was against the delivery of the deed, and in favor of the grantor's right to destroy it, and such presumption could not be overcome unless the grantor showed by preponderance of affirmative evidence that the grantor at the time he placed such deed in the hands of such third person, intended absolutely to part with the control and dominion over the same. Davis *v.* Ellis, 39 W. Va. 226, 19 S. E. 399.

(b) To Hold until Grantor's Death.

"Where a grantor executes a deed, and delivers it to a third person, to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee succeeds to the title." Lang *v.* Smith, 37 S. E. 725, 17 S. E. 216.

"A grantor may deliver a deed to a third person to hold until after the grantor's death, and then to deliver it to the grantee. Such a delivery is perfectly valid, but the deed must be left with depositary without a reservation by the grantor, expressed or implied, of the right to retake it or otherwise control its use." Schreckhise *v.* Wiseman, 102 Va. 12, 45 S. E. 745.

A deed need not be delivered to the grantee in person in order to be effectual. If delivered to a third person unconditionally, and without reservation of any kind, with direction to deliver to the grantee after the death of the grantor, the delivery is effectual to pass title to the grantee, and the grantor can not recall it. A subsequent deed to another grantee who has full knowledge of the facts will be null and void as to the first grantee. Notice to an agent to negotiate a transaction and procure a deed is notice to his principal. Schreckhise *v.* Wiseman, 102 Va. 9, 45 S. E. 745; Frank *v.* Frank, 100 Va. 627, 42 S. E. 666.

The doctrine enunciated in the foregoing authorities is recognized and sanctioned by this in court in Frank *v.* Frank, 100 Va. 627, 42 S. E. 666, the opinion saying: "Where a deed is left with a third person with instructions to hold it until the grantor's death, and then to deliver it to the grantee, the weight of authority seems to be in favor of the doctrine that if there is no reservation by the grantor of the privilege of recalling the deed before his death, but if he delivers it to the depositary with the absolute and final determination that it shall take effect when the contingency of his death happens, it will become operative upon its delivery, after his death, to the grantee, and such delivery will relate back to the prior delivery for the purpose of passing the grantor's title." Schreckhise *v.* Wiseman, 102 Va. 13, 45 S. E. 745.

(c) Escrow.

See the title ESCROW.

(6) Delivery upon Condition.

A deed, or bond, signed, sealed and delivered to the obligee, or his previously constituted agent, upon condition, is not the deed of the party sign-

ing, until the condition is complied with. Newlin *v.* Beard, 6 W. Va. 110.

In Humphreys *v.* Richmond, etc., R. Co., 88 Va. 431, 13 S. E. 985, it was held, that parol evidence was admissible to show that a deed was delivered to the grantee to take effect only upon the happening of a condition, which was shown never to have happened.

(7) A Question of Fact.

Delivery is a mere question of fact. The court can not say what weight of evidence shall be necessary to prove it. American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319; Currie *v.* Donald, 2 Wash. 59.

e. Evidence of Delivery.

(1) In General.

"The delivery of the deed, like any other fact, may as well be inferred from circumstances as proved by positive testimony." Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 213.

Delivery, like any other fact, may be established, either by direct proof, or by circumstances. Harman *v.* Oberdorfer, 33 Gratt. 497.

Though delivery is not made in formal words it may be shown by circumstances. Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

(2) Presumption as to Date of Delivery.

In General.—If a deed has a date, the law intends it to have been delivered at the date; and when it is proved by witnesses, who say nothing as to time of delivery, and is recorded, it stands recorded as a deed proved to have been delivered at its date. Rodgers *v.* McCluer, 4 Gratt. 81; Harman *v.* Oberdorfer, 33 Gratt. 502; Raines *v.* Walker, 77 Va. 94; Hardy *v.* Norfolk, etc., Mfg. Co., 80 Va. 404; Harvey *v.* Alexander, 1 Rand. 219, 241; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Renick *v.* Ludington, 20 W. Va. 511.

There is no distinction, in principle, between the presumption of delivery arising from the proof by witnesses, and the acknowledgment before a justice or notary. Harman *v.* Oberdorfer, 33 Gratt. 497; Rodgers *v.* McCluer, 4 Gratt. 81; Hardy *v.* Norfolk, etc., Mfg. Co., 80 Va. 404; Harvey *v.* Alexander, 1 Rand. 219; Raines *v.* Walker, 77 Va. 94; Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Renick *v.* Ludington, 20 W. Va. 511.

Rebutting Presumption.—The presumption will yield to evidence to the contrary. Raines *v.* Walker, 77 Va. 94.

Acknowledgment Subsequent to Date as Rebutting Presumption.—A certified acknowledgment is by no means inconsistent with a prior delivery, and is not, at all events, sufficient of itself to rebut the presumption arising from the date of the instrument. It may very well happen that a deed is delivered and accepted, either with an intention not to record it at all, or to have it acknowledged for that purpose at a future time. Harman *v.* Oberdorfer, 33 Gratt. 497; Raines *v.* Walker, 77 Va. 94; Hardy *v.* Norfolk, etc., Mfg. Co., 80 Va. 404; Rodgers *v.* McCluer, 4 Gratt. 81; Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

(3) Acknowledgment as Evidence of Delivery.

It seems that acknowledgment of a deed is not conclusive evidence of its delivery, but is only a circumstance tending to show delivery. Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Lang *v.* Smith, 37 W Va. 725, 17 S. E. 213; Hutchison *v.* Rust, 2 Gratt. 394. See the title ACKNOWLEDGMENTS, vol. 1, p. 104.

It was said in one case that if the grantor executes and acknowledges a deed as his, and either retains it or delivers it, to a third person, though that third person be not the agent of the grantee, it is a good delivery in contemplation of law. Hunt *v.* Brent, 1 Va. Dec. 258.

Where an acknowledged deed is retained by the grantor, it depends on his intention at the time whether the acknowledgment is a complete execution of the deed. The intention may be ascertained by evidence of his previously declared purpose, though such intention is not indicated at the time of the acknowledgment Lang *v.* Smith, 37 W. Va. 725, 17 S. E. 216; Hutchison *v.* Rust, 2 Gratt. 394.

"That the acknowledgment of a deed before the court, will have the effect of a delivery, where there has been no previous delivery, would not, I think, be denied. Since the statute allowing the acknowledgment of deeds before the clerk, the sealing and delivery in presence of witnesses, has become more rare than formerly." Roanes *v.* Archer, 4 Leigh 567.

"That the acknowledgment of a deed before witnesses is sufficient evidence of delivery, would seem, perhaps, inferrible from the case of Currie *v.* Donald, 2 Wash. 58. That such an acknowledgment before a court, followed by a deposite of the deed with the clerk to be recorded, is a sufficient delivery, although the deed was never actually delivered to the bargainee, provided he afterwards assented to it, is not a question now open to be examined. It was expressly decided in the case of Com. *v.* Selden, 5 Munf. 160. Indeed, no particular form of ceremony is necessary to make a good delivery. It is sufficient if the grantor testifies his intention to deliver or put the deed into the possession of the other party. And, therefore, a delivery to a third person for the use of the grantee, and without his knowledge, becomes a valid delivery by his subsequent assent, and relates back to the original delivery. Indeed, there are many cases which show that a deed, though never parted with, by the person who executed it, may yet operate as a deed, where it has been signed, sealed and acknowledged; as where a grantor signed a deed (which was ready sealed) in the presence of his niece, the grantee not being present, saying 'I deliver this as my act and deed;' and as soon as she attested it, took it into his own possession and carried it away; it was resolved to be a good delivery." Roanes *v.* Archer, 4 Leigh 567.

(4) Recording as Evidence of Delivery.

Recordation under certain circumstances is sufficient evidence of delivery. Parsons *v.* Baltimore Bldg. & Loan Ass'n, 44 W. Va. 335, 29 S. E. 999.

A deed of bargain and sale admitted to record on the acknowledgment of the bargainor in court, without any actual delivery thereof to the bargainee, was determined to be good in law, as a deed delivered; the bargainee having entered upon the land immediately after the purchase, having paid a part of the purchase money, retained possession according to the bargain; and, upon being informed of the deed, approved thereof, and claimed title to the land thereby intended to be conveyed. Com. *v.* Selden, 5 Munf. 160.

(5) Possession by Grantee as Evidence of Delivery.

In General.—Possession of a complete and perfect deed by the party claiming under it, is prima facie evidence of delivery, and, under ordinary circumstances, no other proof would be required. Seibel *v.* Rapp, 85 Va. 31, 6 S. E. 478; Newlin *v.* Beard, 6 W. Va. 110; Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

The general principle of the law is that the formal act of signing, sealing, and delivery is the perfection and consummation of the deed, and it lies clearly with the grantor to prove that the appearances are not consistent with the truth. The presumption is against him, and the task is upon him to destroy that presumption by positive proof that there was no delivery, and that it was so understood at the time. Seibel *v.* Rapp, 85 Va. 31, 6 S. E. 478.

Where the defendants admit the signing and sealing, the rule of evidence is sufficiently complied with by the plaintiff when he produces before the jury the instrument, and it is then incumbent on defendants to show some special matter in avoidance. Newlin *v.* Beard, 6 Va. 110.

Evidence to Rebut Presumption.—"But it may be shown by parol evidence that a deed in the possession of the grantee was not delivered. The principle that parol evidence is not admissible to contradict a deed has no application to a case of this kind." Gaines *v.* Keener, 48 W. Va. 56, 35 S. E. 857; Newlin *v.* Beard, 6 W. Va. 110.

Burden of Proving Wrongful Acquisition of Deed.—When a father seeks to set aside such deed to a son, on the sole ground that the son wrongfully came into possession of it, the burden of proving such wrongful possession is upon the father. Ward *v.* Ward, 43 W. Va. 1, 26 S. E. 542.

f. Estoppel to Deny Delivery.

Where a deed is executed and placed in the hands of depository to be held subject to the joint order of the grantor and grantee, and the grantee has possession of the property by its agent, who surreptitiously obtains such deed and places it on record, and then conveys the property to an innocent holder for value, and places him in possession thereof, and a period of seven months is permitted to elapse before the original grantor makes inquiry about the deed or property, and then permits the fraudulent agent to escape without arrest, a court of equity will refuse to cancel such deed and restore the property to such grantor, but will hold him estopped from setting up title to such property as against the innocent purchaser. McConnell *v.* Rowland, 48 W. Va. 276, 37 S. E. 586.

As between persons equally innocent of wrongdoing, he whose neglect, default, or conduct was the occasion of loss must bear it; and equity will not relieve him of it, and place the burden on the other innocent party, guiltless of fraud. McConnell *v.* Rowland, 48 W. Va. 276, 37 S. E. 586. See the title ESTOPPEL.

g. Effect of Delivery.

Where a deed has been once completed by delivery, so as to pass title to land, its subsequent oral cancellation or destruction, though by consent of both parties, does not divest the grantee of title, but it still remains in him. Where it is clear that a deed has been delivered, it is still a deed, though afterwards found in the possession of the grantor. Ferguson *v.* Bond, 39 W. Va. 561, 20 S. E. 591.

A redelivery does not divest the grantee's title. Rootes *v.* Holliday, 6 Munf. 251. See post, "Loss or Relinquishment of Rights under Deed," IV, F.

A gift by deed is good between the parties if it goes into effect at once, without delivery, for the delivery of the deed answers the place of the delivery of the property, when the property is capable of actual delivery. Hogue *v.* Bierne, 4 W. Va. 658; Ewing *v.* Ewing, 2 Leigh 337.

5. Acceptance.

a. Necessity of Acceptance.

It has been said that a deed must not only be delivered by the grantor, but must be accepted by the grantee. Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; Gwinner *v.* Michael, 103 Va. 268, 48 S. E. 895; Skipwith *v.* Cunningham, 8 Leigh 272; Zell Guano Co. *v.* Heatherly, 38 W. Va. 410, 18 S. E. 611.

It is observable, however, that acceptance is not enumerated as one of the essentials. Skipwith *v.* Cunningham, 8 Leigh 281.

The meaning of this rule is that deeds, immediately upon the execution by the grantors, divest the estate out of them, and put it in the party to whom the conveyance is made, though in his absence and without his notice,

till some disagreement to such estate appears. Skipwith *v.* Cunningham, 8 Leigh 282.

"On authority, we may properly say that acceptance is not a part of delivery, but that delivery makes the deed good against the grantor, vesting the estate in the grantee; but such delivery may be avoided by the disclaimer or disavowal of the deed by the grantee, and thereupon the delivery is avoided, and the estate revests in the grantor by remitter. Skipwith *v.* Cunningham, 8 Leigh 272. While acceptance is necessary, it need not be expressed, as it may be implied, and it will be implied from many circumstances. We must not understand that acceptance of a deed is to be expressly or affirmatively shown. The establishment of such a rule would shake innumerable titles. The language of the books is that acceptance of a deed is necessary to its operation. Perhaps it would be better to say that dissent by the grantee must be shown, for it is not stating the law too broadly to say that in all conveyances beneficial to the grantee the assent of the grantee is presumed until his dissent be shown, and this because it is for his benefit, and it is not likely one will disclaim a benefit; and also it is unreasonable that when the grantor has made a deed the estate should still remain in him, and also it is to prevent uncertainty as to where the freehold is." Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 875, citing Skipwith *v.* Cunningham, 8 Leigh 272; Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

b. Manner of Making Acceptance.

Acceptance may be express, by signing the deed or otherwise, or may be implied from circumstances. Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874.

Ratification and acquiescence imply knowledge, and in order to waive a right a person must have knowledge of its existence. Therefore, a party can not ratify a deed when he does not know of its existence, or of the circumstances attending its execution. Hotchkiss *v.* Middlekauf, 96 Va. 649, 32 S. E. 36.

c. Presumption of Acceptance.

The assent of the grantee will be presumed, where the deed is beneficial to him, until dissent appear. Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874; Skipwith *v.* Cunningham, 8 Leigh 281.

Acceptance of a deed by the grantee is presumed from the delivering of the deed, and until he renounces it the law presumes it to be beneficial to him. Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616.

The assent of the grantee is implied in all conveyances; first, because of the supposed benefit; secondly, because it is incongruous and absurd that when a conveyance is completely executed on the grantor's part, the estate should continue in him; thirdly, to prevent the uncertainty of the freehold. Skipwith *v.* Cunningham, 8 Leigh 282.

d. Effect of Acceptance.

A deed was made upon consideration that the grantees would pay the debts of the grantor, and pay him $500 a year for his life. The grantees did not execute the deed, but they accepted it, and took possession of and held the lands. It was held, that the grantees having accepted the deed were personally liable for the debts of the grantor. Vanmeter *v.* Vanmeters, 3 Gratt. 148; Hobson *v.* Whitlow, 80 Va. 784.

The acceptance of a deed for a less quantity of land than that to which the grantee is entitled by his written agreement, with full knowledge of the facts, accompanied with a surrender of said written agreement, constitutes a rescission of said agreement to the extent of the number of acres omitted from said deed. Straley *v.* Perdue, 33 W. Va. 375, 10 S. E. 780.

e. Effect of Disclaimer.

Where dissent or disclaimer appears,

the deed is inoperative, and the title to the thing granted reverts to the grantor by remitter from such disclaimer. Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874.

Where such a fraudulent deed is made, but is disclaimed by the grantee, equity has no jurisdiction of a suit brought after such disclaimer by a creditor of the grantor to subject the property to debt, in advance of judgment, merely because of such deed. Guggenheimer *v.* Lockridge, 39 W. Va. 457, 19 S. E. 874.

Where grantees refuse to accept a deed put on record for their benefit, and recover from the estate of their grantor compensation for the value of land which should have been conveyed to them, upon the theory that their refusal to accept the deed rendered it a nullity, and the decree for the compensation declares that they shall not be entitled to the sum decreed until a deed of reconveyance is executed and delivered, the effect of the transaction is to reinvest the heirs of the grantor with the title to the land, although no deed is made by the grantees. Gwinner *v.* Michael, 103 Va. 268, 48 S. E. 895.

6. Attestation.

A deed admitted to record upon proof of the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded. Johnston *v.* Slater, 11 Gratt. 321.

A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to his wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record. Johnston *v.* Slater, 11 Gratt. 321.

7. Acknowledgment.

See the title ACKNOWLEDGMENTS, vol. 1, p. 104.

8. Recording.

See the title RECORDING ACTS.

9. Burden of Proof as to Execution.

The burden of proof of the formal execution of a deed, when put in issue under the plea of non est factum, rests upon the party claiming under the deed; and that proof must show that the deed was signed, sealed and delivered by the authority of the grantor as his deed. Newlin *v.* Beard, 6 W. Va. 110.

E. EFFECT OF FRAUD, MISTAKE AND UNDUE INFLUENCE.

1. Fraud.

See the titles FRAUD AND DECEIT; RESCISSION, CANCELLATION AND REFORMATION; VENDOR AND PURCHASER.

a. Fraud in Factum.

In a court of common law, fraud may be given in evidence to vacate a deed, under the plea of non est factum, if such fraud relates to the execution of the instrument; as if it be misread to a party, or his signature be obtained to an instrument which he did not intend to sign. Taylor *v.* King, 6 Munf. 358; American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

Deed Not Drawn in Accordance with Directions.—Where any deception has been practiced and the direction being to draw a deed for one purpose, it is fraudulently drawn for another, and the deceit is not discovered until after execution, a court of equity will set such deed aside. Pennybacker *v.* Laidley, 33 W. Va. 642, 11 S. E. 39.

Mrs. H., intending to settle certain slaves on her niece, Mrs. D., and her children, from the control and debts of D., the husband, requests G. to prepare for her a deed which will effect this object. D., the husband, prepares a deed which he hands to G. informing him Mrs. H. approves it; and G. bringing the deed to Mrs. H., she executes it, under the belief that it is such a deed as she had directed. The deed in fact gives to D., the husband, an in-

terest in the slaves; and he conveys that interest in trust to secure a debt. H. then files a bill to set aside the deed, and have a settlement made as she has intended. It was held, that H. may maintain the suit. The deed will be set aside; and with the assent of H. a settlement will be made according to her original intention. The trustees in D.'s deed will be decreed to convey to the trustee in the new deed. Shepherd *v.* Henderson, 3 Gratt. 367.

b. Fraud in Inducement.

(1) In What Court Defense Available.

At the common law fraudulent representations which induced the execution of a deed could not be shown at law. Taylor *v.* King, 6 Munf. 358; Burtners *v.* Keran, 24 Gratt. 42; Wyche *v.* Macklin, 2 Rand. 426; American Buttonhole, etc., Co. *v.* Burlack, 35 W. Va. 647, 14 S. E. 319.

In Virginia, the defense may be made at law in the mode provided by statute. Va. Code of 1887, § 3299. Burtners *v.* Keran, 24 Gratt. 42.

The defendant should file a special plea alleging the fraud, or special circumstance, which would entitle him to relief in equity. The facts should be set forth with sufficient precision to apprise the plaintiff of the character of the defense intended to be made, and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. Burtners *v.* Keran, 24 Gratt. 42; Wyche *v.* Macklin, 2 Rand. 426.

In equity, fraudulent representations of a material fact, upon which a person has a right to rely, inducing him to execute a deed, is ground to set aside the deed. Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243; Beckley *v.* Riverside Land Co. (Va.), 23 S. E. 778; Hull *v.* Fields, 76 Va. 594.

Where a bill charges a fraud by the grantee in procuring a deed, equity has jurisdiction to give relief. Wampler *v.* Wampler, 30 Gratt. 454.

(2) What Constitutes.

(a) In General.

The false representation of a material fact, constituting an inducement to a contract for the purchase of real estate, on which the purchaser had a right to rely, is always ground for a rescission of the contract by a court of equity. Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243.

In order to rescind a conveyance in equity for misrepresentation, it must appear that false representations were made, that they were material, that they were relied upon by the grantee, and that they were made to induce him to enter into the contract. Beckley *v.* Riverside Land Co. (Va.), 23 S. E. 778.

To rescind an executed contract of sale of property, on ground of false and fraudulent representations, there must have been false representation of material fact, constituting an inducement to the contract, whereupon purchaser had a right to rely, and did rely, and was thereby misled to his injury. Hull *v.* Fields, 76 Va. 594.

(b) Materiality of Representation.

A representation that $1,500,000 has been secured to be invested in industrial enterprises in a proposed town is material, and if by such representation a person is induced to purchase real estate in such proposed town, and the representation is false, it is good ground for the rescission of such contract by a court of equity. Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243.

(c) Intention to Deceive.

The intent of the party making the representation, and his belief in its truth, are alike wholly immaterial. It is sufficient that the statement is material, was relied on by the purchaser, and was in fact untrue. Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243.

(d) Reliance on Representation.

In General.—One of the fundamental principles in regard to fundamental misrepresentation is that the false

statement must be believed by the party to whom addressed; otherwise, however false, or however fraudulent the intent, the false statement does not constitute any ground for rescission of a contract. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Hull *v.* Fields, 76 Va. 594; Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243.

Where the representations were made by the grantor to the effect that certain industries had been secured to locate upon the land near the land granted it was proved that the grantee had heard the president of the land company, upon whose land the grantor had represented that the industries were going to locate, state publicly before the conveyance, that the industries had not been secured, it was held, that the grantee was not entitled to a rescission of the conveyance in equity. Beckley *v.* Riverside Land Co. (Va.), 23 S. E. 778.

C. sells and conveys several adjoining tracts of land to L. without having them surveyed. C.'s deeds for the lands call for about 500 acres, and he conveys to L. the same tracts of land for 500 acres more or less; but before the execution of the deed by C. to L., C. informed L. that he had never had the lands surveyed, and that he was disposed to believe there was not more than 450 acres embraced within the several tracts, although his deeds called for more land. L. replied that as he made by his calculations about 500 acres called for by the several deeds, to put it at that amount, that the difference was of no consequence, and should cause no difference between himself and C. Upon survey subsequently made, the several tracts contained but 453 acres. It was held, that this was no such misrepresentation in the quantity of land as would entitle L. to a rescission of the contract. Lovell *v.* Chilton, 2 W. Va. 410.

Presumption as to Reliance on Representation.—When the seller has made a false representation which, from its nature, might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was thereby induced to contract, and to remove this inference the seller must prove either that the buyer had knowledge of facts which showed the representations to be untrue, or that he expressly stated in terms, or showed by his conduct, that he did not rely upon the representations, but acted on his own judgment. Nor is the buyer deprived of his right to relief because he had the means of discovering that the representation was false. Wilson *v.* Carpenter, 91 W. Va. 183, 21 S. E. 243.

(e) Silence as Amounting to Fraud.

Where parties deal at arms' length, and there is no confidential or fiduciary relation between them, mere silence on the part of the purchaser of realty, or failure to disclose knowledge on his part of a peculiar value affecting the property, or the title thereto, would not be sufficient to set aside a sale fairly made, and which is otherwise unimpeachable. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39.

(f) Representation as to Law.

Mere misstatement of law will not alone constitute fraud to annul a conveyance or other act; but when accompanied by fraud in any form, such as misrepresentation or concealment of fact, imposition, undue influence, or misplaced confidence, or advantage had been taken of one's ignorance of law to mislead him, or there is a relation of trust and confidence between the parties, it will constitute such fraud for relief. Schuttler *v.* Brandfass, 41 W. Va. 201, 23 S. E. 808.

(3) Rights of Bona Fide Purchaser.

Where a bona fide purchaser, without notice of fraud, receives a deed from two persons, one of whom fraudulently induced the other to join therein, he is not responsible in equity; but the loss ought to fall on the fraudulent vendor. In such case, the circum-

stance that the person defrauded is of weak understanding, but not an idiot or lunatic, is not sufficient to affect the right of the bona fide purchaser. Whitehorn *v.* Hines, 1 Munf. 557. See the title VENDOR AND PURCHASER.

c. Conveyances in Fraud of Rights of Third Persons.

D. makes a verbal agreement with E., for an exchange of lands, but afterwards refuses to perform the agreement. At the time D., did not have the legal title. E. brings suit to compel a specific performance of the contract, and by the highest court in the state, it is ascertained and adjudicated that he is entitled to have the contract performed. F., being fully informed of all these facts, of the existence of the contract, of its binding obligation, and of the pendency of a suit to enforce it, co-operates with D., in obtaining and using a deed conveying the land to himself, and by virtue of said deed, recovers in ejectment against E. It was held, that it is inequitable to allow F. the advantage of a deed obtained under these circumstances, which amount to bad faith and fraud; that he should be perpetually enjoined from all proceedings under the same, and that D. and F. should be decreed to convey the legal title to E., by sufficient deeds for that purpose. Parrill *v.* McKinley, 6 W. Va. 68.

Fraud upon Creditors.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Conveyances in Fraud of Marital Rights.—See the title HUSBAND AND WIFE.

d. Evidence.

Burden of Proof.—In a suit to set aside a deed on the ground of fraud and undue influence, the burden of proof is, as a rule, on the plaintiff to prove the fraud and undue influence alleged, and such proof must be clear and convincing. But if indicia of fraud are proved, so that the fraud may be presumed from the circumstances and condition of the parties, or their intimate and confidential relations one to the other, as parent and child, or in any other way, the burden of proof shifts to the defendant and he is obliged to repel the presumption of fraud and undue influence arising from the circumstances of the transaction and the relation of the parties by strong and clear evidence. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

A transaction may of itself and by itself furnish proof of fraud so conclusive as to outweigh the answer of the defendant, and even the evidence of witnesses. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

If the relationship of the parties and the surrounding circumstances cast doubt upon the payment of the consideration for a conveyance, the burden of proving such payment and of showing good faith in the transaction is on the grantee. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

Circumstantial Evidence.—Fraud may be established by circumstantial evidence as well as by direct and positive proof, and in most cases circumstantial evidence is the only proof that can be adduced. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

Evidence of Similar Representation.—In a suit to rescind a contract for false representations, evidence of similar representations to other persons, about the same time, is admissible to show the bent of mind of the party making the representation. Wilson *v.* Carpenter, 91 Va. 183, 21 S. E. 243.

Weight and Sufficiency.—False admission of receipt of consideration, absence of means in the grantee, failure on the part of the grantee to produce evidence supposed to be within his reach, unusual mode of payment, and want of clear proof are among the indicia of fraud. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

Mere relationship of the parties is not alone a badge of fraud, but it strengthens a presumption arising from other circumstances, and calls for close scrutiny. Todd *v.* Sykes, 97 Va. 143, 33 S. E. 517.

An aunt, by deed, conveyed to her nephew, who was at the time, and had been for many years, living in her family, and managing her farm and other business affairs, her whole estate, real and personal, subject to her life estate therein. Upon a bill filed by the grantor to set aside said deed after the death of the grantee, and nearly five years after its date, upon the ground that, by the misrepresentation and fraud of the grantee, the grantor was induced to execute a different instrument from that she believed she was executing, the plaintiff failed to prove that there was any such misrepresentation or fraud, or that the contents of the deed were not such as she intended. It was held, that such deed will not be set aside for the alleged fraud nor were the grantor and grantee placed in such a fiduciary or confidential relation to each other as would entitle the grantor to have the deed annulled at her mere volition or pleasure. And especially would a court of equity refuse to grant relief in such case, after such unexplained delay in bringing her suit. Curlett *v.* Newman, 30 W. Va. 182, 3 S. E. 578.

2. Mistake.

See the titles MISTAKE AND ACCIDENT; RESCISSION, CANCELLATION AND REFORMATION.

a. Mistake of Law.

Mutual Mistake as to Effect of Warranty Deed.—A court of equity will relieve against a mutual mistake of law as well as of act, when such mistake is established by clear and convincing proof, and the rights of innocent third parties do not interfere. Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499.

While a general warranty deed, without limitation, reservation, or exceptions, conveys all the grantor's right, title, and interest, both legal and equitable, in and to the property embraced therein, and while parol testimony is not admissible to vary, contradict, or explain such deed, unambiguous on its face, yet, if such deed is executed through mutual mistake as to the legal effect thereof, contrary to the plainly established intention of the parties thereto, a court of equity will grant relief against such mistake, especially when the same is attributable to the party or his agent who is seeking to take an unconscionable advantage thereof. Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499.

Mistake as Effect of Transfer of Rights by Wife to Husband.—A transfer of her rights by a married woman to her husband and consenting to its investment in a particular manner, or to its use by him, can not be avoided upon the ground that she was ignorant of the law affecting the subject. Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285. See the title SEPARATE ESTATE OF MARRIED WOMEN.

Mistake of Law Accompanied by Fraud.—Mere mistake of law will not alone be ground of relief against a conveyance or other act; but when accompanied by fraud in any form, such as misrepresentation or concealment of facts, imposition, undue influence, or misplaced confidence, or advantage has been in any way taken of one's ignorance of law to mislead him, or where there is a relation of trust and confidence, it will be ground for relief in equity. Schuttler *v.* Brandfass, 41 W. Va. 201, 23 S. E. 808.

b. Mistake of Fact.

In General.—"A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the party complaining

would not have entered into the agreement, or assumed the obligation from which he seeks to be relieved; and the proof must be clear and convincing of the existence of the state of facts upon which the claim for relief is based." Simmons *v.* Palmer, 93 Va. 393, 25 S. E. 6.

Where by plain intention of the parties, it appears that mistakes have occurred from misplacing points of compass, or leaving out lines, etc., the same will be corrected by the court. Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305.

Equity is the proper form to reform a deed, and a bill which charges mutual mistake in making the deed is not demurrable, even though it fails to charge notice to a purchaser for value. Such notice must be proved, but the defense must be made by plea or answer. Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647.

It has been held, that in an action of ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed. Elliott *v.* Horton, 28 Gratt. 766.

Mistake as to Interest of Grantor.—Upon a mutual mistake of parties as to the interest of the vendor in the land sold, a court of equity will, under the circumstances, set aside the sale entirely. Irick *v.* Fulton, 3 Gratt. 193.

Where by mistake defendant conveyed to complainant land, to a portion of which it had no title, complainant was entitled to a cancellation of the contract of purchase and deed, and a return of money paid thereon. Home Building, etc., Co. *v.* London, 98 Va. 154, 35 S. E. 363.

Mistake as to Quantity of Land Conveyed.—Where a deed is on its face a sale in gross, if it is subsequently ascertained that there is either a deficiency or an excess in the quantity of land specified therein, and it is shown that the error in the quantity arose from a mutual and innocent mistake of the parties, a court of equity may, in some cases, upon proper pleadings and proof, annul the deed and rescind the sale, but in the absence of fraud, actual or constructive, in either party, such court can allow no abatement for a deficiency or compensation for any excess. Hansford *v.* Chesapeake Coal Co., 22 W. Va. 70.

Mistake in Description.—In Blessing *v.* Beatty, 1 Rob. 287, sale was made of land embraced by a deed under which the vendor claimed, but by mistake the conveyance from the vendor embraced some land not conveyed by that deed, and omitted some comprised in it. On a bill by the vendee against the administrator and heirs of the vendor, it was held, that equity would correct the mistake, by directing a conveyance from the heirs of the vendor according to the calls of the deed under which the vendor claimed.

Mistake of Scrivener in Drawing Deed.—A court of equity will correct mistakes of the scrivener in drawing a deed, where he has not drawn it in accordance with the clearly established directions and intentions of the parties. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Deitz *v.* Providence, etc., Ins. Co., 33 W. Va. 526, 11 S. E. 50; Lough *v.* Michael, 37 W. Va. 679, 17 S. E. 182; Troll *v.* Carter, 15 W. Va. 567; Peyton *v.* Harman, 22 Gratt. 643; Alexander *v.* Newton, 2 Gratt. 266; Perkins *v.* Dickinson, 3 Gratt. 335; Elliott *v.* Horton, 28 Gratt. 766; Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187; Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305; Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094; Allen *v.* Yeater, 17 W. Va. 128; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

A mistake of the scrivener in drawing a deed, whether of law, or fact, will be corrected by a court of equity, even against bona fide creditors of the grantor. Alexander *v.* Newton, 2 Gratt. 266.

Generally, to warrant equity to reform a deed for mistake, the mistake must be mutual; but where there are not two parties to the contract, and by mistake of the scrivener the instrument does not execute the purpose of the party executing the deed, equity will reform the deed at his instance. Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187.

If a deed fails to carry out the intent of the parties by conveying one tract, whereas another was intended to be conveyed, it will be canceled. Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094; Allen *v.* Yeater, 17 W. Va. 128; Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Pusey *v.* Gardner, 21 W. Va. 476; Alexander *v.* Newton, 2 Gratt. 266.

In Weidebusch *v.* Hartenstein, 12 W. Va. 760, the grantor in a deed who was a German and did not speak the English language, brought a suit to rescind the deed on the ground of mistake. He alleged that the lawyer had drawn a deed, when it was his intention to have a will drawn, and that he signed the deed believing it to be a will and not a deed. It was held, that in order to set aside such deed, the proof of mistake should be the clearest and strongest, and the bill was dismissed as the proof was not sufficient considering the great length of time which had elapsed in this case.

Diligence in Applying for Relief.—Application to rescind a contract on the ground of mistake should be made with due diligence, and what constitutes due diligence must be determined by the facts of the particular case. The diligence must be in proportion to the injury likely to ensue from delay. In the case in judgment, though the complainant negotiated for the purchase of lot 5 in section 16, and there was conveyed to him lot 5 in section 15, and he promptly called attention to the mistake and demanded a return of his money and bonds, yet he was perfectly familiar with the land and its division in lots and sections, and must have known of the mistake at the time. The lots were bought for speculation, and it does not appear that they were of unequal value, or that the location of the lot was the inducing motive to the purchase. The complainant kept the deed and never offered to reconvey the lot until the lots had greatly depreciated in value. These and other attending facts and circumstances present a case in which the complainant has not been diligent, and is not entitled to relief by the recision of his contract. Simmons *v.* Palmer, 93 Va. 389, 25 S. E. 6.

Evidence.

Burden of Proof.—A deed is presumed to be correct until it is shown by such evidence to be incorrect. Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

If a deed made under a prior executory contract varies therefrom, it is presumed that the deed, so far as it departs from such contract, represents a change agreed upon by the parties from the terms of the prior contract, and the deed represents the final contract of the parties, and such contract and all antecedent propositions, negotiations, and parol interlocutions on the same subject are merged in the deed. It may, however, be shown that such variance is due to a mistake in drawing the deed by such evidence as the law in such case requires. Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

Sufficiency of Evidence.—In a suit to reform a deed for mistake, the evidence of such mistake must be clear, convincing, free from reasonable doubt, and not conflicting. Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902; Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. 39; Weidebusch *v.* Hartenstein, 12 W. Va. 760.

3. Undue Influence.

See the titles RESCISSION, CANCELLATION AND REFORMATION; UNDUE INFLUENCE.

Effect of Undue Influence.—Whenever a deed is tainted with undue influence this will render it voidable. In all such cases courts of equity have jurisdiction to set aside and cancel the deed, and to place the parties in the position occupied by them before the imposition was practiced. Davis *v.* Strange, 86 Va. 793, 11 S. E. 406; Pusey *v.* Gardner, 21 W. Va. 469; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516; Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. 246.

What Constitutes Undue Influence—In General.—Suggestion and advice, addressed to the judgment, are not undue influence. To annul a deed for undue influence, it must appear that it was such as to destroy free agency, and to substitute the will of another for that of the person nominally acting. It must appear to the satisfaction of the court that the party had no free will but stood in vinculis. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201; Erwin *v.* Hedrick, 52 W. Va. 537, 44 S. E. 165.

The influence which will vitiate an act must amount to force and coercion destroying free agency, and not be merely the influence of affection. The act must be obtained by this coercion, and it must appear that it was done merely for the sake of peace, so that the motive was tantamount to force or fear. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

Influence resulting from affection and attachment, or the mere desire of gratifying the wishes of another, if the free agency of the party is not impaired, does not affect the validity of the act. Where a legal capacity is shown to exist, that the party had sufficient understanding to clearly comprehend the nature of the business, that he consented freely to the special matter about which he was engaged, and no fraud or undue influence is shown to have been used to bring about the result, the validity of the disposition can not be impeached, however unreasonable or imprudent or unaccountable it may seem to others. It is not the propriety or impropriety of the disposition, but the capacity to make it, and the fact that it was freely made with the full assent of the grantor, that must control the judgment of the court. It would be a useless consumption of time to enter upon a careful analysis of the great mass of testimony contained in this voluminous record. Almost every case of this kind must depend on the peculiar circumstances attending it. Greer *v.* Greers, 9 Gratt. 333.

A deed induced by an appeal on the score of gratitude, past kindness, or love or esteem is not the result of undue influence. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

Influence acquired over the grantor by reason of acts of kindness and attachment, does not constitute such undue influence as will vitiate a deed otherwise valid. Hale *v.* Cole, 31 W. Va. 576, 8 S. E. 516; Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. 201.

Confidential Relations.—"There are certain relations in life, which, from the peculiar confidence necessarily subsisting, courts of equity feel bound to guard and protect. These are guardian and ward, trustee and cestui que trust, attorney and client, principal and agent, parent and child, and the like. Transactions between persons occupying such confidential relations are viewed with jealous vigilance by courts of equity." Rixey *v.* Rixey, 103 Va. 414, 49 S. E. 586; Burwell *v.* Burwell, 103 Va. 314, 49 S. E. 68; Davis *v.* Strange, 86 Va. 793, 11 S. E. 406. See the titles AGENCY, vol. 1, p. 240; ATTORNEY AND CLIENT, vol. 2, p. 145; GUARDIAN AND WARD; HUSBAND AND WIFE; PARENT AND CHILD; TRUSTS AND TRUSTEES.

Conveyances from parent to child are not guarded with a jealous eye, but are generally presumed to be free

from suspicion, and the party who claims that they were procured by undue influence must prove that actual undue influence was exercised. It will not be presumed. Rixey *v.* Rixey, 103 Va. 414, 49 S. E. 586.

A court of equity will not avoid a conveyance from a parent to a child made in consideration of the support of the parent by the child when it appears that the parent, though weak and in failing health, is not of unsound mind, and, being aware of the consequence of his act, and that it can not be recalled, deliberately makes the conveyance. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

Where a conveyance was made by a mother, seventy-eight years of age, to two of her daughters, and there was considerable disparity between the consideration stated in the deed and the value of the property conveyed, but the deed contained a covenant of support for life, secured by a lien reserved, and there was no mental weakness other than that incident to the age of the mother and the deed was in accord with a will made four years before, and which had since been admitted to probate, and the grantees looked after the affairs of their mother, and shielded and watched over her with affectionate interest and care, and there was no proof of actual fraud or undue influence, the deed was upheld. Rixey *v.* Rixey, 103 Va. 414, 49 S. E. 586.

"In the case of Greer *v.* Greers, 9 Gratt. 332, a man in extreme old age conveyed the whole of his estate to one of his sons, and this court held, that as he had sufficient capacity to understand what he was doing, and there was no direct proof of fraud or undue influence, the improvidence and injustice of the act is disinheriting his other children did not give rise to a presumption of an abuse of confidence, or justify the court in setting aside the conveyance." Rixey *v.* Rixey, 103 Va. 419, 49 S. E. 586.

Conveyances by a child to a parent will be set aside where they are not entered with scrupulous good faith and are not reasonable under the circumstances. Rixey *v.* Rixey, 103 Va. 418, 49 S. E. 586.

"While the natural and just influence which a parent has over a child renders it peculiarly important for courts to watch over and protect the interests of the latter, and to set aside contracts and conveyances whereby benefits are secured by children to their parents, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances; the same rule does not apply where contracts and conveyances are made by which benefits are secured by the parent to the child. Instead of such contracts and conveyances being guarded with a jealous eye, they will generally be presumed to be free from suspicion, and the party who claims that they were procured by undue influence must generally prove it." Rixey *v.* Rixey, 103 Va. 418, 49 S. E. 586.

Where daughter, in situation of sudden surprise, without advice of friend or counsel, and when rendered unable to exercise a consenting mind, by the undue influence of her father and of his attorney, who pressed her with importunity and strong persuasions, and assurances that she would be otherwise provided for and compensated, and that it would be best to convey the property back to her father, as it was threatened to be burned, hastily and inconsiderately executed a deed granting the property to him without any consideration whatever, it was held, a case for equitable relief, by setting the deed aside. Davis *v.* Strange, 86 Va. 793, 11 S. E. 406.

A conveyance from a child to its parent, whether with or without a valuable consideration, is presumed to be valid in the absence of any circumstances or proof tending to show fraud, misrepresentation or undue influence or reasonable grounds, from which the

court may presume that the act was not entirely free and voluntary on the part of the child. Pusey *v.* Gardner, 21 W. Va. 470.

A court of equity, therefore, will not set aside a deed made by a daughter to her father immediately before her marriage, conveying her remainder in land, in which the father had a life estate, upon the ground of undue influence after an interval of thirty-five years and after the death of the father, though the claim of the daughter is not barred by the statute of limitations, where the case is not a clear one, and there are no circumstances which sufficiently account for the delay. Pusey *v.* Gardner, 21 W. Va. 470.

F. VALIDITY OF DEED MADE DURING WAR.

Not Necessarily Invalid.—The fact that a deed was made, acknowledged, and recorded during the war, does not render it null and void, but there must be some special circumstances alleged to show the deed void. Henderson *v.* Alderson, 7 W. Va. 217. See the titles CONFEDERATE STATES, vol. 3, p. 53; ILLEGAL CONTRACTS; WAR.

G. EFFECT OF DEFECTIVE OR INFORMAL DEED.

A deed, though invalid to pass the title to land, may nevertheless be sufficient to constitute color of title in the party claiming under it, which will ripen into title by possession claimed under it for the period of the statutory bar. Shanks *v.* Lancaster, 5 Gratt. 110; Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527; Swann *v.* Thayer, 36 W. Va. 46, 14 S. E. 423. See the title ADVERSE POSSESSION, vol. 1, p. 199.

Although a deed of conveyance of real estate from a grantor who has no title conveys no title to the grantee, yet it is color of title, and possession taken under it and held adversely, for the statutory period will ripen into a good title. Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233.

IV. Construction and Operation.

A. GENERAL RULES OF CONSTRUCTION.

1. Intention of Parties.

In General.—It is a fundamental principle in the interpretation of deeds that the expressed intention of the parties when ascertained shall govern unless the language employed renders it impossible to give effect to the intention. Humphrey *v.* Foster, 13 Gratt. 657; Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298; Temple *v.* Wright, 94 Va. 338, 26 S. E. 844; State Sav. Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543; Hunter *v.* Hume, 88 Va. 29, 13 S. E. 305; Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469; Bailey *v.* Hill, 77 Va. 492; King *v.* Norfolk, etc., R. Co., 99 Va. 629, 39 S. E. 701; Perkins *v.* Dickinson, 3 Gratt. 335; Bradley *v.* Mosby, 3 Call 60; Lee *v.* Bumgardner, 86 Va. 317, 10 S. E. 3; Wilson *v.* Langhorne, 102 Va. 637, 47 S. E. 871; Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274; Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239; Wiseley *v.* Findlay, 3 Rand. 361; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266; Hurst *v.* Hurst, 7 W. Va. 289; Ocheltree *v.* McClung, 7 W. Va. 232; Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 199, 46 S. E. 262; McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 282.

In construing a deed or will, the object is to ascertain the intention of the maker as gathered from the language used and the general purpose and scope of the instrument, in the light of surrounding circumstances; and when such intention clearly appears by giving to the words their natural and ordinary meaning, technical rules of construction will not be invoked to defeat it. Lindsey *v.* Eckels, 99 Va. 668, 40 S. E. 23.

"Deeds have orderly parts, technical words of precise legal signification, and in times gone by those parts and words, and the strict rule of construction

of them, have been rigorously observed, often defeating the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills. Humphrey *v.* Foster, 13 Gratt. 653; Mauzy *v.* Mauzy, 79 Va. 537; Lindsey *v.* Eckels, 99 Va. 668, 40 S. E. 23, show this to be the rule in Virginia; and Hurst *v.* Hurst, 7 W. Va. 289; and Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266; McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 282; and Bank *v.* Green, 45 W. Va. 171, 174, 31 S. E. 260, show this to be the rule in West Virginia." Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

Intention Must Be Expressed.—The intention of the grantor must be gathered from the language he has seem fit to employ. Wilson *v.* Langhorne, 102 Va. 637, 47 S. E. 871.

The intention of the grantor, as derived from the deed itself, should be sought after, and, if discovered, should be carried into effect, if it can be done consistently with the rules of law. Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298.

A court of equity will so construe the deed, consistently with it terms, as will give effect to the leading intent of the parties. Perkins *v.* Dickinson, 3 Gratt. 335.

Although it be a rule that in the construction of writings, the intention of the parties ought to prevail, yet that rule does not extend so far as to overturn the established interpretation which has, for ages, been put upon certain expressions; the legal effect of which, in particular instruments, has been constantly held to convey the absolute property. Bradley *v.* Mosby, 3 Call 60.

Neither the land books themselves, nor parol evidence of their contents, are admissible to show a meaning of the parties other than that plainly expressed in a deed. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274. See the titles EVIDENCE; PAROL EVIDENCE.

Deed Presumed to Express Intention.—Every deed is supposed to express the intention of the parties, and however unusual the form may be, it is a primary and cardinal rule of construction, that effect must be given to that intent whenever it is reasonably clear and free from doubt; and, in ascertaining the purpose and object of the parties, all parts of the deed must be taken and considered together, it being a rule of law too well settled to need citation of authority that, in the construction of any instrument, it must be construed as a whole. Temple *v.* Wright, 94 Va. 340, 26 S. E. 844.

2. Construed against Grantor.

In General.—It is a general rule in the interpretation of deeds that in cases of doubt or ambiguity, they will be construed most strongly against the grantor. Carrington *v.* Goddin, 13 Gratt. 587; Humphrey *v.* Foster, 13 Gratt. 653; Isaac *v.* West, 6 Rand. 652; Logan *v.* Com., 2 Gratt. 571; Rucker *v.* Lowther, 6 Leigh 259; Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298; Tate *v.* Tate, 75 Va. 527; Wilson *v.* Langhorne, 102 Va. 631, 47 S. E. 871; King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701; Chapman *v.* Mill Greek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262; Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214; Turk *v.* Skiles, 45 W. Va. 84, 30 S. E. 234; Allen *v.* Yeater, 17 W. Va. 128.

A grantor must be considered as having intended to convey all that the language he has employed is capable of passing to his grantee. Wilson *v.* Langhorne, 102 Va. 631, 47 S. E. 871.

Ambiguous words are to be taken most strongly against the person using them. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262.

Rule Only Applies in Case of Ambiguity.—It has been held, that this rule can only apply where the language of the deed is ambiguous or will admit of two constructions. Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214; Tate *v.* Tate, 75 Va. 527.

Whether One or Two Tracts of Land Are Granted.—Where it was doubtful, on the face of the deed, whether one or two parcels of land were intended to be conveyed, the deed was construed to pass both. Carrington *v.* Goddin, 13 Gratt. 587; Bank *v.* Green, 45 W. Va. 168, 31 S. E. 260.

Construction of Exceptions, Conditions and Reservations.—This rule is applied to exceptions and provisos in deeds. They are taken most favorably to the grantee. Conditions, exceptions, reservations, and provisos are to be strictly construed against the person in whose favor they are introduced; nor will the law permit a thing which is expressly granted, covenanted, or promised to be defeated by the subsequent restrictions. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 196, 46 S. E. 262.

Construction of Covenants.—With respect to covenants, it has been said that the rule is seldom or never applied except where the intention of the covenantor evidently harmonizes with the rule, and its application is therefore useless. Rawle on Covenants, p. 484; Allemong *v.* Gray, 92 Va. 224, 23 S. E. 298. See generally, the title COVENANTS, vol. 3, p. 741.

Deed of Emancipation.—If the construction of a deed of emancipation be doubtful, resort may be had to the rule, that the deed is to be taken most strongly against the grantor, and to the spirit of the laws of all civilized nations which favors liberty. Isaac *v.* West, 6 Rand. 652; Logan *v.* Com., 2 Gratt. 571. See the title SLAVES.

3. Construed to Have Some Effect Rather than None.

It is a general rule in the interpretation of deeds that they shall be so interpreted as to have some effect rather than none, in accordance with the maxim ut res magis valeat quam pereat. Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305; Lagorio *v.* Dozier, 91 Va. 503, 22 S. E. 239; Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 199, 46 S. E. 262; Liston *v.* Jenkins, 2 W. Va. 65. See also, Wilson *v.* Langhorne, 102 Va. 636, 47 S. E. 871; Flanary *v.* Kane, 102 Va. 556, 46 S. E. 312.

"A deed should be considered as intended to have some effect, and a construction making it operative will be preferred to one rendering it void. Some effect will, if possible, be given to the instrument, for it will not be intended that the parties meant it to be a nullity." Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 199, 46 S. E. 262.

4. Whole Instrument Construed Together.

The effect of language used in a deed is to be gathered from a careful examination of the whole deed, and not merely of disjointed parts, so as to give effect to the whole. Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298; Mauzy *v.* Mauzy, 79 Va. 538; Temple *v.* Wright, 94 Va. 338, 26 S. E. 844; Lagorio *v.* Dozier, 91 Va. 504, 22 S. E. 239; Bradley *v.* Zehmer, 82 Va. 685; Humphrey *v.* Foster, 13 Gratt. 653; Bank *v.* Green, 45 W. Va. 171, 31 S. E. 261; Uhl *v.* Ohio River R. Co., 51 W. Va. 115, 41 S. E. 340; Hurst *v.* Hurst, 7 W. Va. 289.

"The construction of a deed must be made upon the entire instrument, and be such that the whole deed and every part of it may take effect, and one part must be construed by another, so that all parts may agree." Uhl *v.* Ohio River R. Co., 51 W. Va. 114, 41 S. E. 340.

The deed should be so construed as to arrive at the true intent of the grantor and grantee, and in so doing the whole of the deed and all its parts

should be considered together. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 282; Hurst *v.* Hurst, 7 W. Va. 289.

5. Effect Must Be Given to Every Part of Deed.

Akin to the rule that the whole instrument must be construed together, is that which requires effect to be given to every part of the instrument. It is a familiar principle that force and effect must be given, if possible, to every word employed. Flanary *v.* Kane, 102 Va. 556, 46 S. E. 312; Wilson *v.* Langhorne, 102 Va. 636, 47 S. E. 871; Bailey *v.* Hill, 77 Va. 492; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

6. Construed in Connection with Other Deeds or Writings.

It has been held, that two deeds embracing the same subject matter, between same parties and relating to the same transaction, the latter executed to correct a mistake and supply an omission in the earlier, should be construed together as one deed. King *v.* Norfolk, etc., R. Co., 90 Va. 210, 17 S. E. 868.

And where two deeds of the executor and devisees were made at the same time and to the same parties, it was held, that they must be considered as parts of one transaction and as constituting in law one entire deed; and that therefore though one of the deeds made no exception of the part of the land embraced within the bounds of a tract of land, yet as the other did, the effect of the two deeds taken together was to except out of the grant in each the land in the interlock as fully as if the exception had been in both deeds. Anderson *v.* Harvey, 10 Gratt. 386. See also, French *v.* Townes, 10 Gratt. 513.

It has also been held, that two deeds should be taken and read together, as parts of the same transaction, where one was dated on the 26th of September, 1866, and the other on the following day, before the first was completely executed, and they were recorded on the same day, and the latter referred to the former, and its recitals as inducements to its execution, were the same. Walden *v.* Walden, 33 Gratt. 93.

Where a deed was made in a pending suit by commissioners appointed for that purpose, it was held, that the deed was to be considered together with the report of the commissioner ascertaining the boundaries of the land so conveyed, and the decrees directing and confirming the sale. Byrd *v.* Ludlow, 77 Va. 483.

But in construing one deed, another deed from the same grantor to a different grantee, which refers to a different subject matter, can not be looked to in order to ascertain the meaning of the grantor in the first deed. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

7. Adoption of Construction Placed upon Deed by Parties.

Where the language of an instrument is ambiguous, and the intention of the parties is the subject of inquiry, the construction placed upon such language by the parties themselves is entitled to great weight. King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701.

"Looking to the face of the deed, therefore, it appears to me, it may be clearly implied, that the grantors intended to grant the fee simple or absolute property in the coal, as well as in the eight acre lot, so conveyed in terms; and the implication is certainly not rebutted by anything found in the record, but on the contrary, is rather confirmed, by the long acquiescence in the right of the grantee, and those claiming under him, by the grantors, and those claiming under them." List *v.* Cotts, 4 W. Va. 543.

8. Repugnant Clauses.

The rule is that when two clauses in a deed are repugnant, the first shall prevail. Blair *v.* Muse, 83 Va. 240, 2 S. E. 31; distinguishing Humphrey *v.* Foster, 13 Gratt. 657.

Unlimited power of alienation is an

essential incident of a fee simple estate, and where a deed conveys land to four grantors in fee simple, a subsequent clause giving one of them power to dispose of the whole at her pleasure is invalid, the rule being that where two clauses in a deed are repugnant, the first shall prevail. Blair *v.* Muse, 83 Va. 238, 2 S. E. 31.

Rule Yields Where Contrary Intention Is Clear.—The common-law rule that the habendum clause of a deed must yield to the granting clause, in case of repugnance between the two, has no application except where the repugnance is such that the intention of the grantor can not be determined with reasonable certainty from the whole instrument. Temple *v.* Wright, 94 Va. 338, 26 S. E. 844.

Repugnant words yield to the purpose of the grant, where such purpose is clearly ascertained from the premises of the deed, although such words stand first in the grant. Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266; Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340.

9. Rejection of False or Erroneous Description.

In General.—It is well settled that where the subject matter of a deed or will is sufficiently and clearly ascertained, though there be added particulars of description which are found to be false or mistaken, effect will be given to the grant or devise, notwithstanding, and these false or mistaken particulars of description will be rejected. In such a case the maxim, "falsa demonstratio non nocet cum de corpore constat" applies. Flanary *v.* Kane, 102 Va. 555, 46 S. E. 661; Wootton *v.* Redd, 12 Gratt. 196, 208; State *v.* Savings Bank *v.* Stewart, 93 Va. 447, 451, 25 S. E. 550; Preston *v.* Heiskell, 32 Gratt. 48; Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469; Wiseley *v.* Findlay, 3 Rand. 366; Smith *v.* Chapman, 10 Gratt. 445; Hunter *v.* Hume, 88 Va. 28, 13 S. E. 305; Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1096.

This rule of construction is said to be derived from the civil law. State Savings Bank *v.* Stewart, 93 Va. 452, 25 S. E. 543; Wootten *v.* Redd, 12 Gratt. 196; Preston *v.* Heiskell, 32 Gratt. 48.

Remaining Description Must Be Complete, Clear and Certain.—But in order to bring a case within the influence of the principle invoked it must appear that the other words of the grant or devise give a clear, certain and unambiguous description of the subject granted or devised, and that the particulars given are but words of suggestion and affirmation superadded as further description of a subject otherwise and sufficiency described. If, on the other hand, such particulars are restrictive in their character, if they serve to narrow and limit the extent of the subject pointed out by the other words, they can never be rejected. Flanary *v.* Kane, 102 Va. 555, 46 S. E. 312; Wootten *v.* Redd, 12 Gratt. 211; State Sav. Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543; Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094.

Position of True Description Immaterial.—It is immaterial whether the true or the false description of land be placed first. The courts will reject the false wherever found, and give effect to the intention of the parties when so expressed as to enable the premises intended to be conveyed to be identified. State Savings Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543.

"The rule is clearly settled that when there is a sufficient description set forth of premises, by giving the particular name of a close or otherwise, we may reject a false demonstration; but that if the premises be described in general terms, and a particular description be added, the latter controls the former. It is not, however, because one part of the description is placed first and the other last in the sentence, but because, taking the whole together, that intention is manifest. For, in-

deed, it is vain to imagine one part before another; for, though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence." Hunter *v.* Hume, 88 Va. 28, 13 S. E. 305. See generally, the title BOUNDARIES, vol. 2, p. 579.

Material Calls Prevail over Immaterial.—Cases of grants having conflicting calls are of not uncommon occurrence, but such a grant is not therefore necessarily void. If the conflict be irrevocable, one or the other of the conflicting calls may be rejected, and locality given to the survey by the rest; and in determining which call shall be disregarded, the rule is that the one less certain shall yield to the one more material and more certain. Smith *v.* Chapman, 10 Gratt. 474.

And if there be found one call incongruous and irreconcilable with the other calls of the grant, but it appear that the survey can be located by those others, and it is shown by whatever evidence that this incongruous and incompatible call had been inserted in the certificate of survey by mistake, it would seem that there certainly could be no less reason and propriety in rejecting it than if the mistake were demonstrated by proof that the lines had been actually run when the original survey purported to have been made, and that no such object as that constituting the call in question any where occurred upon them. Smith *v.* Chapman, 10 Gratt. 475.

Owners of a large tract of land convey a part of it. The call of the deed is, beginning on the line of a survey, made for S. about six hundred and ninety poles from its northerly corner, running thence with S.'s line a given course and distance to two white oaks, etc. Though there is an obvious mistake in some one or other of the calls of the survey, yet the beginning corner must be made at the point on the line of S., six hundred and ninety poles from his northerly corner. Smith *v.* Chapman, 10 Gratt. 445. See the title BOUNDARIES, vol. 2, p. 579.

Illustrations of Rule.—If two descriptions of land are given in a deed, each of which is equally explicit, but which are repugnant to each other, that description will prevail, which appears from the whole deed best expresses the intention of the parties. Therefore, where there were two repugnant descriptions in a deed, but the grantor only owned the land answering to one of them, the deed was held operative to convey the land which answered to the description. State Savings Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543.

A statement in a deed that the lot conveyed is situated on the northeast corner of two streets mentioned, when in fact it is on the southwest corner of said streets, does not affect the deed where it appears that the grantor owned no property on the northeast corner, but did own the lot on the southwest corner; that possession of the last-mentioned lot had been taken and held for a number of years, and there are other sufficient descriptions of the lot on the southwest corner contained in the deed. Clark *v.* Hutzler, 96 Va. 73, 30 S. E. 469.

Where land was described as "215 acres, lying in Wythe county, adjoining the lands of the plaintiff, being the same tract on which their father lived at the time of his death and which he devised to his wife during life," it was held, that where upon an inspection of the will, it was found that no land was devised to the wife for life, but the same tract to her for years only, this erroneous description did not render that bad which was good without it, as utile per inutile non vitiatur. Wiseley *v.* Findlay, 3 Rand. 361.

By deed in 1858, H. conveyed to P. all his right, title and interest, as well at law as in equity, in and to King's salt works estate, embracing the following interests in the King's salt works estate. The deed then sets out

the persons from whom H. derived the several interests, and the amount of each, and among them the interests derived from three C.'s stating the interest of each C. to be one two hundredth and seventieth. By deed in 1862 between P. and H., this first deed is annulled, P. released to H. all claim to the interest of H. in said King's salt works derived from W.—being one twenty-fourth, and H. conveys to P. for a certain sum, with general warranty, the interest in the King's salt works purchased by him from—naming all the persons mentioned in the first deed, except W. and setting out their interests in the same way, the interest derived from the C.'s being stated at the same amount. In a suit by the trustee of H. against P. and parties claiming under him, it appears the interests derived from H. from the C.'s instead of being 3-270 or 6-540, they were 11-540; and he insisted that the excess over 6-540 did not pass by the deed of H. to P. It was held, that the deed of 1862 conveys the interest in the King's salt works estate derived from the C.'s; this is a sufficient description to pass the whole interest of H., and it being apparent that such was the intention of both H. and P., the addition stating the amount of the interest derived from the C.'s will not restrict the operation of the deed. Preston *v.* Heiskell, 32 Gratt. 48.

10. Contemporaneous Construction.

Contemporaneous construction of a deed is that drawn from the time when, and the circumstances under which, the deed originated. It is of great weight in determining the intent of the parties. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262, citing Hurst *v.* Hurst, 7 W. Va. 299; Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

The state of the country and the manners of society at the time the deed was made is to be regarded in giving it a construction. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262, citing Hurst *v.* Hurst, 7 W. Va. 299; Gibney *v.* Fitzsimmons, 45 W. Va. 334, 32 S. E. 189.

11. Consideration of Surrounding Circumstances.

If a writing is not ambiguous, it must speak for itself by its words, without aid of any oral evidence; but if it is ambiguous, oral evidence is admissible to show the occasion of the contract, the situation of the parties, the circumstances surrounding them, their subsequent acts in executing the contract, in order to show their intention in making it; but evidence can not be received to show their declarations, conversations or interlocutions before or at the execution of the contract. Uhl *v.* Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340; Crislip *v.* Cain, 19 W. Va. 483; West Virginia Trans. Co. *v.* Pipe Line Co., 22 W. Va. 614; Tucker *v.* Cocke, 2 Rand. 51.

If susceptible of different constructions, the circumstances attending the transaction, the situation of the parties, and the state of the thing granted at the time of the grant, should be taken into consideration, for the purpose of ascertaining the probable intent. Allemong *v.* Gray, 92 Va. 216, 23 S. E. 298.

If the language of the instrument is susceptible of more than one construction, the intent of the parties, to be collected from the whole instrument, must govern, and, in order to ascertain that intent, the court may take into consideration the extrinsic circumstances authorizing the transaction, the situation of the parties, and the subject matter of the instrument. Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305.

12. Punctuation.

In the interpretation of a deed very little consideration is given by the courts to punctuation. It is never allowed to interfere with the usual and natural sense and meaning of the language employed. O'Brien *v.* Brice, 21 W. Va. 704. See also, Ketchum *v.*

Spurlock, 34 W. Va. 597, 12 S. E. 832.

13. Meaning of Words and Language Used.

Primary Meaning.—The terms of every deed are to be understood in their plain, ordinary, and proper sense, and where words have a primary meaning they must always be understood in that sense, unless the context shows that they were otherwise intended. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274; Lindsey *v.* Echels, 99 Va. 668, 40 S. E. 23.

"It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning." Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214.

Where the meaning of the words of a written contract are clear, parol evidence is not admissible to show that the parties intended something else. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

It is the duty of courts to give effect to the true intent of the parties, ascertained, not by straining the signification of words so as to reach what to the court may appear a more rational or more equitable construction than that to be deduced from the language actually employed, but by construing the language used in accordance with its common and usual acceptation, and searching the entire writing in which the parties have seen fit to set out their agreement. Lagorio *v.* Dozier, 91 Va. 504, 22 S. E. 239.

The word "contiguous," in a deed describing two tracts of land as being "contiguous," means that the two tracts touch each other on one side. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

Where in a deed the land conveyed is described as a certain "estate and the lands contiguous thereto," a tract of land separated therefrom by intervening lands of other persons, and distant three-quarters of a mile, was held, not embraced within the conveyance. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

"What, then, is the meaning of 'contiguous?' Its primary meaning, according to all the lexicographers, is 'in actual contact' or 'touching,' from the two Latin words con and tangere. It is not synonymous with 'adjacent', although sometimes used in that sense, and vice versa. 'What is adjacent,' says Worcester, 'may be separated by the intervention of some other object; what is contiguous must touch on one side.'" Holston Salt, etc., Co. *v.* Campbell, 89 Va. 398, 16 S. E. 274.

Technical Words.—No rule is better settled than that technical words are presumed to be used technically, unless the contrary appears on the face of the instrument, and that words of definite legal signification are to be understood as used in their definite legal sense. Nye *v.* Lovitt, 92 Va. 713, 24 S. E. 345.

Applying this rule to the case of a grant to "Jane C. Lovitt, for and during her natural life, and at her death then to the heirs of her body and their heirs forever," it was held, that the deed gave to the heirs of the body of Jane C. Lovitt a contingent remainder in the lands conveyed, and the persons answering the description of "heirs of her body" at the time of her death took a fee simple estate, there being nothing in the deed to require the word "heirs of her body" to be given other than their technical and ordinary meaning. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

14. Construction a Question for the Court.

The general rule is that the construction of all written instruments is a question of law for the court. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274; New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300; Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

A question concerning real property, depending on the construction of a

deed, is a proper subject for a court of law. Poage *v.* Bell, 3 Rand. 586.

The construction of the terms used in a deed, aside from extraneous evidence, is for the court. Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

The construction of written instruments is for the court and not for the jury, but, in determining whether the court has improperly left such construction to the jury, the instructions given by the court must be read as a whole, and if it appears that the court did construe the instrument, and that the jury accepted and followed the court's construction, that is sufficient. New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

B. PROPERTY CONVEYED.

1. Property Included within Description.

a. Construction of Description.

(1) Intention of Parties.

The court will look to the surrounding facts, and will adopt that description, if certain and definite, which, in the light of such facts will most effectually carry out the intention of the parties. State Savings Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543.

And if two descriptions be given, each equally explicit, but repugnant to each other, that description will prevail which the whole deed shows best expresses the intention of the parties. State Savings Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543. See ante, "Intention of Parties," IV, A, 1.

(2) Rejection of False or Erroneous Description.

See ante, "Rejection of False or Erroneous Description," IV, A, 9.

(3) Parol Evidence to Explain Ambiguities.

Extrinsic is admissible to identify granted premises, and to apply the grant to its proper subject matter. This is not a question of construction, but of location, to be determined by the jury by the aid of such extrinsic evidence. New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

Parol evidence is always admissible to show the proper location of all descriptive calls, and determine if the land in dispute is embraced in the deed, and so give effect to the true intent of the parties. Hunter *v.* Hume, 88 Va. 24, 13 S. E. 305.

When a deed mentions the course and distance of a line, without any other description thereof, parol evidence is admissible to prove marked trees, not in the course or termination of that line, to be the true line intended. Baker *v.* Seekright, 1 Hen. & M. 177.

Extrinsic evidence was admissible to ascertain the location of the adjoining lands called for, so as to apply the deed to its proper subject matter. If, with the aid of such evidence, the land could not be identified, then the plaintiffs must fail in their action; but the deed upon its face, is not so defective in the description of the land as that the court could pronounce it ambiguous or uncertain, and exclude it from the jury. No court is at liberty to pronounce an instrument ambiguous or uncertain until it has brought to and in its interpretation all the lights afforded by collateral facts and circumstances which are properly provable by parol. Sulphur Mines Co. *v.* Thompson, 93 Va. 308, 25 S. E. 232.

There is error in permitting parol evidence of the intention of the parties that the purchaser should have the growing crop, that being in harmony and not inconsistent with the deed. Robinson *v.* Pitzer, 3 W. Va. 370.

But a grantor will not be allowed to change the effect of his conveyance by a statement that he did not intend to include this or that parcel of land therein when such intention was not made known to his grantee at the time and acquiesced in by him. Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 405, 46 S. E. 393.

Where in addition to the specification of an exact quantity of land, it appears on the face of the deed or con-

tract of sale, that the consideration for the land is a multiple of the number of acres specified; this, while it is prima facie a sale in gross, renders the deed or contract ambiguous, as to whether it was intended in fact as a sale in gross or by the acre; and in such case, parol evidence of the circumstances surrounding the parties is admissible to assist the court in interpreting the deed. Hansford *v.* Chesapeake, etc., Co., 22 W. Va. 70.

(4) A Question for Court.

When a question arises, what passes by a written instrument, it is proper for the court to decide it. Herbert *v.* Wise, 3 Call 239.

b. Particular Descriptions.

(1) Conveyance of All Property of Grantor.

In General.—A conveyance of "all the estate, both real and personal, to which the grantor is entitled in law or in equity, in possession, remainder or reversion" is valid to pass the grantor's whole estate. Mundy *v.* Vawter, 3 Gratt. 518; Wilson *v.* Langhorne, 102 Va. 631, 47 S. E. 871.

"There is no ambiguity about the word 'all;' a conveyance of 'all' is not a reservation of 'part.'" Snyder *v.* Grandstaff, 96 Va. 483, 31 S. E. 647.

But the registry of a deed conveying land by such general description, is no notice in law, to a subsequent purchaser of the grantor, of the existence of said deed. Mundy *v.* Vawter, 3 Gratt. 518.

Effect as Conveying Contingent Remainder.—Between the parties thereto, a deed from an insolvent debtor, containing a release clause, which conveys certain enumerated property, and "also any and all other property of every description" of the grantor, embraces and conveys a remainder in property contingent upon the grantor's surviving his mother. Wilson *v.* Langhorne, 102 Va. 631, 47 S. E. 871.

A testator devised and bequeathed his entire estate, real and personal, to his three grandchildren, to be equally divided between them, share and share alike, but, on the death of either of them without issue, his or her share should pass to the survivors or survivor, and in case all died without issue, then to collateral kin. Subsequently the grandchildren divided the estate amongst themselves, and by deeds reciting the provisions of the will and the partition which they had made, and their desire 'to vest exclusive title to the several parcels of land in the said parties to whom they had been assigned and allotted respectively," each conveyed to the other all of his right, title, and interest in the property allotted to such other. One of the grandchildren, in contemplation of marriage, conveyed the property so received by him to his intended wife and then married her, and shortly thereafter died without issue, or possibility of issue. It was held, that the title of survivorship of the two surviving grandchildren passed by their deed to their deceased brother, in his lifetime, and by his deed is vested in his widow. Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647.

Passes Equitable as Well as Legal Rights. — Where a grantor has conveyed all his estate, real and personal to trustees, the conveyance includes equitable as well as legal rights, and the trustees are the proper persons to assert them, in a court of equity. Carter *v.* Harris, 4 Rand. 199.

Effect as Including Money or Bank Stock.—A deed executed by a father to his two daughters upon certain trusts, declared on the face of the deed, contained the following clause, descriptive of the property conveyed: "First. All his household and kitchen furniture at present at the family residence in the town of L. and on the home farm; all live stock, grain, hay, and products of all kinds; all his farming implements of every description on the home place or Gabbert land; all debts, claims, and rights of recovery which the said grantor then possessed, and any and all

other personal estate of any and every description whatsoever." Held, that this description included all money possessed by the grantor at the time said deed was executed and delivered, and that any subsequent attempt to dispose of the same by will or otherwise would be inoperative. Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253.

A deed which conveyed all the grantor's property "real and personal" was held to embrace and convey all the shares which he owned in a national bank. Feckheimer *v.* Bank, 79 Va. 80.

(2) Conveyance of Certain Tract and "Contiguous" Lands.

Where land was described in the deed as a certain "estate and the lands contiguous thereto," a tract of land separated therefrom by intervening lands of other parties, and distant three-quarters of a mile, was held not to be embraced within the deed. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

(3) Conveyance of Right of Way.

The words "right of way" in a grant to a railroad company, taken alone, mean an easement only, and do not pass the very land itself. Uhl *v.* Ohio River R. Co., 51 W. Va. 107, 41 S. E. 340.

An agreement grants to a railroad company "the full and free right of way of the width of fifty feet * * * in, upon and through the lands of the sand Uhl * * * which right of way is hereby granted and conveyed for the construction, building and use of the road of said company." It also says, "And the said Uhl also hereby covenants and agrees to execute and acknowledge in due form of law, when required by said company, a deed conveying to said company in fee simple the land hereinbefore described." Such agreement conveys only a right of way, an easement in fee simple, not the land itself and the oil in it. Uhl *v.* Ohio River R. Co., 51 W. Va. 107, 41 S. E. 340. See the titles PRIVATE WAYS; RAILROADS.

(4) Conveyance of "Surface."

The word "surface" when specifically used as a subject of conveyance has a definite and certain meaning, and means only that portion of the land which is or may be used for agricultural purposes. Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214.

"Surface" means that part of the land which is capable of being used for agricultural purposes. There can be no question but that the word "surface" has a definite, certain meaning; that it is that portion of the land which is or may be used for agricultural purposes, for plowing, grazing, etc., and that a conveyance of the surface of a tract of land as completely severs the surface from the various strata beneath it as the conveyance of the coal, iron, limestone or any other specified stratum or interest in the land conveys a separate estate. Williams *v.* South Penn Oil Co., 52 W. Va. 189, 43 S. E. 214.

M. and D. jointly owned in fee simple a tract of 180 acres of land. M. conveyed to W. "All the coal in, on, or underlying the undivided one-half" of the tract and granted to W. the right to make and maintain on said tract of land such openings as might be necessary for ventilation, for drainage and for taking out all of the coal without any liability for injury to the surface of said land, or anything thereon, by reason of the mining of said coal, and the right to remove same, with rights-of-way, etc. D. conveyed to W. his undivided one-half of the tract in fee. W. conveyed to M. "All the surface of the one hundred and eighty acres undivided that was so conveyed to him by said D." retaining the right to make and maintain on said tract of land such openings as might be necessary for ventilation, for drainage and for the taking out of all the coal without any liability for injury to the surface of the land or anything thereon by reason of the mining of said coal, and the right to remove same, and rights-of-way, etc. It was held, that the said last convey-

ance from W. to M. was an express grant of the surface only and severed it from all underlying strata. Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214.

The coal and gas in and under the said tract of 180 acres of land is the joint property of W. and M. or their heirs, assigns or grantees. Williams *v.* South Penn Oil Co., 52 W. Va. 182, 43 S. E. 214. See the title MINES AND MINERALS.

(5) Conveyance of Specified Quantity "More or Less."

The conveyance of the land, after giving the number of acres, adds the words "more or less." These words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise, unless there be evidence to show that a contract of hazard was intended. Triplett *v.* Allen, 26 Gratt. 721.

Ten acres, in a tract of 166 acres, where the land is worth fifty dollars an acre, is not one of these small deficiencies to be covered by the phrase "more or less." Triplett *v.* Allen, 26 Gratt. 721.

Where a sale of land either by deed or contract describes the tract as containing a given quantity, but says "be the same more or less, and is conveyed by the boundary, and not by the acre," there can be no abatement of purchase money for deficiency of quantity, in the absence of intentional fraud. Adams *v.* Baker, 50 W. Va. 249, 40 S. E. 356. See the title MORE OR LESS.

(6) Conveyance Referring to Maps, Plats and Surveys.

Where a map of land is referred to in a deed for the purpose of fixing its boundaries, the effect is the same as if it were copied into the deed. State Savings Bank *v.* Stewart, 93 Va. 447, 25 S. E. 543; Snooks *v.* Wingfield, 52 W. Va. 445, 44 S. E. 277.

"The boundaries, monuments, courses, and distances laid down on a map referred to are as much to be regarded the true descriptions of the land as if they were expressly recited in the deed." Snooks *v.* Wingfield, 52 W. Va. 445, 44 S. E. 277.

When a plan of premises is referred to in the grant or deed, it becomes, by legal construction, a part of the grant ordered, and is not explainable by evidence aliunde any further than if inserted in the deed or grant. Snooks *v.* Wingfield, 52 W. Va. 445, 44 S. E. 277.

If the plat can be identified, it is immaterial whether the grantee had actual notice of it. Snooks *v.* Wingfield, 52 W. Va. 445, 44 S. E. 277.

"If a deed describes the property conveyed as a lot of land in a town 'known and described on the official map of said town as Block No. 6,' the map may be identified by parol evidence, and when identified, constitutes a portion of the deed." Snooks *v.* Wingfield, 52 W. Va. 445, 44 S. E. 277.

If I. J. purchase, at so much per acre, of C. C., "all a certain tract of land, called by a certain name, situate in the county of L. conveyed to the said C. C. by R. C. by deed of a certain date, said to be a moiety of the large tract granted to an ancestor of R. C. and comprehending the lots and land laid down in a certain survey," this is a purchase by metes and bounds, by virtue of which I. J. is entitled to no more than the land within the limits of such survey. Jones *v.* Carter, 4 Hen & M. 184.

2. Property Not Included within Description but Passing as Incidents.

When property is conveyed everything which belongs to it or is used with it, and which is reasonably essential to its enjoyment, whether specifically mentioned or not, passes an incident to the principal thing, or as a part of it. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Deacons *v.* Doyle, 75 Va. 262; Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227; Hardy *v.* McCullough, 23 Gratt. 251; Sanderlin *v.* Baxter, 76 Va. 299,

44 Am. Rep. 165; Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344; Scott *v.* Beutel, 23 Gratt. 1; French *v.* Williams, 82 Va. 462, 4 S. E. 591; Warren *v.* Syme, 7 W. Va. 474; Standiford *v.* Goudy, 6 W. Va. 364; Patton *v.* Quarrier, 18 W. Va. 447; Jordan *v.* Eve, 31 Gratt. 1.

Where land is sold, without reservation of any kind, it embraces the underlying minerals. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227. See the title MINES AND MINERALS.

But land can not be appurtenant to other land, or pass with it as belonging to it. And a right reserved in vendor to take ore, is land, not an easement, and can not pass as an appurtenant to other land. Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3; Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344.

It has been held, that permission to the grantees of real estate to use a dock while it is owned by the grantor, or until it is filled in, does not make it an easement appurtenant, which passes upon a sale and conveyance by the grantee. Hardy *v.* McCullough, 23 Gratt. 251.

Easements and Rights of Way.—See the titles EASEMENTS; PRIVATE WAYS.

Fixtures.—See the title FIXTURES.

C. ESTATES AND INTERESTS CREATED.

See generally, the titles ESTATES; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; SHELLEY'S CASE, RULE IN; SEPARATE ESTATE OF MARRIED WOMEN.

1. Necessity of Words of Perpetuity in Deed Conveying Fee Simple.

At Common Law.—At the common law, the words "heirs" was necessary to create a fee simple in all feoffments and grants to natural persons, and conveyances to natural persons taking effect as transfers of the legal estate by the operation of the statute of uses. Humphrey *v.* Foster, 13 Gratt. 656; Herring *v.* Wickham, 29 Gratt. 633.

At the common law a deed to a person forever to hold for life would have been for life, as the word heirs was wanting. "To have and to hold to him forever, he hath but an estate for term of life, for that there lack these words (heirs) which words only make an estate of inheritance in all feoffments and grants." Humphrey *v.* Foster, 13 Gratt. 656.

An exception to the rule, that the word "heirs" was necessary in a deed, in order to create a fee simple estate in the grantee, was the case of a conveyance by a father to a man and his daughter in frank marriage. In such case a fee simple usually passed without the use of the word "heirs," for there was no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity. Herring *v.* Wickham, 29 Gratt. 633.

Under Statutes.—By statute in Virginia (1 Rev. Code, 1819, ch. 99, § 27, p. 369) it was enacted, "that every estate in lands, which shall hearafter be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." Humphrey *v.* Foster, 13 Gratt. 656.

The West Virginia statute is in substance the same as that of Virginia. W. Va. Code, 1899, § 8, ch. 71; Bank *v.* Green, 45 W. Va. 168, 31 S. E. 260.

But since under the statute the whole deed is to be looked at in order to ascertain the intention of the parties, it has been held, that even under the Virginia statute, a deed to a person "forever to hold for life" only creates a life estate. Humphrey *v.* Foster, 13 Gratt. 656.

Effect of Conveyance with Absolute Power of Disposition.—G. conveyed by deed of general warranty to V. a tract of land, upon the following trust: "That the party of the second part hereby agrees and covenants that he will take, hold, and stand seised of the above-described real estate to and for the only, sole, and separate use, behoof, and benefit of Mary E. Green, wife of the said Charles S. Green, so that the said Charles S. Green will not sell, mortgage, charge, or incumber, the same by way of anticipation or otherwise; that the said Mary E. Green shall receive the rents and profits arising from the said property, or such person or persons as the said Mary E. Green shall be her order in writing direct and appoint to receive the same, during the joint lives of the said Charles S. Green and Mary E. Green, his wife; and upon the decease of the said Charles S. Green, in case his wife should survive him, then the said Mary E. Green, his wife, shall immediately take and hold the property hereinbefore described, to her and the heirs of herself forever; and upon this further trust and confidence, that the said Mary E. Green may devise and dispose of the above described property by her last will and testament, or by a paper in the nature of a will, as if she were a feme sole, and that she may otherwise dispose of the same by the consent of her trustee, and joining with him and her said husband in a conveyance of the same or any part thereof." It was held, that said deed conveys to Mary E. Green an equitable estate in fee. Bank *v.* Green, 45 W. Va. 168, 31 S. E. 260.

In Milhollen *v.* Rice, 13 W. Va. 510. Green, J., in delivering the opinion of the court said: "I conclude, therefore, as stated by Sir William Grant in Bradly *v.* Wescott, 13 Ves. 453, and by Chancellor Kent in Jackson *v.* Robins, 16 Johns 588, 'that a devise or gift to A and such persons as he shall appoint is a fee simple or absolute propperty in A, without appointment.'"

2. As Dependent upon Kind of Deed Employed.

a. Bargain and Sale.

The deed of bargain and sale was, and is, adequate to vest an estate in fee in land, in one person, and afterwards, upon a contingency, to divest it out of him and vest it in another person, though the latter was not ascertained or in existence at the date of the deed. But such shifting and revesting of an estate must be limited to take effect, if at all, within the time prescribed to prevent the creation of perpetuities. Ocheltree *v.* McClung, 7 W. Va. 232.

Such deed might be employed by a woman in contemplation of marriage, with the consent of the intended husband, effectually to convey and limit the legal estate in land to a trustee in fee; in trust for herself till the marriage; and to allow the husband to occupy the land till the death of the one of them who should first die; and, if she should survive, then to convey to her; but if she should die, the husband surviving, then to such person as the wife notwithstanding the coverture, might, by last will, published in the presence of three witnesses, appoint; and in default of such appointment, the estate in the trustee to terminate, so as to revert to her heirs. Ocheltree *v.* McClung, 7 W. Va. 232.

This deed may be employed to convey an estate and reserve or confer a power of appointment, upon the execution of which the deed will vest the estate in the appointee. In such case, the appointment is the event upon which the declaration in the deed operates to create the use, and, under the statute on the subject, to transfer the estate to the appointee. Ocheltree *v.* McClung, 7 W. Va. 232.

b. Release or Quitclaim Deed.

Under the provisions of § 2439 of the Virginia Code of 1887, a release deed is effectual to convey all the right, title, and interest of the grantor in the premises released, whether he were at

the time in the possession of the premises or not. Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

The grantee in a quitclaim deed, with covenant of special warranty, which purports to convey "such interest only as they (the grantors) now have, whatever that may be" takes in subordination to a prior unrecorded deed, and such quitclaim deed can not be introduced in evidence to defeat the title deduced under such prior unrecorded deed. Virginia, etc., Iron Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

"But even in states where a quitclaim deed is recognized as an effectual mode of transferring the title of the grantor, and is accorded the same privileges under the registry law as a deed of bargain and sale, yet if it appears by the deed of quitclaim that the grantor intended to convey only such land as he owned at the time of its execution, the lands embraced in the prior operative conveyance are reserved from the operation of the quitclaim deed, and title to such previously conveyed lands will not pass by the deed of quitclaim, notwithstanding that the prior deed remains unrecorded." Virginia, etc., Iron Co. *v.* Fields, 94 Va. 115, 26 S. E. 426.

At the sale under the decree of confiscation under the act of congress for the confiscation of the property of rebels in the late war, A became the purchaser, and there was a conveyance of the property by the marshal to him. Afterwards A obtains from B, the original owner of the land, a conveyance by which he released to A all his interest of every kind in the land, and covenanted against the claims of all persons claiming under him. It was held, that this conveyance was valid to convey the fee in the land, and the heirs of B after his death could not recover it although the title of A acquired at the sale was defective. Mason *v.* Tuttle, 75 Va. 105.

A grantee in a deed who has released all interest in the property conveyed, in consideration of the conveyance to her of other property by the grantor, which last-mentioned conveyance was made on condition that she should execute such release, can not thereafter assert any title or interest under the first-mentioned deed. Townsend *v.* Outten, 95 Va. 536, 28 S. E. 958.

c. General Warranty.

Section 2, ch. 72, W. Va. Code, referring to general warranty deeds, provides: "Every such deed, conveying lands, shall, unless an exception be made therein, be construed to include all the estate, right, title and interest, both at law and in equity, of the grantor in or to such lands." Southern Building, etc., Ass'n *v.* Page, 46 W. Va. 302, 33 S. E. 336. Morrison *v.* Clarksburg Coal, etc., Co., 52 W. Va. 331, 43 S. E. 102.

A general warranty deed, without limitation, reservation, or exception, conveys all the grantor's right, title, and interest, both legal and equitable, in and to the property embraced therein, including the right of retention of the title to secure the unpaid purchase money due and owing from a prior recorded title bond purchaser of an undivided interest in such property, and operates as a transfer of such unpaid purchase money to the grantee; and after due recordation of such deed, and notice thereof, such title bond purchaser can not pay such unpaid purchase money to his vendor, the grantor in such absolute deed, except at his own risk and peril, but must pay the same to the grantee before he can demand conveyance of the retained legal title. Southern Building, etc., Ass'n *v.* Page, 46 W. Va. 302, 33 S. E. 336; Turk *v.* Skiles, 45 W. Va. 82, 30 S. E. 234.

It is a fraud upon the grantee in such deed, after delivery and recordation thereof, for the grantor to receive payment of such unpaid purchase money; and such title bond purchaser must take notice of the recorded condition of the legal title, and he can not take

advantage of such fraud without becoming a participant therein. Southern Building, etc., Ass'n *v.* Page, 46 W. Va. 302, 33 S. E. 336.

A deed made in the following form: "This deed, made and entered into this first day of March, 1894, by and between A. C. and W. A. C., her husband, of the first part, and C. A. C. and L. R. C., all of the county of D., and state of West Virginia, witnesseth, that for and in consideration of the sum of $500 * * * the parties of the first part have sold and doth hereby convey unto the parties of the second part a certain tract of land (describing it). And the parties of the first part hereby covenant that they will warrant generally the property hereby conveyed, retaining a vendor's lien to secure the payment of the residue of the purchase money. Witness the following signatures and seals. A. C. (Seal). W. A. C. (Seal),"duly acknowledged, conveys all the right, title, and interest of W. A. C., the husband, in and to the described property, whether the legal title was in him or in A. C., the wife. Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

3. As Dependent upon Estate or Interest of Grantor.

a. Effect Where Grantor Has Distinct Interests in Property Conveyed.

A tract of land is conveyed to a husband and R., his wife, jointly; the husband dies intestate leaving children; and the said R., his widow, being his administrator, then executes a deed to a third party for said land, in the premises of which she is mentioned as "R., in her own right as widow, and also as administratrix;" the grant in the deed is of the land without qualification and the deed is signed, "R, in her own right, R. as administratrix." Held, that said deed operates as a conveyance not only of the dower interest of the said widow in the land, but also as a conveyance of the moiety owned by her in fee. It conveys her entire interest in the land. O'Brien *v.* Brice, 21 W. Va. 704.

b. Effect of Absolute Conveyance by Owner of Defeasible Fee.

A deed from a person in fee simple to whom an estate was limited by will subject to be defeated upon the devisee's death without heirs of the body, vest a defeasible estate in the grantee, and if the grantor dies without such heirs, the estate of the grantee is terminated. Tomlinson *v.* Nickell, 24 W. Va. 148; Elys *v.* Wynne, 22 Gratt. 224. See the title ESTATES.

4. As Dependent upon Mode of Designating Beneficiaries.

a. Conveyance for Life, with Limitation to Heirs of Grantee's Body.

By a deed dated in 1769, certain slaves were given to a daughter of the donor, and her husband for and during their natural lives, or that of the longest liver of them; and, after the decease of them both, the said slaves and their increase to be equally divided among the heirs of her body; and, in default of such heirs, to return and be divided equally between the donor's son and other daughter, their heirs and assigns forever. By virtue of this deed, the first female donee took an estate for life only; the words "heirs of her body," coupled with the words, "equally to be divided between them," being to be construed not as words of limitation, but of purchase, describing the persons intended to take. Self *v.* Tune, 6 Munf. 470.

Limitation, by deed, of slaves to the donor's daughter for life, and after her death, to the heirs of her body, to the only proper use and behoof of such heirs, their executors, administrators or assigns: Quære, what estate the daughter takes. Bradley *v.* Mosby, 3 Call 50. See the titles HEIR, HEIRS AND THE LIKE; SHELLEY'S CASE, RULE IN.

A grant to "Jane C. Lovitt, for and during her natural life, and at her death then to the heirs of her body and their heirs forever," gave to the

heirs of the body of Jane C. Lovitt a contingent remainder in the lands conveyed, and the persons answering the description of "heirs of her body" at the time of her death took a fee simple estate upon the ground that technical words are presumed to have been used in a technical sense notwithstanding the grantor in the preliminary part of the deed gave as reason for the conveyance that he desired "specially to provide for her and her children." Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345. See the title HEIR, HEIRS AND THE LIKE.

b. Conveyance for Life with Limitation to Grantee's Children.

A deed conveying "in trust for the sole and separate use and benefit of Susan E. Cotts during her natural life, and upon her death the said property shall be equally divided among the children of said Isaac Cotts and Susan E. Cotts, his wife," creates a life estate in Susan E. Cotts, and a remainder in such children, vesting in both cases at once on the execution of the deed, and such remainder does not await the death of Susan E. Cotts to vest. Diehl *v.* Cotts, 48 W. Va. 255, 37 S. E. 546. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

c. Conveyance to Several Grantees.

Where there is a joint purchase of land by two, to whom it is conveyed, and who give their bond for the purchase money, in the absence of proof of any agreement between them to the contrary, they are entitled to the land in equal proportions. Jarrett *v.* Johnson, 11 Gratt. 327.

In such case of a joint purchase parol evidence is not admissible to prove an agreement between them for an unequal division of the land. Jarrett *v.* Johnson, 11 Gratt. 327.

One of the purchasers having previously made a conditional contract for the purchase of the land, agreed in writing with the other, that if the contract was completed this other should have a specified part of the land; but the contract was not completed, this agreement between the purchasers was then at an end, and can not affect their rights under their joint purchase. Jarrett *v.* Johnson, 11 Gratt. 327. See the title JOINT TENANTS AND TENANTS IN COMMON.

Deed to Firm.—Where real estate is purchased for partnership purposes and a conveyance is made to the partners in the name of the firm, the partners are tenants in common of the estate and hold the legal estate subject to the equities of the partnership. Jones *v.* Neale, 2 Pat. & H. 339. See the title PARTNERSHIP.

Deed Conveying Slaves to Husband and Wife.—M., the father of D., the wife of C., executes a deed by which in consideration of natural love and affection for D., and for the further consideration of one dollar paid him by D. and C., he grants to D., for the use of herself and C., and their joint heirs, certain slaves, to have and to hold the said slaves to D. and C., their heirs, etc., and he warrants the title to D. and C. It was held, that the deed conveyed to D. and C. a joint estate in the slaves. Cleland *v.* Watson, 10 Gratt. 159. See the title SLAVES.

d. Conveyance to Mother and Children.

In case of a conveyance to a mother and her children, it has been held, in Virginia, that where the context and language of the instrument, whether a deed or will, taken together as a whole, manifests an intention that the mother shall take the whole estate, although expressed to be to her and to her children, the mentioning of the children in such case merely indicates the motive or consideration for the gift, and does not vest in them any interest in the estate. Rhett *v.* Mason, 18 Gratt. 541; Mauzy *v.* Mauzy, 79 Va. 537; Richardson *v.* Seevers, 84 Va. 259, 4 S. E. 712; Bain *v.* Buff, 76 Va. 371; Waller *v.* Catlett, 83 Va. 202, 2 S. E. 280;

Fackler *v.* Berry, 93 Va. 565, 25 S. E. 887; Walke *v.* Moore, 95 Va. 729, 30 S. E. 374; Jones *v.* Jones, 96 Va. 749, 32 S. E. 463. See also, the title WILLS.

In a conveyance the words in the habendum, "for the sole and separate use and benefit of the wife and her children forever," do not give any estate to the children, but indicate the motive for the gift to the mother. Mauzy *v.* Mauzy, 79 Va. 537.

A conveynance to a trustee for the use and benefit of a married woman and her children, or for the support of herself and her children, vested the equitable fee in the wife alone. The mention of the children was but the expression of the motive for the gift. Tyack *v.* Berkeley, 100 Va. 296, 40 S. E. 904.

A conveyance by a husband of land acquired by his wife, to a trustee, to hold as the absolute property of the wife "that she may have a permanent home for her life, and his children by her a pittance after her death," vests a fee simple estate in the wife. The mention of the children merely indicates the motive for the gift.

"He gives to his wife the absolute property that 'she may have a permanent home for life, and his children by her a pittance after her death.' The word 'that,' in the sense here used, is equivalent to 'in order that,' 'to the end that,' and was never designed to vest any interest or estate in his children by her." Fackler *v.* Berry, 93 Va. 568, 25 S. E. 887.

But in the late case of Vaughan *v.* Vaughan, 97 Va. 322, 33 S. E. 603, Judge Riely, in a dictum said, that such words standing alone would undoubtedly convey a joint estate to the mother and her children. See also, Lindsey *v.* Eckels, 99 Va. 668, 40 S. E. 23.

A deed conveys property to a trustee for the use, maintenance and support of a mother, and for the use, maintenance and support of her issue; and the grantor further declares that it is the intention of the deed that the mother shall be supported from said property, or the proceeds thereof, during her life, and that the issue, during the life of the mother, shall be supported and educated from the proceeds of said property, and, at the death of the mother, all of the property and its proceeds shall be divided equally among such issue. It was held, that the mother and her issue each take an equal interest in the proceeds of the property during the life of the mother, and, at her death, the issue take the property in fee simple. Lindsey *v.* Eckels, 99 Va. 668, 40 S. E. 23.

5. Conveyance of Future Estate, Reserving Present Estate to Grantor.

A, the rightful owner, in fee simple, of a tract of land, and the father of B, conveyed it to B by deed. The land was described in the deed by metes and bounds, as containing one hundred and ninety acres, "to have and to hold the above-described tract of land, with its appurtenances, to the said B and his heirs and assigns forever. And A and wife, covenanted to and with, the said B, his heirs and assigns, to warrant and defend, generally, the above-described tract, or parcel of land, to the said B," etc. In the deed immediately after the last-recited clause, are the following clauses, the one immediately following the other, viz: "(It is fairly understood that the above-described tract or parcel of land is to be the said B's share of A's estate.) And it is further understood that A holds a life interest in the above described tract of land." Held, that, the plain legal effect of the deed, from its face was, and is, to convey to B an estate in fee simple in the land to commence upon the death of A, and that A reserved to himself an estate for, and during, his life in the land. Hurst *v.* Hurst, 7 W. Va. 289.

D, by deed, conveys to A and B slaves at his death. Held, the estate in the slaves held by A and B is not an estate in remainder, in contemplation of the act, 1 Rev. Code, ch. 111,

§ 48, p. 431, providing for the forfeiture of the life tenant's interest upon his removal of slaves from the state. Poindexter *v.* Davis, 6 Gratt. 481.

A settlement which gives to the grantor a bare maintenance with his wife, for his life, and provides that the property shall not be subject to his debts thereafter contracted, does not vest him with such an interest in the property as can be subjected to satisfy such after-contracted debts. Johnston *v.* Zane, 11 Gratt. 552.

6. Repugnant Clauses Designating Estate Conveyed.

Conveyance Forever to Hold for Life.—A deed conveyed land to the grantee forever, to hold for his lifetime. In such case as the premises would only convey a fee by virtue of the statute, and by the statute the whole deed was to be looked to in order to ascertain what estate was intended to be passed, it was held, that the habendum in this deed was not void, but was valid to pass the life estate to the grantee. Humphrey *v.* Foster, 13 Gratt. 653. See ante, "Repugnant Clauses," IV, A, 8.

7. Effect of Rule in Shelley's Case.

See the title SHELLEY'S CASE, RULE IN.

8. Remainders and Executory Interests.

See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

9. Conveyance of Oil, Gas or Mineral Rights.

See the titles GAS; MINES AND MINERALS.

D. RESERVATIONS AND EXCEPTIONS.

1. Definitions and Distinctions.

"There is a distinction between an exception and a reservation. By the former the grantor withdraws from the operation of the conveyance which is in existence, and included under the terms of the grant." McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

"An exception in a deed is always part of a thing in being and a part of the thing granted; while a reservation is of a thing not in being, and is newly created, as rent and the like. An exception withdraws from the operation of the conveyance some part of the thing granted, which but for the exception would have passed to the grantee under the general description; while the reservation is the creation, in behalf of the grantor, of some new right, issuing out of the thing granted, —that is to say, something which did not exist as an independent right." Harris *v.* Cobb, 49 W. Va. 356, 38 S. E. 559; McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

But while technically reservations and exceptions are different in meaning, they have often been used as synonymous. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 195, 46 S. E. 262.

And though apt words of reservation be used they will be construed as an exception, if such was the design of the parties. Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 195, 46 S. E. 262.

2. Requisites and Validity.

a. To Whom Reservation May Be Made.

In every good reddendum or reservation the reservation must be made to the grantor, or to one of the grantors in a deed, and not to a stranger. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281. See also, Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3.

A tract of land divided into separate parcels, No. 6 passed to plaintiffs, and No. 11, whereon was the abandoned furnace called "Cotopaxi," passed to defendants. In the deed to lot No. 6 is this language: "Subject to the right of the owners of Cotopaxi furnace to raise ore from a bank or banks on lot No. 6." Defendants were engaged in hauling large quantities of iron ore from the banks on lot No. 6. Plaintiffs enjoined them. After suit brought, defendants obtained a conveyance of

the ore banks from the holders of the title thereof. It was held, that plaintiffs acquired no right to the iron ore by the deed granting lot No. 6, but reserving the iron ore as stated. Nor could the iron ore pass as appurtenant to No. 11, granted to defendants. So, the iron ore remained the property of the vendor until he conveyed it to defendants; and the conveyance, though made after suit brought, is a valid defense to a bill to restrain them from mining the ore. Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3. See the title MINES AND MINERALS.

b. Out of What Estate Reservation Made.

The reservation to be valid, must be out of the estate granted, and not out of something extraneous. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 282. See also, Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3.

c. In What Part of Deed Reservation Should Be Made.

In General.—The reddendum clause usually follows the habendum. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

Indorsement on Back of Deed.—Upon a deed of conveyance of land from B. to L. there is a writing indorsed and signed by L., the bargainee, importing, that "it is understood that two acres of land in the deed conveyed, having been heretofore applied for the erection of a church, are excepted in the deed, and are to be located in the most convenient spot near the cross roads." B., the bargainor, conveys two acres of land near the cross roads, by metes and bounds, to S.; and H. claiming under L. brings ejectment for the two acres of land against S. claiming under B. It was held, that the writing indorsed on the deed from B. to L. is part of the deed, and not a distinct executory contract; and, therefore, the defendant in ejectment giving B.'s deed to L. in evidence, has a right to give in evidence the writing indorsed thereon also. Stone *v.* Doe, 5 Leigh 422.

d. Certainty.

Where there is an intention on the part of the grantor to except from the operation of the deed certain land which would otherwise be covered by such deed, the land intended to be excepted must be described with certainty in order to withdraw it from the operation of the deed. Butcher *v.* Creel, 9 Gratt. 201.

But uncertainty in a reservation in a deed may be cured by the election of the grantor; but such election must be made within a reasonable time. Benn *v.* Hatcher, 81 Va. 25.

Reservation of Maintenance for Life.—A reservation for maintenance for life, is valid, though no amount be fixed. Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; McClure *v.* Cook, 39 W. Va. 579, 20 S. E. 612.

Where, in a deed of settlement from father to son, a tract of land is conveyed on the consideration that the son will support for life his father and his wife, the grantors, and the deed, taken as a whole, shows the intention to be to charge the real estate conveyed as security for the performance of such duty, it is not necessary that a lien on the land for such support be expressly reserved on the face of the conveyance. McClure *v.* Cook, 39 W. Va. 579, 20 S. E. 612.

e. Repugnancy.

Stipulations, reservations, exceptions, or conditions in a deed, which are inconsistent with, and tend to depreciate or destroy the estate or interest granted, are void. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

A reservation in a grant, inconsistent therewith, and which tends to defeat the purpose thereof, is void, as a repugnant condition. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831. See also, Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262.

When an owner of real estate within the corporate limits of a town lays and plats the same off in town lots, streets, and alleys, and sells such lots with rela-

tion to such streets and alleys, granting to the purchasers the use of such streets and alleys, the same as though they were public streets and alleys in all respects, and throws them open to the use of the public, he will be considered to have dedicated the same to public use, although the deeds for the lots and such streets and alleys may contain a reservation to the grantor of any damages that may be recoverable against the municipality in case the bed of such streets and alleys should be thereafter condemned for public use, as such reservation is inconsistent with and repugnant to the nature of the estate or interest granted in such streets and alleys, and tends to the destruction thereof. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

3. Construction and Operation.

a. Construed against Grantor.

"It is an old principle of law that exceptions in a deed and every uncertainty are to be taken favorably for the grantee. But this rule is not applicable to any case but one of strict equivocation, cases where the language of the deed is susceptible of two interpretations. * * * But a construction should if possible, be adopted that will render all parts of the deed operative. This rule is often misunderstood; it does not mean that the words are to be twisted out of their proper meanings, but only that where the words may properly bear two meanings and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they are used, we must take them in the meaning most disadvantageous to the person who used them, unless the adoption of that meaning would work wrong." Williams *v.* South Penn Oil Co., 52 W. Va. 181, 43 S. E. 214. See ante, "Construed against Grantor," IV, A, 2.

b. Property Excepted or Reserved.

Reservation of Property Previously Sold to Another.—Where a deed conveying a tract of land by boundary, excluded a tract of fifty acres, theretofore sold to another, other than the grantee in such deed; it was held, not to pass the title to the fifty acres excluded, even though no deed for said fifty acres had been made to such other person who purchased it. Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922.

Reservation of Life Estate.—Where a party conveys a lot of land, for valuable consideration, to another, describing it, and concluding the deed with the following clause: "To have and to hold said real estate and premises with all the right, title, and interest of the said M. unto the said T. M., his heirs and assigns, forever.. But the said M. expressly reserves to herself a life estate in and to the above described real estate,"—said last clause will not be regarded as repugnant and void, and M. will thereby reserve a life estate therein. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281. See the title ESTATES.

Where a deed conveying in fee simple contains a clause by the grantor to the effect that he holds "a life interest in the above tract of land," this amounts to reservation of an estate for life to the grantor. Hurst *v.* Hurst, 7 W. Va. 289.

Reservation of Vendor's Lien.—See the title VENDOR'S LIEN.

Reservation of Oil, Gas or Mineral Rights. — See the title MINES AND MINERALS.

E. CONDITIONS.

See generally, the title CONDITIONS, vol. 3, p. 50.

1. Definitions.

A condition determines an estate after breach upon entry or claim by the grantor or his heirs, or the heirs of the divisor. Camp *v.* Clearly, 76 Va. 145.

A provision in a deed declaring that the property conveyed should be subject to the maintenance of the grantor, was held not to be a condition upon the breaking of which the grantor

might re-enter, but was simply a charge upon the land, and only enforcible in equity. Pownal *v.* Taylor, 10 Leigh 172; Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17.

As to conditional limitations, see the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

2. What Constitutes.

Conditions Not Favored in Construction. — Conditions subsequent are not favored in law, as they tend to destroy estates. When relied upon to work a forfeiture, they must be created by express terms, or clear implication, and are strictly construed. If it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to hold it a covenant, and leave the parties to their appropriate remedies for its breach. King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701; Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17.

"The rule laid down in the cases, and sustained by all the authorities is, that conditions subsequent are strictly construed, because they tend to destroy estates, and a rigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable, with conscience." Alexandria, etc., R. Co. *v.* Chew, 27 Gratt. 557.

Necessity of Clause of Re-Entry.— While the presence of a clause of re-entry is not essential to the creation of a condition subsequent, the absence of such a clause, in connection with other circumstances, tends to sustain the construction that a covenant, rather than a condition, was intended. King *v.* Norfolk, etc., R. Co., 99 Va. 629, 39 S. E. 701.

If there be no clause of re-entry, the court is left untrammeled to ascertain the intention of the parties in the light of all the circumstances surrounding them at the date of the execution of the deed, as disclosed by the deed itself and by the facts set forth in the bill of particulars. King *v.* Norfolk, etc., R. Co., 99 Va. 629, 39 S. E. 701.

A conveyance containing no clause of re-entry, but made in consideration of care and support, is not upon a condition subsequent and a failure to maintain and support the grantee does not forfeit the estate, though a court of equity may be justified in setting aside the deed, and reinstating the parties to their former position. Lowman *v.* Crawford, 99 Va. 688, 40 S. E. 17; Pownal *v.* Taylor, 10 Leigh 172.

General Words Insufficient to Create a Condition.—When, in a deed of bargain and sale, made by a contributor to an incorporated academy, the clause of conveyance to the president and trustees is accompanied by general words, that, alone, might or might not create or imply a condition, upon the failure to perform which the estate in the president and trustees would, ipso facto, or upon entry, determine and revert to the bargainor, followed by words declaring and defining a condition on which the estate will revert; and, in a subsequent deed, without the appearance of any other intent than the release and extinguishment of the right of reverter, the general words are transcribed, and the special provision is omitted—the former words are not construed to create or imply such a condition. Mercer Academy *v.* Rusk, 8 W. Va. 373.

Grant of Land to Be Used as Burying Ground.—Where land granted was for a consideration to a trustee upon a trust that he should "at all times permit all the white religious societies of Christians and members of such societies to use the land as a common burying ground and for no other purpose," it was held, that this was not a grant upon the condition subsequent, and upon a failure to use the land for the purpose named in the deed, ejectment would not lie by the heirs of the grantor. Brown *v.* Caldwell, 23 W. Va. 189.

3. Construction of Condition; Whether Precedent or Subsequent.

Whether a condition contained in a

deed is a condition precedent or subsequent, is a question of intention in the grantor, to be gathered from the whole instrument. Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

4. Validity.

Conditions for Benefit of Stranger to Deed.—A condition reserved in a common law conveyance, for the benefit of a stranger to the deed, is void. Kellam *v.* Kellam, 2 Pat. & H. 357.

Inconsistent or Repugnant Conditions. — Stipulations, reservations, exceptions, or conditions in a deed, which are inconsistent with, and tend to depreciate or destroy, the estate or interest granted, are void. Riddle *v.* Charlestown, 43 W. Va. 796, 28 S. E. 831.

Conditions are said to be repugnant when they are incompatible with the legal nature and incidents of the estate to which they are annexed. 2 Minor's Inst. (3d Ed.), 249. Camp *v.* Cleary, 76 Va. 143.

As to validity of restraints on alienation, see the title RESTRAINT ON ALIENATION.

Effect on Deed of Illegality of Condition.—There is not solid distinction between bonds and other deeds containing conditions, covenants and grants not mala in se but illegal at the common law, and those containing conditions, covenants or grants illegal by the express prohibition of statutes. In each case the bonds are void as to the conditions, covenants or grants that are illegal, and are goods as to all others which are legal and unexceptionable in their purport. The only exception is, where the statute has avoided the whole instrument to all intents and purposes by express words or necessary implication. Reed *v.* Hedges, 16 W. Va. 167.

5. Performance of Conditions.

Where a deed made by a father to his children was attacked by a creditor as void, and the grantees in the deed conveyed one-third of their interest under the deed to an attorney upon condition that they establish the title of the grantees to the tract of land, and this first suit was decided in their favor, but a subsequent suit by other creditors was decided against them, it was held, that the attorneys had no title to the estate. King *v.* Malone, 31 Gratt. 158.

Condition as to Support of Third Person.—Where a father deeds to his son a tract of land, in consideration of the payment of a certain sum therein named by said son to his two sisters, one year after the father's death, without interest, such son is not bound to wait until the end of the year after his father's death before he can pay said amount, but has the privilege of paying it at any time during the year. An offer to pay one of the sisters the amount coming to her under the deed, two or three days before the end of the year, and counting the money down to her, which she declined to receive, without assigning any cause, constituted a valid tender, under the circumstances. Thompson *v.* Lyon, 40 W. Va. 87, 20 S. E. 812.

A., being the owner of 367 acres of land, and the father of seven daughters and two sons, conveyed said tract of land to his two sons in consideration of love and affection, and for the further consideration that said grantees would at his death pay to each one of their sisters the sum of $200, and possession of said land was to be delivered to said grantees after the death of their father and mother; it being further agreed and understood upon the face of the said deed that, should any of the above-named sisters of the grantees be living and unmarried at the death of their father and mother, such unmarried sisters were to remain upon said land, and have a home thereon, so long as they, or any of them, respectively, should live and remain single and unmarried. After the death of A. and his wife, the only sister remaining unmarried filed her bill against said grantees, claiming that

under said clause she was entitled, in addition to a residence on said land, to a full support and maintenance out of the same. Upon demurrer to said bill, it was held, that it appearing from the admissions of plaintiff in her said bill that she was residing in the mansion house on said land without objection by the said grantees, and had been so occupying the same since the death of said grantor and his wife, she was enjoying all she was entitled to under said clause, and that said demurrer should be sustained. Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 11 S. E. 714.

"In the case of Snodgrass *v.* Wolf, 11 W. Va. 158, this court held that in construing a deed 'words and expressions of common use are to be taken in their natural, plain, obvious, and ordinary significations, unless a contrary intention clearly appears from the context;' and in Washburn on Real Property (vol. 3, p. 350), the author says, quoting from Stanley *v.* Green, 12 Cal. 162: 'It is, however, a settled rule that a deed must be construed ex visceribus suis, when the intent is clearly expressed. No evidence of extraneous facts or circumstances can be received to alter it. The nature and quantity of the interest granted are always to be ascertained from the instrument itself.' Webster defines the word 'home' as follows: 'A dwelling house; the house or place in which one resides; the place of constant residence.' If, then, we adopt this as the ordinary meaning of the word 'home,' and apply the rules of construction above indicated, we have little difficulty in determining that the plaintiff in her bill has shown that at the time of the institution of her suit she was in the full enjoyment of all she was entitled to under the provisions of said deed, without let or hindrance from the defendants, or either of them, and she was not entitled to the relief prayed for in her bill." Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 11 S. E. 714.

6. Breach.

When the grantor seeks to destroy an estate which he himself has created, it must plainly appear that the act is within the very terms of the condition and breach. It is not sufficient to show mischiefs and even losses which might have been provided against had they been foreseen. The fact that they were not and could not have been anticipated, may be a sufficient reason for the failure to provide a remedy; but they can not justify the courts in so enlarging the operation of the covenant as to make them a ground of forfeiture. Alexandria, etc., R. Co. *v.* Chew, 27 Gratt. 556.

Use of Right of Way Deeded for Turnpike Purposes by Railroad.—By act of congress in 1808, the Washington & Alexandria Turnpike Co., was incorporated to construct a turnpike road from Alexandria to Washington, to be not less than thirty, nor more than one hundred feet wide. In 1809 A conveyed to the company a strip of land one hundred feet wide and three-fourths of a mile long, for the purpose of the road. And the company covenanted with A and his heirs that said space of one hundred feet should be forever kept open and unobstructed as a public highway, and for no other purpose; and should the route of said turnpike road be thereafter altered, or should it cease to be a public highway, the said property should immediately revert to A, his heirs and assigns. The company made a graveled track twenty feet wide, in the centre of the strip, and on each side a summer road. By a statute of the state the company was authorized to sell any part of their work to the A. & W. R. Co., and the turnpike company conveyed to the railroad company the eastern half of their entire line; and a railroad track has been laid on the summer road occupying in all about eighteen feet on the east line, and leaving the graveled road and the western summer road unobstructed. This deal-

ing with the road does not create a forfeiture under the deed of A, of the land conveyed by him, or any part of it. Alexandria, etc., R. Co. *v.* Chew, 27 Gratt. 547.

"It may be that the operating the railroad subjects travelers on the turnpike to inconvenience, and even to danger; but the turnpike is none the less a highway by reason of the fact. It does not necessarily cease to be a highway because the track of the railroad may be laid upon a portion of the one hundred feet, to any greater or less degree than a street of a city ceases to be a street because of the location of the railroad thereon." Alexandria, etc., R. Co. *v.* Chew, 27 Gratt. 547.

Use of Premises Deeded for Purposes of Courthouse, for Other Buildings in Addition to Courthouse.—An individual grant to the corporation of a town, having by charter a general power to purchase and hold lands, an acre of ground for the use of the town, for the purposes aftermentioned in the deed; the deed then states that the land is granted in consideration of the courthouse and jail having been built thereupon, and also in consideration that the said courthouse and jail, and the judiciary proceedings of the town, shall be continued to be kept and held upon the premises; with a covenant by the grantor that the corporation shall peaceably enjoy the property so long as the judicial proceedings of the town shall continue to be held thereupon; and with a proviso that in case the judicial proceedings shall ever be discontinued to be held on the land thereby conveyed for the purpose, and shall be removed and permanently held elsewhere, the property shall be revested in the grantor. The courthouse and jail, and the judicial proceedings of the town, continue to be maintained and held on the land so granted; but the corporation erects other buildings thereon, and leases them to individuals. It was held, that such use of the land is competent to the corporation, under the terms of the grant, and the grantor has no right to interfere. Bolling *v.* Petersburg, 8 Leigh 224.

Sale of Land Deeded for School Purposes.—A vendor who sells a lot to a board of education for school purposes, and signs a writing stating the purchase, and the terms thereof, can not recover possession of such lot, in an action of ejectment, from a claimant under such board of education, even though such lot has been abandoned for school purposes, and converted to other uses. Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 380.

Failure to Pay Rent Reserved.—Where a deed was made reserving a yearly rent, with a condition that the grantor might re-enter if the rent was not paid, after demand made upon the premises, if no property was found on the land, whereof distress could be made, it was held that the grantor, upon demand made, and failure to pay, no property being found on the land, might re-enter, and grant over to another. Wartenby *v.* Moran, 3 Call 491.

7. Excuses for Nonperformance.

Whether condition be precedent or subsequent, if the act of the party who imposed the condition makes its performance impossible, or unnecessary, the condition is no longer binding, and the estate conveyed by the deed, in which it is contained, is discharged therefrom. Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

8. Enforcement.

By Entry or Action.—At common law where there was a breach of a condition subsequent in a deed granting land, it was necessary that there should be an entry by the grantor or his heirs in order to work a forfeiture of the estate. In West Virginia (and in Virginia also, see Va. Code, 1887, § 2796, et seq.) the necessity of entry by the grantor or his heirs has been abolished by statute, and the grantor may maintain ejectment upon the failure of the grantee to perform the condition by

which his estate is determined. Martin *v.* Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589; Bowyer *v.* Seymour, 13 W. Va. 25.

Injunction against Breach.—An act of assembly of 1799, provided, that a deed of conveyance made by James M. Marshall, to the justices of the county of Frederick, and the mayor and aldermen of the borough of Winchester, for the public square, occupied by the county buildings, should be as good and valid as if such deed had been made to an individual. It was held, that this act did not confer upon the city of Winchester the exclusive right to determine and direct the uses to which the property should be applied, and that a court of equity would enjoin the city from altering a part of the square. Board of Supervisors *v.* Winchester, 84 Va. 467, 4 S. E. 844.

Enforcement of Void Conditions in Equity.—A court of equity will not enforce as a charge, a provision in a deed, which was void at law, as a condition. Kellam *v.* Kellam, 2 Pat. & H. 357.

A reversion was granted by a common-law conveyance to A upon condition that at a particular time he should pay £150 to B, with a provision, that if he failed to pay the £150, at the time specified, B should take possession of the land. Neither A nor B was party to the deed. After the death of B, upon a bill in equity, by his executor, to charge the land with the payment of the £150, it was held, that even if the condition for the benefit of B was valid, his executor could not enforce it. Kellam *v.* Kellam, 2 Pat. & H. 357.

F. LOSS OR RELINQUISHMENT OF RIGHTS UNDER DEED.

1. Effect of Death of Grantor as Revoking Power of Sale in Deed.

A deed duly executed and delivered, which conveys the legal title to real estate to a vendee, although a mere power to sell, is not revoked by the death of the vendor, the power being coupled with an interest. McNeill *v.* McNeill, 43 W. Va. 765, 28 S. E. 717. See the title POWERS.

2. Destruction or Cancellation of Deed by Grantor.

Destruction.—"It will be conceded, after the complete execution of the deed, the erasure or defacement could have no effect to divest the estate." Seibel *v.* Rapp, 85 Va. 30, 6 S. E. 478.

A deed of property in trust for wife was signed and acknowledged by both grantor and trustee. After grantor's decease it was found among his papers, or rather was produced by his wife, in a mutilated and canceled condition. It was held, that it was not in grantor's power to revoke the deed after he had signed, sealed and acknowledged it in due form, and produced the trustee's acceptance in the same way. Seibel *v.* Rapp, 85 Va. 28, 6 S. E. 478.

A father executed, acknowledged, and delivered a deed of gift of land to his son. After its delivery to the clerk for record, but before it was actually recorded, the father took it and destroyed it, and conveyed the land to others, having notice of the son's equitable rights. It was held, that the court below erred in refusing to set up the destroyed deed in behalf of the son. Vaughn *v.* Moore, 89 Va. 925, 17 S. E. 326.

Cancellation of Deed with Consent of Grantee.—A father by deed of gift conveys land to a son, and shortly after the son voluntarily surrenders the deed to the father to be canceled, with design to divest the title out of himself and restore it to the father, and the deed is canceled. It was held, that the son's title is not divested by the cancellation of the deed, and the land shall be charged in equity with the debts of the son. Graysons *v.* Richards, 10 Leigh 57.

In such case, a creditor having obtained a judgment against the son subsequent to the cancellation of the deed, under which the son has taken the oath of insolvency, is not only entitled to

satisfaction of his judgment out of the land as still the property of the son, but he may also claim satisfaction out of it of a simple contract debt which the son owes him; and other creditors of the son, who have not recovered judgments against him, coming in at the same time, shall be entertained to claim satisfaction of the debts due them out of the same land. Graysons *v.* Richards, 10 Leigh 57.

3. Alteration.

Where a deed is altered by a party claiming under it in a material part, such party can not recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form. There is no distinction between deeds and other written instruments in this respect. Newell *v.* Mayberry, 3 Leigh 250.

But any alteration made in a deed which does not materially change its effect, does not render the deed void. Thus where a deed of conveyance for slaves having been signed, sealed, and delivered, with a blank left for the date and afterwards the donee inserted the date, no fraud or imposition appearing to have been practiced in obtaining it, and no evil design in filling up the blank, the deed was adjudged to be good, the date not being a material part. Whiting *v.* Daniel, 1 Hen. & M. 391.

Whether alterations made after the signing, sealing, and delivery of the instrument, were made with or without the knowledge and consent of the grantor, is a question of fact, which must be submitted to the jury; but whether such alterations are material or not, is a question of law to be decided by the court. Keen *v.* Monroe, 75 Va. 424. See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 307.

4. Subsequent Conveyance by Grantor to Third Person.

The owner of land having conveyed it by deed duly executed and delivered, a second deed from him to the same grantee is wholly inoperative. Evans *v.* Spurgin, 6 Gratt. 107; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22.

A voluntary deed, duly recorded, operating as a covenant to stand seised to the use of the grantee, can not be limited in its effect by a subsequent deed from the grantor to a third person. Rowletts *v.* Daniel, 4 Munf. 473.

After executing a deed operating by way of covenant to stand seised to use, the grantor can not, by a deed to a third person, convert his own possession into a possession adverse to that of the grantee. Rowletts *v.* Daniel, 4 Munf. 473.

In 1862 land was conveyed to A in trust for his wife and children. The deed was lost without being recorded, but its contents were established. In 1873 A absconded, and in the same year the original grantors conveyed the same land to the wife reciting the deed of 1862. The wife subsequently sold the land as absolute owner thereof and brought a suit for specific performance against the vendee. It was held, that the first deed to A had not been revoked either by the second deed to the wife, or by the wife's deed to the defendant, and as the children had rights in the land a decree was refused. Hess *v.* Rankin, 78 Va. 175.

5. Delivery of Deed to Grantor for Acknowledgment.

Where a purchaser to whom a deed had been fully executed put the deed into the hands of the vendor, that he might acknowledge it for the purpose of having it recorded, such delivery to the vendor was held not a surrender of the title under the deed. Rootes *v.* Holliday, 6 Munf. 251.

6. Parol Disclaimer by Grantee.

Where legal title is vested in one, no mere parol disclaimer can divest that title. It has been long settled here that disclaimer of a freehold can only be by deed or in a court of record. Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Bryan *v.* Hyre, 1 Rob. 101;

Southern R. Co. *v.* Gregg, 101 Va. 309, 43 S. E. 570.

But it has been held, that under some circumstances, parol evidence of continued possession on the part of the grantor and of the grantee's acknowledgment of his right may be given in evidence, for the jury to presume against a deed, that the grantee has relinquished or reconveyed his right. Biggers *v.* Alderson, 1 Hen. & M. 54.

Deeds of Trust.

See the title MORTGAGES AND DEEDS OF TRUST.

DEEM SUFFICIENT.—In Hartigan *v.* Board of Regents, 49 W. Va. 35, 38 S. E. 698, it is said, by Dent, J., dissenting: "O'Dowd *v.* City of Boston, 149 Mass. 443, is not a case in point. In that case the law provided that the officers and boards of the city of Boston may remove their subordinates 'for such cause as they may **deem sufficient**, and shall design in their order of removal.' The words 'they may **deem sufficient**' gave the board complete and final control over the cause of removal, and are almost equivalent to the words 'at pleasure.'" See generally, the title PUBLIC OFFICERS.

De Facto Corporations.

See the title CORPORATIONS, vol. 3, pp. 532, 537, 541, 542, 566, 579, 581, 594.

De Facto Government.

See the title STATE.

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I. Definition and Distinction.

A. DEFINITIONS.

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: First, without a known appointment or election, but under such circumstances or reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such." Franklin *v.* Vandervort, 50 W. Va. 412, 40 S. E. 374.

"An officer de facto is one who has the reputation of being the officer he assumes to be, and is yet not a good officer in point of law." Lord Ellenborough, quoted in McCraw *v.* Williams, 33 Gratt. 510; Griffin *v.* Cunningham, 20 Gratt. 31; State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

"An officer de facto is one who comes in by the power of an election or appointment, but in consequence of some informality, or want of qualification, or by reason of the expiration of his term of service (or it may be said also by entering upon the duties of his office before his term of service fixed by law begins), can not maintain his position when called upon by the government to show by what title he holds his office. He is one who exercises the duties of an officer under claim and color of title." McCraw *v.* Williams, 33 Gratt. 510; Griffin *v.* Cunningham, 20 Gratt. 31.

B. DISTINCTION.

Officers De Jure, De Facto, and Usurpers.—"An officer de jure has lawful title, but is not in possession; an officer de facto is one who is in possession of the office, acting, but has not good title, a usurper is one who assumes to act without title, without even color of title." Dial *v.* Hollandsworth,

39 W. Va. 1, 19 S. E. 557. See, as to who are officers, de jure and de facto, and usurpers, Monteith *v.* Com., 15 Gratt. 172; Griffin *v.* Cunningham, 20 Gratt. 31; McGraw *v.* Williams, 33 Gratt. 513.

II. Public Officers.

See the titles CLERKS OF COURT, vol. 2, p. 834; ELECTIONS; JUDGES; JUSTICES OF THE PEACE; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

A. WHO ARE DE FACTO OFFICERS.

See post, "Validity of Acts," II, C.

1. Holder of Office Not Vacant.

No De Jure Officer in Possession.—A was elected in January, 1880, judge of the county court of Halifax, and commissioned by the governor; and believing that his term commenced immediately he proceeded to hold the court and transact business. Held, he was a judge de facto; and his judgments are valid and binding, as if he had been a judge de jure. McCraw *v.* Williams, 33 Gratt. 510.

Where a De Jure Officer Is in Possession.—There can not be an officer de facto in a case where there is an officer de jure in possession. Morriss *v.* Virginia Ins. Co., 85 Va. 588, 8 S. E. 383; Dial *v.* Hollandsworth, 39 W. Va. 1, 19 S. E. 557.

2 Ineligible Parties.

Where an officer accepts another office inconsistent with the one he is holding and afterwards perform the duties belonging to the former office, such performance will constitute him an officer de facto. Building & Loan Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222. See also, Maddox *v.* Ewell, 2 Va. Cas. 59.

3. Nonresident Parties.

Where a councilman had moved his residence beyond the corporate limits of the town, and had thereby vacated his office of councilman, but had continued to exercise such office and to discharge its functions until his successor was qualified, it was held, that he was a de facto councilman, and his acts as such were valid and binding. Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

4. Parties Acting under Irregular Election.

Where the legislature incorporated a town and appointed officers to exercise their functions until a regular election, although the constitution provided that town officers should be electors of such towns, councilmen so appointed and exercising their functions were held to be de facto officers and their acts in levying a license tax were held binding. Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

5. Parties Not Properly Qualified.

Where a person was elected to fill the office of sheriff, after he had given bond and entered on the discharge of the duties of such office, although he was not an officer de jure because of his failure to qualify and give the bond the prescribed time, yet it was held, that he was a sheriff de facto. Monteith *v.* Com., 15 Gratt. 172.

It has been held, that a special judge, who failed to take an oath as stipulated by constitutional provision, is a de facto judge notwithstanding his failure to take such oath. Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179.

6. Parties Acting under Color of Authority.

Where a party had been elected as sheriff and then contracted with his deputy that for a certain sum the latter should enjoy all the benefits of the office of sheriff and such deputy had collected funds and acted generally in the capacity of sheriff, it was held, that he was a de facto officer by virtue of the law as well as by reason of the contract. White *v.* Cook, 51 W. Va. 201, 41 S. E. 410.

Where a judge held his office under color of authority of his appointment by the legislature and commission of the governor, the court held, that it

he was not a judge de jure he was without doubt a judge de facto. McCraw *v.* Williams, 33 Gratt. 510.

7. Parties Acting under a De Facto Government.

It has been held, that a commissioner acting under a de facto government is a de facto officer. McClure *v.* Johnson, 14 W. Va. 432. See post, "Under a De Facto Government," II, C, 4.

8. Military Appointees Holding Over after Civil Government Restored.

It has been held, that the military appointees of the federal government, exercising judicial functions in Virginia after its admission into the union, were de facto judges, and their acts and decisions as such must be respected and obeyed as fully as though they had been officers de jure. Quinn *v.* Com., 20 Gratt. 138; Griffin *v.* Cunningham, 20 Gratt. 31; Bolling *v.* Lersner, 26 Gratt. 36. As to effect of the enabling acts, see the title STATUTES.

B. LIABILITY TO RIGHTFUL INCUMBENT.

Where a person exercised duties of an officer under an apparent claim of right, and it was subsequently judicially determined that the office did not belong to him, the rightful owner may recover from such person the fees and perquisites received by him while in office, after deducting the necessary expenses of earning them. Bier *v* Gorrell, 30 W. Va. 95, 3 S. E. 30; White *v.* Cook, 51 W. Va. 201, 41 S. E. 410. See also, Nichols *v.* Branham, 84 Va. 923, 6 S. E. 463. See the titles CLERKS OF COURT, vol. 2, p. 834; SHERIFFS AND CONSTABLES.

By Third Person Holding during Contest.—But where there are two claimants for an office and the right to hold such office is in litigation so that neither can properly hold the office, if a third person is appointed to fill the vacancy during the pendency of such litigation such appointee will not be liable for the fees of the office received during the term of his appointment. Nichols *v.* Branham, 84 Va. 923, 6 S. E. 463. (Commissioner of revenue, see the title REVENUE LAWS.)

C. VALIDITY OF ACTS.

See ante, "Who Are De Facto Officers," II, A.

1. General Rule.

In Griffin *v.* Cunningham, 20 Gratt. 31, the court said: "I have traced the decisions of the English and American courts from a very early date down to the present time, and there is one unbroken current of authority establishing the principle that public officers de facto, acting colore officii, are held to be as well qualified to act while they remain in office as if legally appointed and duly qualified." To the same effect, see Roche *v.* Jones, 87 Va. 484, 12 S. E. 965; Monteith *v.* Com., 15 Gratt. 172; Bolling *v.* Lersner, 26 Gratt. 36; Hord *v.* Com., 4 Leigh 674; Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163; Henning *v.* Fisher, 6 W. Va. 238; Building & Loan Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222; State *v.* Carter, 49 W. Va. 709, 39 S. E. 611; Franklin *v.* Vandervort, 50 W. Va. 412, 40 S. E. 374; Osburn *v.* Staley, 5 W. Va. 85; Dial *v.* Hollandsworth, 39 W. Va. 1, 19 S. E. 557; McClure *v.* Johnson, 14 W. Va. 432; Clay *v.* Robinson, 7 W. Va. 348; Smith *v.* Henning, 10 W. Va. 596.

2. Reason for the Rule.

"The rule which declares that the acts of an officer de facto are as valid and binding as if he were an officer de jure, is founded on the soundest principles of public policy, and is absolutely essential to the protection of the best interests of society. Indeed the affairs of society could not be conducted on any other principle. To deny validity to the acts of such officers, would lead to confusion and insecurity, in public as well as private affairs, and thus oppose the true policy

of every well regulated state." McCraw *v.* Williams, 33 Gratt. 510, 514; Griffin *v.* Cunningham, 20 Gratt. 31; Henning *v.* Fisher, 6 W. Va. 238; McClure *v.* Johnson, 14 W. Va. 432; Clay *v* Robinson, 7 W. Va. 348.

"The policy and reason of the rule upon which the acts of de facto officers are sustained and held valid as to third parties and the public in collateral proceedings are, that a person requiring official duties to be performed, can not be expected to inquire into the title of the officer when he finds him in the open and undisputed occupancy of the office and in the reputed and notorious discharge of its duties." Herring *v.* Lee, 22 W. Va. 661.

Limitation—Notice.—"But when in civil cases, at least, the public or third persons have knowledge that the person so acting or pretending to act is not the officer de jure, the reason of the rule ceases, and the rule itself for validating such act does not apply. If the person who invokes protection for the act of a de facto officer, knew when the act was done that it was not the act of a legal officer, the law will not sustain such act or hold it valid as to such person but will declare it void." Herring *v.* Lee, 22 W. Va. 661.

3. Must Be Colore Officii.

In order to make valid the acts of a de facto officer, he must be exercising the functions of a de jure or de facto office. Hawver *v.* Seldenridge, 2 W. Va. 274.

4. Under a De Facto Government.

While the West Virginia courts in Brown *v.* Wylie, 2 W. Va. 502, and Hawver *v.* Seldenridge, 2 W. Va. 274, held that all persons acting as officers under the confederate government were not de facto officers, and their acts void in law, these rulings seem to have been overturned by a later case in which the court said: "Whatever may have been the ruling heretofore in this state it must now be decided upon the authority of the supreme court of the United States that whether the government under which the clerk acted at the time he recorded the deed was a government de facto of paramount force or an actual though unlawful government, the acts of its officers when not directly in aid of the war power, must be regarded as valid." Henning *v.* Fisher, 6 W. Va. 238. McClure *v.* Johnson, 14 W. Va. 432; Clay *v.* Robinson, 7 W. Va. 348; Smith *v.* Henning, 10 W. Va. 596.

5. Illustrative Cases.

a. City Ordinance Passed by De Facto Officers.

It has been held, where the mayor and council of a town are admitted to be de facto officers with the title to their office unimpeached, except in a collateral proceeding, and unless the contrary plainly appears, they will be presumed to be de jure officers and all their official acts be respected and upheld. Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163. See generally, the title ORDINANCES.

b. Proceedings by De Facto Judges.

See generally, the title JUDGES.

Where a person was tried and convicted in a court of competent jurisdiction presided over by a judge who held his office under color of authority of his appointment by the legislature and commission of the governor, if he was not judge de jure at the time of the trial and conviction, he was certainly a judge de facto, and his judgment is as valid and binding as if he was judge de jure. McCraw *v.* Williams, 33 Gratt. 510.

Special Judges.—The rules upholding the acts of de facto officers or valid apply to special judges irregularly chosen or appointed. State *v.* Cross, 44 W. Va. 315, 29 S. E. 527.

It has been held, that the acts of a special judge, who did not take an oath as stipulated by constitutional provisions are valid as the acts of a de facto judge. Tower *v.* Whip, 53 W. Va. 158, 44 S. E. 179.

Proceedings by De Facto Justice.—It has been held, that where a justice

of the peace accept the office and commission of coroner, such acceptance does not vacate such of his subsequent acts as justice, as may have been done before his disqualification was established by some proper judicial proceeding for that purpose instituted. Maddox *v.* Ewell, 2 Va. Cas. 59. See also, Building Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

c. Oath Administered by De Facto Clerk.

Where a clerk of a court who had never been duly qualified administered the oath to the grand jury, it was held, that his acts were as valid, in administering such oath, as though he were a clerk de jure. Hord *v.* Com., 4 Leigh 674.

d. Acts of a De Facto Recorder.

It has been held, that where a county clerk records a deed, the recordation will be valid although such clerk be a mere de facto officer. Henning *v.* Fisher, 6 W. Va. 238. It has also been held, that a clerk and recorder's act in appointing an administrator is valid although such officer be acting under a de facto government. Clay *v.* Robinson, 7 W. Va. 348; Smith *v.* Henning, 10 W. Va. 596.

e. Acknowledgment by De Facto Notary.

One who forfeits his right to the office of notary public of which he is the incumbent, by accepting another which is incompatible with it, and afterwards performs the functions of the office forfeited, is an officer, de facto, and his acts, done before removal from such office, are valid as to persons other than himself. Building, etc., Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

6. Void Where for Officer's Benefit.

"The act of an officer, de facto, where it is for his own benefit, is void, because he shall not take advantage of his own want of title which he must be cognizant of." Building, etc., Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

7. Collateral Impeachment.

See post, "Collateral Attack," II, D, 2.

D. TITLE TO OFFICE.

1. Held Only by Suffrance.

An officer holding over after his term is properly at an end (in the absence of legislative enactment giving him authority) holds his office by sufferance only, upon the principle of necessity and convenience. Griffin *v.* Cunningham, 20 Gratt. 31. See the title PUBLIC OFFICERS.

2. Collateral Attack.

See the title QUO WARRANTO.

The title of an office de facto can not be indirectly called into question in a proceeding in which he is not a party. The only appropriate mode of testing his title is by an information in the nature of a writ of quo warranto in which after notice and an impartial hearing he will be ousted from the office, if it turn out that he has been exercising official functions without the warrant of law. Griffin *v.* Cunningham, 20 Gratt. 31. See Knight *v.* West Union, 45 W. Va. 194, 32 S. E. 163; Building, etc., Ass'n *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

Where an officer having an apparent authority to do the act had rendered judgment between the people and the prisoner, neither party can in a collateral way call in question the title of the judge. The government may try the title by quo warranto, but until that is done his acts are valid and effectual so far as third persons are concerned. McCraw *v.* Williams, 33 Gratt. 510; Griffin *v.* Cunningham, 20 Gratt. 31.

E. RULES AS TO DE FACTO OFFICERS INAPPLICABLE TO DEPUTIES.

See the titles CLERKS OF COURT, vol. 2, p. 834; CORONERS, vol. 3, p. 508; SHERIFFS AND CONSTABLES.

It is apparent that there can be no such officer as a de facto deputy since a deputy is one authorized by an officer

to exercise the office or right, which the officer possess, for and in his place. Herring *v.* Lee, 22 W. Va. 661.

III. Officers of Private Corporations.

See the titles CORPORATIONS, vol. 3, p. 510; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

A. WHO ARE DE FACTO OFFICERS.

1. Parties Acting after Expiration of Term.

Where an officer holds over after his term of office has expired, if he is still recognized as an officer by the company and continues to fill the duties of such office, he is considered to be a de facto officer. Sangston *v.* Gordon, 22 Gratt. 755.

2. Parties Acting under Irregular Election.

Although the election of an officer of a corporation has been irregular under its by-laws, such election will constitute him a de facto officer. Burr *v.* McDonald, 3 Gratt. 215.

B. VALIDITY OF ACTS.

1. General Rule.

The acts of an officer de facto, done under the authority of the company and colore officii, are binding on the company. Burr *v.* McDonald, 3 Gratt. 215; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620; Roche *v.* Jones, 87 Va. 484, 12 S. E. 965; Sangston *v.* Gordon, 22 Gratt. 755.

Illustration.—Bonds are given to S., secretary, etc., of, a voluntary association, and a deed of trust executed to secure them. And S. is directed by the association to proceed to collect all the debts belonging to them. Though by the by-laws the secretary was to be elected annually, yet as S. continued to act as such, and was so recognized by the association, it was competent for him to direct the enforcement of the deed of trust. Sangston *v.* Gordon, 22 Gratt. 755.

2. Collateral Impeachment.

The acts of an officer de facto, when done under the authority of the company and colore officii, can not be impeached by strangers on the ground of want of authority. Burr *v.* McDonald, 3 Gratt. 215; Sangston *v.* Gordon, 22 Gratt. 755; Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

Defalcation and Embezzlement.

See the titles BANKRUPTCY AND INSOLVENCY, vol. 2, p. 246; EMBEZZLEMENT.

DEFAMATION.—In Hogan *v.* Wilmoth, 16 Gratt. 86, it is said: "It is true that the word **defamation** has a technical sense as a generic term, comprehending the two species of words slanderous at common law, spoken and written slander, and nothing more." See the title LIBEL AND SLANDER.

Default in Pleading.

See the title PLEADING.

Defaults.

See the title JUDGMENTS AND DECREES.

Defeasance.

See the titles CHATTEL MORTGAGES, vol. 2, p. 798; MORTGAGES AND DEEDS OF TRUST.

DEFEASIBLE ESTATE.—A **defeasible estate** is an estate liable to be defeated upon the happening of some contingency. Troth *v.* Robertson, 78 Va. 52.

DEFEAT.—In Seddon *v.* Rosenbaum, 85 Va. 934, 9 S. E. 326, it is said: "We are dealing with the statute that provides 'any agreement that is not to be performed within a year,' not any agreement that is not to be **defeated** within a year, and we think the distinction is clearly defined in reason as well as by the cases. If the agreement may be performed within a year, it can not be said that by its terms it is not to be performed within a year, because it may by its terms be performed within that time; but if, by its terms, it is to be performed beyond the year, it comes within the statute, and that it contains provision for a possible defeasance within the year does not make it thereby capable of being performed otherwise than as provided beyond the year. To **defeat** is not to perform." See also, the title FRAUDS, STATUTE OF.

DEFENDANT.—See the title PARTIES.

In Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881, it is said: "A case occurred in Alabama, where the court held, that the form of the verdict was but a clerical error, and the word used in it, **defendant**, must be regarded as intended for **defendants**, there being two **defendants**; and, if only one was meant, the verdict would necessarily be void. Which of the two was meant was not stated, and no judgment could have been rendered. The point decided was that 'two persons were joined as **defendants** who pleaded the general issue in an action of assumpsit, and thereupon a verdict was rendered as follows: 'We, the jury, find the issue in favor of the **defendant**;' and it was held, the reasonable intendment that 'the **defendant**' was unintentionally used for **defendants**, and the verdict was held decisive of the case. The court say: 'We must in this case intend that the verdict, and judgment upon it, are unintentionally in the singular number; that "the **defendant**" was used for **defendants**. Such, in effect, has heretofore been the decision of this court. The judgment of the circuit court must be affirmed.'"

In an action against a municipality, the declaration was demurred to because it failed to use the words authorities of the town in describing the **defendant**. The court said: "The argument is that the pleader failed to use the words 'authorities of the town,' and 'controlled.' The word **defendant** represents and includes all the authorities of the town, and when it is alleged that 'the **defendant** kept open and treated as a public sidewalk,' 'and it was the duty of said **defendant** to put and keep said sidewalk in good repair,' it is a full equivalent to alleging that 'the sidewalk was controlled and treated by the authorities of said town as a common and public sidewalk, and opened as such.' The town acts through its agents, and the acts of the agents are the acts of the town." Waggener *v.* Point Pleasant, 42 W. Va. 798, 26 S. E. 353.

DEFENDENTIS.—See IN PARI DELICTO.

Deferred Stock and Dividends.

See the title STOCK AND STOCKHOLDERS.

Deficiency in Quantity of Land Sold.

See the title MORE OR LESS.

DEFINED.—In Miller *v.* Black Rock Springs Improvement Co., 99 Va. 757, 40 S. E. 27, it is said: "Subterranean waters can only be the subject of riparian rights when flowing in **defined** or known channels. **Defined** means a contracted and bounded channel, although the course of the stream may be undefined by human knowledge."

And see generally, the title WATERS AND WATERCOURSES.

Definiteness and Certainty in Pleading.

See generally, the title PLEADING.

Definitions.

See the words and phrases treated alphabetically throughout this series.

Defraud.

See the titles FRAUDULENT AND VOLUNTARY CONVEYANCES; FRAUD AND DECEIT.

DEL CREDERE.—In Ruffner *v.* Hewitt, 7 W. Va. 604, it is said: "A factor is commonly said to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal, for a compensation commonly called factorage or commission; and when for additional compensation, in case of sale, he undertakes to guaranty to his principal the payment of the debt due by the buyer, he is said to receive **del credere** commission." See also, the title FACTORS AND COMMISSION MERCHANTS.

Delay.

See the title LACHES.

Delaying and Hindering Creditors.

See the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 1, pp. 817, 819; FRAUDULENT AND VOLUNTARY CONVEYANCES.

Delegation of Authority.

See the title AGENCY, vol. 1, p. 257.

DELIBERATE.—**Deliberate** and premeditated are treated as synonymous. State *v.* Hobbs, 37 W. Va. 812, 17 S. E. 380. See the title HOMICIDE.

Delinquent and Forfeited Lands.

See the title TAXATION.

Delinquent Taxes.

See the title TAXATION.

DELIVER.—An administrator's bond was conditioned for the faithful administration of the personal estate, and that he should "**deliver** all the legacies contained and specified in said will." It was held, that though the condition of the bond did not use the word pay but only **deliver**, yet this last word covered the general as well as the specific legacies. The court said: "But, although the term pay would be more appropriate in reference to monied legacies, and would not be at all appropriate in relation to legacies which were not pecuniary, yet the word **deliver** is applicable to both sorts of legacies." Murphy *v.* Carter, 23 Gratt. 477, 483.

In Arents *v.* Com., 18 Gratt. 775, it is said: "It is argued that these coupons must be regarded as payable on demand on or after the day specified, and not as payable on that day; because the bond provides that the interest shall be paid by Duncan, Sherman & Co. 'on presenting' to them the proper coupon. Sometimes the form of expression in such bond is, that the coupons shall be 'surrendered' or **delivered.** But the meaning is the same, whether the

coupon is to be 'presented,' 'surrendered' or **delivered**. The coupon passes by **delivery**, and is evidence of the title of the holder to demand the interest." See also, the title MUNICIPAL, STATE AND COUNTY SECURITIES.

DELIVERY.—See the titles BONDS, vol. 2, p. 520; CARRIERS, vol. 2, p. 671; DEEDS, ante, p. 364; ESCROW; GIFTS.

A deposit of a contract in a post office addressed to the party to whom it is to be **delivered** is a **delivery** at the post office. Galloway *v.* Standard Fire Ins. Co., 45 W. Va. 237, 31 S. E. 969.

Bills and Notes.—See the title BILLS, NOTES AND CHECKS, vol. 2, p. 422.

Delivery Bond.

See the title FORTHCOMING AND DELIVERY BONDS.

DEMAND.

CROSS REFERENCES.

Generally, as to the necessity for demand as a condition precedent to the commencement of an action, see the following titles: ACTIONS, vol. 1, p. 122; ASSUMPSIT, vol. 2, p. 1; DETINUE AND REPLEVIN; TROVER AND CONVERSION. See also, the particular titles in this work upon subjects in connection with which the question of demand may arise, as in the following: BILLS, NOTES AND CHECKS, vol. 2, p. 401; BONDS, vol. 2, p. 507; CONTRACTS, vol. 3, p. 307; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; FINES AND COSTS IN CRIMINAL CASES; GUARANTY; INSURANCE; INTEREST; LACHES; LIMITATION OF ACTIONS; PAYMENT; SHERIFFS AND CONSTABLES; STOCK AND STOCKHOLDERS.

Demand Defined.—"Webster defines 'demand,' 'the asking or seeking what is due or claimed to be due;' and Worcester, 'a calling for a thing due or claimed to be due.'" Clarke *v.* Tyler, 30 Gratt. 134.

The word demand is a word of larger significance, and more comprehensive meaning than the word due. "Indeed Lord Coke says, the word demand is the largest word in law, except claim. In 2 Coke upon Littleton, 291b. he says 'demandum is a word of art, and in the understanding of the common law, is of so large an extent, as no other word in the law is, unless it be clamum, whereof Littleton maketh mention. Section 445.'" Clarke *v.* Tyler, 30 Gratt. 134.

DE MINIMIS NON CURAT LEX.—See Bond *v.* Davis, 48 W. Va. 27, 35 S. E. 889.

Demonstrative Evidence.

See the title INSPECTION AND PHYSICAL EXAMINATION.

Demonstrative Legacy.

See the title WILLS.

DEMURRAGE.—See the titles CARRIERS, vol. 2, p. 688; SHIPS AND SHIPPING.

In Brown *v.* Ralston, 4 Rand. 510, it is said: "'**Demurrage** is an allowance made to the master of a ship by his freighters, for staying longer in a place than the time first appointed for his departure, or his staying at the delivering

ports.' Beaw. lex. merc. 142. In Abbott on Shipping, also, pp. 191, 192, it is said, 'The merchant usually covenants to load and unload the ship, within a limited number of days, after she is ready to receive the cargo, and after arrival at the destined port. Frequently, also, it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called demurrage.'"

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CROSS REFERENCES.

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I. Nature, Classification and Distinctions.

A. NATURE.

1. Demurrer Defined.

See post, "Classification," I, B.

A demurrer (from the Latin demorari or French demorrer, to wait, or stay) imports, according to its etymology, that the objecting party will not proceed with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer. St. Pl. (Andrew's Edition) § 67.

A demurrer is an allegation that, admitting the facts of the preceding pleading to be true as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

Answer in Law to Bill.—A demurrer is an answer in law to a bill, but not in the technical sense in which it is used in practice. Harris *v.* Thomas, 1 Hen. & M. 18; Alderson *v.* Biggars, 4 Hen. & M. 473; Young *v.* Scott, 4 Rand. 416; Northwestern Bank *v.* Nelson, 1 Gratt. 126; Young *v.* McClung, 9 Gratt. 336; Towner *v.* Lucas, 13 Gratt. 705; Henderson *v.* Lightfoot, 5 Call 241; Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

"Issue in Law."—A demurrer is frequently called an "issue in law." Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

2. Statement in Answer as Constituting.

A statement in the answer of a defendant that he reserves "unto himself

all just exceptions to the many deficiencies by a demurrer to a bill" is not a demurrer to the bill. Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512.

3. Analogy to Motion to Quash Writ in Mandamus.

In mandamus a motion to quash the alternate writ is not only the equivalent of a demurrer to such writ, but more; it puts in issue the sufficiency of the petition on which such writ has been issued. State *v.* County Court, 33 W. Va. 589, 11 S. E. 72.

4. Analogy to Motion to Dismiss.

In an action by a husband, for the use of his wife, on a policy of insurance, the policy described the property as his, and contained a provision that, if the insured is not the absolute owner of the property, it must be so expressed in writing in the policy, otherwise the insurance as to such property shall be void. The defendant demurred to the declaration, which demurrer the court overruled. The defendant then, under the provisions of § 2 of the statutes (W. Va.) obtained from the court an order requiring the plaintiff to file a more particular statement in respect to his claim, and the facts expected to be proved by him at the trial. The plaintiff responded to the order of the court and filed a statement under oath. The defendant thereupon demurred to the declaration, and the statement filed in aid of it, and also moved the court to dismiss the plaintiff's action, which demurrer and motion the court sustained, and dismissed the action. On error the court said: "The important question is whether or not, according to the facts thus appearing, the plaintiff has any right to maintain this action. I think this question is properly raised by the defendant's demurrer to the declaration, and the plaintiff's statement filed in support thereof. The statement, being a specific averment of the facts intended to be proved to sustain the action, must be considered a part of the declaration; and if it so modifies or contradicts the general averments of the declaration as to show that the plaintiff has no cause of action, it would be vain and useless to put the plaintiff to the proof of them, because that would be in effect to call upon him to prove facts which when proved would defeat his action. The demurrer at this stage of the proceedings is analogous to a motion to dismiss on the plaintiff's opening statement of his case, or according to the practice of this state, of moving the court to exclude the plaintiff's evidence." Per Snyder, J., in Deitz *v.* Providence Wash. Ins. Co., 31 W. Va. 851, 8 S. E. 616, citing Oscanyan *v.* Arms Co., 103 U. S. 261; Dresser *v.* Transportation Co., 8 W. Va. 553; Schwarzbach *v.* Ohio Valley, etc., Union, 25 W. Va. 622.

5. As Constituting a Plea to the Jurisdiction.

In Pryor *v.* Adams, 1 Call 382, the court said that the demurrer to the bill was to be regarded as a plea to the jurisdiction.

6. As Forming Part of Record.

A demurrer copied into the record by the clerk, no order or decree of the court having been entered in the cause tendering or filing the same, nor in any manner recognizing it as tendered or filed, is not a part of the record and can not be considered by the appellate court. Building, etc., Ass'n *v.* Westfall, 55 W. Va. 305, 47 S. E. 74.

B. CLASSIFICATION.

1. General Demurrer.

A demurrer which in point of form avers simply that the adversary's pleading is not sufficient in law, is known as a general demurrer. Stephens' Pl. § 107.

A general demurrer is one that does not assign any special cause of demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

A general demurrer is one which raises an objection without specifying any particular cause or defect. Hord *v.* Dishman, 2 Hen. & M. 600.

A general demurrer is one which ex-

cepts to the sufficiency of the previous pleading in general terms, without showing specifically the nature of the objection. Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

In Equity.—By a general demurrer in equity is meant one which simply says there is no equity in the bill, or in the common-law form, as given by the Code: "The defendant says the bill is not sufficient in law." Section 28, ch. 125, W. Va. Code, 1899. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

2. Special Demurrer.

A demurrer which in point of form adds to the general averment, that the adversary's pleading is not sufficient in law, a specification of the errors imputed to the pleading demurred to, is denominated a special demurrer. Stephens' Pl., § 107.

A special demurrer is one that assigns some special cause of demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

Special demurrers had their origin under the statutes of 27 Eliz., ch. 5, and 4 Anne, ch. 16. It was provided that merely formal defects could not be taken advantage of unless specifically pointed out in the demurrer. Thus a distinction was made between material defects which went to the substance of the pleading, and those errors which were merely technical and formal. But assigning special causes for demurrer does not make a demurrer special, which in its nature is general. Miller *v.* McLuer, Gilmer 338.

Special demurrers have been abolished in civil cases by statute in Virginia and West Virginia, except as to pleas in abatement. Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

3. Distinction between General and Special Demurrer in Equity.

See post, "General and Special Demurrers Distinguished," I, C, 3.

4. Speaking Demurrer.

Introduce New Facts.—A demurrer can not introduce new facts in support of itself. When it is defective in this regard, it is called a speaking demurrer, and will be overruled. Harris *v.* Thomas, 1 Hen. & M. 17.

C. DISTINCTIONS.

1. Plea Distinguished.

A demurrer at common law is, in strictness, not a plea, since it never asserts nor denies any matter of fact, but merely advances a legal proposition; viz., that the pleading demurred to is insufficient in law to maintain the case shown by the adverse party. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

But see Pryor *v.* Adams, 1 Call 382, in which a demurrer is regarded as a plea to the jurisdiction.

"On the first point as to the jurisdiction, I am well satisfied that the demurrer is to be considered as a plea to the jurisdiction; so as to take the case out of the act which precluded appellate courts from proceeding to a reversal for want of jurisdiction if it be not pleaded in the inferior court." Per Pendleton, Pres., in Pryor *v.* Adams, 1 Call 382.

2. Demurrer to the Evidence Distinguished.

See the title DEMURRER TO THE EVIDENCE.

Under the English practice a demurrer to the evidence is a proceeding by which the judges whose province it is to determine questions of law are called upon to declare what the law is upon the facts in evidence. And it is analogous to the demurrer upon the facts alleged in pleading. Miller *v.* Insurance Co., 8 W. Va. 532.

3. General and Special Demurrers Distinguished.

The distinction of general and special demurrer, in the common-law sense, never existed in equity. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

II. Tribunals in Which Cognizable.

A. COURTS ADMINISTERING COMMON LAW.

Courts administering common law have always taken cognizance of demurrers. Stephens' Pl., § 107; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

B. COURTS ADMINISTERING CIVIL LAW EXCLUSIVELY.

It seems that there was no demurrer in the civil law, hence courts administering that law exclusively took no cognizance of a demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

C. ECCLESIASTICAL COURTS.

There was no demurrer in the ecclesiastical courts. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

D. COURTS OF CHANCERY.

Courts of chancery take cognizance of demurrers, which apply only to the bill. The demurrer in equity was borrowed from the common law, and is not the equivalent of the common-law demurrer. It seems that demurrers to bill in equity were always subject to certain rules of pleading and practice, which always required them to express the several causes of demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

III. Office and Scope.

A. IN GENERAL.

1. Denial of Legal Sufficiency.

The office of a demurrer at common law is to deny, not the truth, but only the legal sufficiency of the allegation demurred to, admitting all such facts as are well pleaded, and referring the questions of law arising upon them to the court. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

It is the long-established rule of practice in Virginia that a demurrer to the entire declaration raises the question whether it sets out sufficient matter to sustain the action. Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Roe *v.* Crutchfield, 1 Hen. & M. 361; Hollingsworth *v.* Milton, 8 Leigh 50; Henderson *v.* Stringer, 6 Gratt. 130; Wright *v.* Michie, 6 Gratt. 354; Smith *v.* Lloyd, 16 Gratt. 295; Wright *v.* Smith, 81 Va. 777; Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4.

A demurrer admits the facts demurred to and refers their legal sufficiency to the court. It puts in issue the legality of the whole proceeding, and compels the court to examine the validity of the record. State *v.* Ball, 30 W. Va. 382, 4 S. E. 649. See also, Com. *v.* Roach, 1 Gratt. 561.

The function of a demurrer is to raise a question of law as to the sufficiency of the facts sated, in point of form or substance, which questions must arise upon the fact of the pleading to which the demurrer is interposed. Price *v.* Via, 8 Gratt. 79.

Notice—Motion for Judgment under Va. Code, 1887, § 3211.—On a motion for judgment for money under § 3211, of the Virginia Code, 1887, the notice fixes the place of both the writ and the declaration, and a demurrer to the notice only raises the question whether there is matter in the notice sufficient to maintain the action. Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487, approving Henderson *v.* Stringer, 6 Gratt. 133.

Action on Insurance Policy—Declaration.—In an action by a husband for the use of his wife, on a policy of insurance, which policy described the property insured as the plaintiff's, and contained a provision that, if the insured is not the absolute owner of the property, it must be so expressed in the writing in the policy, otherwise the insurance as to such property shall be void; the declaration was in the form prescribed by our statute (§ 61, ch. 125, W. Va. Code); the plaintiff, at the instance of the defendant, filed a particular statement of the facts he expected to prove at the trial. Among those facts he stated that the insured prop-

erty belonged to his wife, and that he so informed the agent of the defendant at the time the insurance was procured, but that said agent, contrary to his instructions, and without his knowledge, made out the policy in his name, instead of that of his wife; the defendant then demurred to the declaration and this statement; held, if the declaration desired to test the legal sufficiency of the plaintiff's case as thus presented, his demurrer was the proper proceeding. Deitz *v.* Providence Wash. Ins. Co., 31 W. Va. 851, 8 S. E. 616.

2. Matters of Form and of Substance.

At common law a demurrer reached all faults in pleadings,—formal faults as well as substantial, except in cases of demurrer for duplicity. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

3. To Settle Questions of Fact.

Whether a paper declared on as a simple contract is a sealed contract or not can not be raised by demurrer, but is a matter of fact to be presented at the hearing by proper plea or motion. It can not be raised by craving oyer and demurrer. Grubbs *v.* National Life, etc., Ins. Co., 94 Va. 589, 27 S. E. 464.

4. To Avoid Discovery—Cover Defect of Title—Save Expense.

A demurrer to a bill is founded exclusively upon grounds apparent on the face of the bill, or of the documents filed therewith, and not upon extrinsic matter. Its object is to avoid a discovery which may injuriously affect the interests of the defendant, to cover a defective title, or prevent unnecessary expense; or to test the sufficiency of the case as stated in the bill. Harris *v.* Thomas, 1 Hen. & M. 18; Alderson *v.* Biggars, 4 Hen. & M. 473; Young *v.* Scott, 4 Rand. 416; Bank *v.* Nelson, 1 Gratt. 126; Young *v.* McClung, 9 Gratt. 336; Towner *v.* Lucas, 13 Gratt. 705; Henderson *v.* Lightfoot, 5 Call 241; Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

5. Reservation of Legal Point for Appellate Opinion.

If a point of law arise in the cause, the party, who wishes to avail himself of the opinion of an appellate court thereon, should demur (or) move the court to instruct the jury, or present notes for a special verdict. Syme *v.* Butler, 1 Call 105.

6. To Raise Question of Constitutionality of a Law or Ordinance.

The unconstitutionality of a law or an ordinance of a municipal corporation need not be specially pleaded. The question may be raised by a general demurrer in the trial court, and the error assigned for the first time in the appellate court. Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967.

7. To Raise Question of Jurisdiction.

See generally, the title JURISDICTION.

"The question of jurisdiction may always be raised by demurrer, and though no objection has been so taken, the court will dismiss the bill at the hearing if it does not state a case proper for relief. Green *v.* Massie, 21 Gratt. 356; Salamone *v.* Keiley, 80 Va. 86." Poindexter *v.* Burwell, 82 Va. 512; Ryan *v.* Com., 80 Va. 385.

The question of jurisdiction may always be raised by demurrer, and though no objection has been so taken, the court will dismiss at the hearing if it does not state a case proper for relief. Ryan *v.* Com., 80 Va. 385; Phillips' Case, 19 Gratt. 519; Poindexter *v.* Burwell, 82 Va. 507; Green *v.* Massie, 21 Gratt. 356; Salamone *v.* Keiley, 80 Va. 86.

A demurrer to a bill may be filed where some other court, as for instance a court of law, has jurisdiction. Surber *v.* McClintic, 10 W. Va. 236.

Waiver of Objection to Process.—Where an original or amended bill is filed by leave of court, and the defendant appears and demurs thereto, he thereby waives any objection he may have for want of process, and submits himself to the jurisdiction of the court. Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627.

8. Import of Demurrer.

The import of a demurrer is that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do. Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

B. GENERAL DEMURRER.

1. Purpose and Effect.

Assails Substantial Defects.—A general demurrer is one which raises an objection without specifying any particular cause and is sufficient only to reach matters of substance. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Hord *v.* Dishman, 2 Hen. & M. 600; Reid *v.* Field, 83 Va. 26, 1 S. E. 395.

On a general demurrer to a declaration the court always looks to the substantial meaning of its allegations, to ascertain if it states a good cause of action. Mowry *v.* Miller, 3 Leigh 561. See ante, "General Demurrer," I, B, 1.

Matter of Form in Plea in Abatement.—A general demurrer to a plea in abatement ought to be sustained though the plea be defective in point of form only. Mantz *v.* Hendley, 2 Hen. & M. 308.

In Criminal Cases.—In criminal cases defects of form and pleading may be taken advantage of by general demurrer. Com. *v.* Jackson, 2 Va. Cas. 501; Thomas *v.* Com., 2 Rob. 797; Lazier *v.* Com., 10 Gratt. 708.

Formal Defects.—It seems that formal defects, where available, are still proper subjects of general demurrer, as at common law in criminal cases. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

Statute of Limitations—Defect of Form or Substance.—If the plea of the statute of limitations is defective in form or substance, the defect is the subject of demurrer. Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095.

2. Test of Sufficiency.

a. General Rule.

The test of the sufficiency of a pleading as against a general demurrer is, whether the defendant can admit all that is alleged and escape liability. See post, "Statement of Good Cause of Action or Defense," III, B, 2, b.

b. Statement of Good Cause of Action or Defense.

(1) Substantial Compliance Sufficient.

A declaration or bill which substantially complies with the requirement that it shall set out a good cause of action is sufficient to withstand a general demurrer or motion to dismiss in the nature of such a demurrer. Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372; Goodman *v.* Richmond, etc., R. Co., 81 Va. 580; Richmond City R. Co. *v.* Scott, 86 Va. 902, 11 S. E. 404; Cabell *v.* Cox, 27 Gratt. 182; Mowry *v.* Miller, 3 Leigh 561; Hoppess *v.* Straw, 10 Leigh 348; Wilson *v.* Straight, 46 W. Va. 651, 33 S. E. 758; Hortenstein *v.* Virginia, etc., R. Co., 102 Va. 914, 47 S. E. 996; Virginia, etc., Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577; Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991; Goddin *v.* Vaughn, 14 Gratt. 102; Steenrod *v.* Wheeling, etc., R. Co., 27 W. Va. 1; Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440; Kemble *v.* Herndon, 28 W. Va. 524; Knight *v.* Brown, 25 W. Va. 808; Polsley *v.* Anderson, 7 W. Va. 202; Moore *v.* Smith, 26 W. Va. 379; Tracewell *v.* Boggs, 14 W. Va. 254.

A demurrer to a bill is properly overruled where the plaintiff by his bill makes such a case that, if true, entitles him to relief against the defendant. Snodgrass *v.* Wolf, 11 W. Va. 158.

If a declaration is sufficient to inform the defendant of the nature of the demand made upon him, and states sufficient facts to enable the court to say that if the facts stated are proved, the plaintiff is entitled to recover, it is good on demurrer. Va. Portland Cement Co. *v.* Luck, 103 Va. 427, 49 S. E. 577; Hortenstein *v.* Virginia, etc., R. Co., 102 Va. 914, 47 S. E. 996.

An allegation of duty is only a con-

clusion of law, and where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise, and enable the court to proceed upon the merits of the cause, the declaration is sufficient. Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991.

A declaration is sufficient if it informs the defendant of the nature of the demand made upon him, and states such facts as will enable the court to say that if the facts are proved as alleged they establish a good cause of action. Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991.

Cause Alleged by Way of Recital—Assumpsit.—It is a general rule in pleading, that whatever facts are necessary to constitute the cause of action, must be directly and positively stated in the declaration; but an exception to this general rule is, that if in an action in assumpsit the cause of action is alleged by way of recital, and the declaration concludes, "and whereas the defendant promised to pay the said lien," etc., it is good upon general demurrer. Sayre *v.* Edwards, 19 W. Va. 352.

Ejectment—Plaintiff Complains "Of a Plea of Trespass and Ejectment for This, To Wit."—A declaration in ejectment in all other respects good should not be held insufficient on a demurrer, only because in the beginning it uses the language, that the plaintiff complains of the defendant "of a plea of trespass and ejectment for this, to wit." Kemble *v.* Herndon, 28 W. Va. 524.

Bill for Specific Performance—Sufficiency.—Where the bill is clear and specific as to the terms of a sale, and land sold and the price per acre it sold for, and alleges, that the vendee took immediate possession of the land under said sale and has been in continuous and peaceable possession thereof ever since the sale, but refuses to pay the balance of the purchase money, the bill is sufficient in law, and a demurrer thereto is properly overruled. Tracewell *v.* Boggs, 14 W. Va. 254, citing and approving Goddin *v.* Vaughn, 14 Gratt. 102.

Failure to Ask Specifically for Subrogation.—Failure to ask specifically for subrogation is not ground for a demurrer to a bill filed by a surety against his principal to subject the lands of the principal to the lien of a judgment which he has paid as surety, where the bill alleges a state of facts which shows that the complainant is entitled to subrogation, and contains a prayer for general relief. Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554. See generally, the title SUBROGATION.

Bill Charging Fraud.—When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie. Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288. See generally, the title FRAUD AND DECEIT.

A bill which seeks to subject improvements put on a wife's property by a husband, in fraud of his creditors, must allege sufficient facts to show the existence of such fraud, or it will be demurrable. Billingsley *v.* Menear, 44 W. Va. 651, 30 S. E. 61.

In Love *v.* Teter, 24 W. Va. 741, a demurrer to the plaintiff's bill was sustained because the averments of the bill for setting aside the contract complained of, attempted so to predicate fraud upon representations of intentions and promises, and not upon the representations made in regard to existing facts.

Bill of Injunction to Stay Waste.—It is sufficient, on demurrer, to sustain a bill of injunction to stay waste and prevent the removal of improvements, that the bill alleges that complainant is the owner and is entitled to the possession of the premises with improvements, and that defendants are in possession and threaten to destroy the improvements, and that they are insolvent, and unable to respond in pecuniary damages. Frank *v.* Brunnemann, 8 W. Va. 462.

Queritur—Insufficiency of Demand.—The queritur in an action of debt on an injunction bond, ought regularly to demand the aggregate of all the injunction bonds named in the declaration, where there are several counts, and there are apparently several bonds. If, however, the queritur demands only the amount of the penalty of the injunction bond and not their aggregate, it is not so material as to be a ground of objection on a general demurrer. Bank *v.* Fleshman, 22 W. Va. 318.

(2) Form and Substance of Plea.

A special plea concludes thus, "and this, etc." The et cetera can not be construed to imply a verification, or a conclusion to the country, and is bad on special demurrer. Cooke *v.* Beale, 1 Wash. 313.

A. brings an action of detinue against two, and gives bond under the statute in order to take possession of the property: in order to retain it they give bond with secuirty to have the property forthcoming to answer the judgment. In an action upon the bond the defendant pleads in bar, that judgment was against one only, and that he was thereby discharged. A demurrer to this plea was properly sustained. Reynolds *v.* Hurst, 18 W. Va. 648.

Second Plea—Matter Already in Issue.—Where the objection to a second plea, filed under the act of assembly, is, that the matter of that plea is already put in issue, the party ought not to be put to the hazard of a demurrer, in order to avail himself of that objection; the proper and safe practice being, to try that question on a motion to reject the plea, or to strike it out, if it has been entered on record. So decided by two judges in a court, consisting of three. Reed *v.* Hanna, 3 Rand. 56.

To Plea in Abatement.—A demurrer to a plea in abatement is propely sustained under the act of November 1863, p. 109, § 5, prescribing qualifications for grand jurors, the concluding sentence of which section provides that "no plea in abatement to any indictment shall be allowed for any objection to any grand juror arising under this section." Bradford *v.* State, 4 W. Va. 763.

(3) Matter Set Up in Replication.

Omitting Technical Form of Commencement and Conclusion.—Upon a motion by a high sheriff against a deputy and his sureties, they file a special plea; and the plaintiff replies specially, and relies on the facts therein stated and especially on the bond as an estoppel; though the replication has not the peculiar commencement and conclusion of a pleading by way of estoppel. A demurrer to the replication should not be sustained. Cecil *v.* Early, 10 Gratt. 198.

Reply to Plea of Autrefois Acquit.—The plea of autrefois convict being replied to specially, the replication which sets forth such fraudulent prosecution and conviction, being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer. Com. *v.* Jackson, 2 Va. Cas. 501.

Setting Up Estoppel to Deny Admissions in Bond.—A executed a bond for the payment of a sum of money to B as executor. On suit brought A pleaded that B was not at the date of the bond, the executor, to which replication was made by B that A was estopped by his bond from denying what was admitted therein, and the court on demurrer to the replication held the demurrer well taken. On error it was held, that the replication should not have been held bad on demurrer; the plea itself being bad, the judgment should have been to sustain the demurrer and hold the plea bad. Hoke *v.* Hoke, 3 W. Va. 561.

When Part Only of Plea Answered.—It seems that a replication which is an answer to a part only of the plea will be held bad on demurrer. Jones *v.* Stevenson, 5 Munf. 1.

(4) Form and Contents of Indictment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Upon general demurrer to an indictment, all defenses, both as to form and substance, are put in issue. Com. *v.* Jackson, 2 Va. Cas. 501; Thomas *v.* Com., 2 Rob. 795; State *v.* Ball, 30 W. Va. 382, 4 S. E. 649.

A party indicted may demur to the indictment against him wherever it is defective in form or substance, and upon such demurrer he may take advantage of error to the same extent as he might by motion in arrest of judgment. State *v.* Ball, 30 W. Va. 382, 4 S. E. 649.

c. Pleading Good in Part.

(1) In General.

A general demurrer goes to the whole pleading to which it is addressed and should be overruled if any part of the pleading is good in substance. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

Where a bill in equity contains some matter proper for relief and some matter not calling for relief, a general demurrer is not proper, and there is no error in overruling. The demurrer should be aimed specially at the improper matter. Castleman *v.* Veitch, 3 Rand. 598; Wright *v.* Michie, 6 Gratt. 354; Taylor *v.* Stringer, 1 Gratt. 159; Miller *v.* Richmond, etc., R. Co., 1 Va. Dec. 351; Hendricks *v.* Com., 75 Va. 934; Rand *v.* Com., 9 Gratt. 738; Pryor's Case (Va.), 26 S. E. 865; Shifflett's Case, 14 Gratt. 652; Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924; Gay *v.* Skeen, 36 W. Va. 588, 15 S. E. 64; Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722; State *v.* Cartright, 20 W. Va. 37; Newton *v.* Reitz, 31 W. Va. 483, 7 S. E. 411; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Wheeling *v.* Black, 25 W. Va. 266; Clark *v.* Ohio River R. Co., 34 W. Va. 200, 12 S. E. 505.

(2) Declaration or Bill.

Overruled Where Part Good.—A general demurrer will not prevail where a part of the declaration or bill is good. Wright *v.* Michie, 6 Gratt. 334; Martin *v.* Strum, 5 Rand. 693; Wright *v.* Smith, 81 Va. 777; Henderson *v.* Stringer, 6 Gratt. 134; Hollingsworth *v.* Milton, 8 Leigh 50; Roe *v.* Crutchfield, 1 Hen. & M. 361; Power *v.* Ivie, 7 Leigh 147; Trump *v.* Tidewater, etc., Co., 46 W. Va. 238, 32 S. E. 1035.

A demurrer which is too large, that is to say, which reaches the whole pleading, can not be sustained if the pleading is good in part, and this rule applies alike to the declaration or complaint and to all subsequent pleading; and if a declaration though defective in part, contain one good count, a general demurrer to the whole declaration will be overruled and the same principle is held to apply to single divisible counts. Hollingsworth *v.* Milton, 8 Leigh 50; Wright *v.* Smith, 81 Va. 777; Smith *v.* Lloyd, 16 Gratt. 295; Kennaird *v.* Jones, 9 Gratt. 184; Nutter *v.* Sydenstricker, 11 W. Va. 535; Thompson *v.* Boggs, 8 W. Va. 63; Simmons *v.* Trumbo, 9 W. Va. 362; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Smith *v.* County Court, 33 W. Va. 713, 11 S. E. 1; Wheeling *v.* Black, 25 W. Va. 266; Newlon *v.* Reitz, 31 W. Va. 483, 7 S. E. 411; Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368; Standiford *v.* Goudy, 6 W. Va. 364.

Upon the demurrer to the entire declaration the first inquiry is as to whether either of the counts be good; for if there be one good count, the demurrer must be overruled, unless it be found united with some other which can not properly be joined with it. Kennaird *v.* Jones, 9 Gratt. 184; Roe *v.* Crutchfield, 1 Hen. & M. 361; Henderson *v.* Stringer, 6 Gratt. 130.

A demurrer to a plea can only operate upon the declaration, as a demurrer to the whole thereof, and if one count be good, the demurrer will be overruled. Smith *v.* Lloyd, 16 Gratt. 295.

One of Several Counts Good.—If there be several counts in a declara-

tion, one good and all the rest bad, and a general demurrer is filed to the whole declaration, the demurrer ought to be overruled. Power *v.* Ivie, 7 Leigh 147; Hollingsworth *v.* Milton, 8 Leigh 50; Gray *v.* Kemp, 88 Va. 201, 16 S. E. 225; Henderson *v.* Stringer, 6 Gratt. 130; Wright *v.* Michie, 6 Gratt. 354; Roe *v.* Crutchfield, 1 Hen. & M. 316; Elliott *v.* Hutchinson, 8 W. Va. 453; Thompson *v.* Boggs, 8 W. Va. 63; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4; Bank *v.* Beirne, 1 Gratt. 539; Nutter *v.* Sydenstricker, 11 W. Va. 535; Snyder *v.* Pittsburgh, etc., St. R. Co., 11 W. Va. 14. This rule is questioned in Jarrett *v.* Jarrett, 7 Leigh 93.

"The demurrer was properly overruled. There are three counts in the declaration. The demurrer is a general demurrer, and if either count is good the demurrer can not be sustained. Hollingsworth *v.* Milton, 8 Leigh 50; Henderson *v.* Stringer, 6 Gratt. 133; 4 Minor, 485; Smith *v.* Floyd, 16 Gratt. 309." Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 251.

If a declaration contain several good causes of action, some of which are defectively stated, a demurrer thereto is properly overruled. Trump *v.* Tidewater, etc., Co., 46 W. Va. 238, 32 S. E. 1035.

Where Demurrer Is to Each Separate Count.—But where there are two or more counts in a declaration and a demurrer is entered to each count separately, they must be respectively regarded as separate declarations; and the demurrers to defective counts ought to be sustained, whatever may be thought of the rest. Burkhart *v.* Jennings, 2 W. Va. 242.

To Whole Count Where Matter Divisible.—Where the matter in a single count is divisible in its nature, the demurrers should be confined to those parts which are defective, as the same general rule which applies to different counts, applies, also, to the divisible matter in the same count constituting different causes of action. Wheeling *v.* Black, 25 W. Va. 266; Robrecht *v.* Marling, 29 W. Va. 765, 2 S. E. 827; Newton *v.* Reitz, 31 W. Va. 483, 7 S. E. 411; Clark *v.* Ohio River R. Co., 34 W. Va. 200, 12 S. E. 505.

Thus in Clark *v.* Ohio River R. Co., 34 W. Va. 200, 12 S. E. 505, it was held, that where the declaration contains but one count, and that sets out a demand of several matters, which in their nature are divisable, any one of which is well claimed, that is sufficient, and a general demurrer to the whole declaration should be overruled.

Single Count—Some Breaches Well Assigned.—The same is true where there is a general demurrer to a declaration containing a single count, some of the breaches of which are well assigned. Martin *v.* Strum, 5 Rand. 693; Wright *v.* Michie, 6 Gratt. 354; Henderson *v.* Stringer, 6 Gratt. 130; Wright *v.* Smith, 81 Va. 777.

One of Several Assignments of Breaches Good.—On a general demurrer to a declaration, if any of the breaches are well assigned, the demurrer must be overruled, though other breaches are assigned, for which the action would not lie. Wright *v.* Michie, 6 Gratt. 354.

The specification of error in the assignment of a particular breach in the declaration, does not convert a general demurrer to the declaration into a demurrer to the particular breach; and if there be other breaches assigned which will maintain the action the demurrer must be overruled. Wright *v.* Michie, 6 Gratt. 354.

In a declaration on a bond in an action of debt, with collateral condition, if there be two assignments of breaches, and either assignment be good, and the whole declaration is demurred to, the demurrer ought to be overruled. Martin *v.* Sturm, 5 Rand. 693.

Bill Stating Several Causes of Action Some of Which Are Good.—Where a bill in chancery sets forth various claims, and the defendant files

a general demurrer, the demurrer will be overruled, if any of the claims be proper for the jurisdiction of a court of equity. Castleman *v.* Veitch, 3 Rand. 598.

Where a bill in equity contains some matter proper for relief, and some matter not calling for relief, a general demurrer is not proper, and there is no error in overruling it. The demurrer should be aimed specially at the improper matter. Where, however, after overruling such general demurrer, the court gives relief only justifiable upon such improper matter, it is reversible error. Turner *v.* Stewart, 51 W. Va. 493, 41 S. E. 924.

Thus, where a bill in equity sets forth various claims by distinct and separate paragraphs, and the defendant files a general demurrer, such demurrer will be overruled if any of the claims be proper for the jurisdiction and cognizance of the court in that form of proceeding; but when there is a demurrer to the whole bill, and also specifically to each of the several claims set out therein, and a part of those claims so demurred to are of such a character as to authorize no relief in such a suit, the court should sustain the demurrer in part, and should dismiss so much of the bill as seeks relief in reference to matters adjudged bad, and overrule the demurrer as to the residue, and give a rule against the defendant to answer the bill as to such residue. Gay *v.* Skeen, 36 W. Va. 582, 15 S. E. 64.

(3) Plea.

Plea Equivalent to General Issue.—In an action upon a policy of insurance a plea that such policy was made and issued to a different person than the person named therein, although of the same name, is equivalent to the general issue, and if objected to, ought to be rejected, or if demurred to, the demurrer should be sustained. Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Plea in Abatement.—A general demurrer to a plea in abatement ought to be sustained though the plea be defective in point of form only. Mantz *v.* Hendley, 2 Hen. & M. 308.

(4) Indictment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Demurrer to Indictment and Each Count.—Where one count in an indictment fails to state that the offense charged occurred in the county wherein the indictment was found, a demurrer to the indictment and each count thereof should be sustained. Jones *v.* Com., 86 Va. 950, 12 S. E. 950.

Demurrer General.—A demurrer to an indictment containing two counts, being general, and not to each count thereof, if either count is good it is properly overruled. And the verdict being general, if supported by either count, must stand. Hendricks *v.* Com., 75 Va. 934; State *v.* McClung, 35 W. Va. 280, 13 S. E. 654; Sprouse *v.* Com., 81 Va. 374; Anthony *v.* Com., 88 Va. 847, 14 S. E. 834; Dowdy *v.* Com., 9 Gratt. 727; Rand *v.* Com., 9 Gratt. 738; Shiflet's Case, 14 Gratt. 652; State *v.* Cartright, 20 W. Va. 32.

d. As Determined by Sufficiency of Prayer.

When a firm has received money, and, after its dissolution, a chancery suit is brought against the persons who were members of the firm, to compel them to refund the money, it is not necessary, though it is usual, to describe these persons as lately doing business under a certain name in the prayer of the bill, asking to make these parties defendants; but if the bill fails to do so, it is not on that account demurrable. Vance *v.* Kirk, 29 W. Va. 344, 1 S. E. 718.

C. SPECIAL DEMURRER.

A special demurrer goes merely to the structure of form of the pleading to which it is interposed, and not to the substance. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Cook

v. Dorsey, 38 W. Va. 196, 18 S. E. 468; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320; Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457; Miller *v.* M'Luer, Gilmer 338.

D. AS SEARCHING THE RECORD.

The rule of practice is well settled as a general rule that on demurrer the court will look back through the pleadings for the first fault, and will render judgment always against the party that permits the first fault in the pleading. Baird *v.* Mattox, 1 Call 264; Callis *v.* Waddy, 2 Munf. 511; Day *v.* Pickett, 4 Munf. 104; Smith *v.* Walker, 1 Wash. 135; Roane *v.* Drummond, 6 Rand. 182; Kirtley *v.* Deck, 3 Hen. & M. 388; Bennett *v.* Giles, 6 Leigh 316; Doolittle *v.* County Court, 28 W. Va. 158.

Thus, if a replication be insufficient, and demurred to as such, yet, if the plea be also insufficient, the court will go up to the first fault, and give judgment for the plaintiff. Kirtley *v.* Deck, 3 Hen. & M. 388.

So upon demurrer taken by a plaintift to a plea, the court goes back to the first fault, and if plaintiff's declaration is defective, gives judgment for defendant on the demurrer; nor is the defect cured by the defendant pleading over. Bennett *v.* Giles, 6 Leigh 316.

Therefore, when pleadings terminate in a demurrer on either side, any error in the previous pleadings, on either side, may be taken advantage of. Roane *v.* Drummond, 6 Rand. 182.

Mandamus Cases.—The general rule of pleading that a demurrer requires the whole pleading to be searched by the court and judgment given against him who made the first fault in pleading is applicable to pleadings in mandamus cases. Doolittle *v.* County Court, 28 W. Va. 158. See also, Smith *v.* Walker, 1 Wash. 135.

E. OPERATION AND EFFECT.

1. Demurrer to Plea of Autrefois Acquit or Convict—Production of Record.

In Com. *v.* Myers, 1 Va. Cas. 188, it is held, that if the prisoner tenders a plea of autrefois acquit, or autrefois convict, and the attorney for the commonwealth demurs to the plea, this is an admission that the record of acquittal or conviction was produced as it ought to have been.

2. Effecting Appearance.

It is a well-settled rule that a defendant by appearing and pleading, or taking or assenting to a continuance, waives all defects in the process and in the service thereof. By so doing he makes himself a party to the record, and thereby recognizes the case as in court, and it is too late for him afterwards to say he has not been regularly brought into court. Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130, 12 S. E. 348; Harvey *v.* Skipwith, 16 Gratt. 410; Barger *v.* Buckland, 28 Gratt. 850.

A defendant having appeared and filed his demurrer and pleas, thereby recognizes the case as in court, and waives thereby all defects in the taking of the rules, if any really existed. Simmons *v.* Trumbo, 9 W. Va. 362; Harvey *v.* Skipwith, 16 Gratt. 410.

When an original or amended bill is filed in court, by leave thereof, and the defendant appears and demurs thereto, he thereby waives any objection he may have for want of process, and submits himself to the justice of the court; and he can not afterwards raise such objection in his answer or otherwise. Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627.

3. Operation as Admission.

a. General Rule.

It is a well-settled rule that a demurrer to a pleading admits the truth of all the matters of fact which are well pleaded, and claims that it is legally insufficient to found upon it the relief prayed for or to compel an answer. And every allegation of fact contained in the pleading must in accordance with the rule be received as true. Welsh *v.* Ebersole, 75 Va. 651; Reid *v.* Field, 83 Va. 26, 1 S. E. 395; Newberry Land Co. *v.* Newberry, 95 Va. 111, 27

S. E. 897; Shufflebarger *v.* Blanchard, 101 Va. 690, 44 S. E. 951; Hord *v.* Dishman, 2 Hen. & M. 595; Trumbo *v.* Fulk, 103 Va. 73, 48 S. E. 525; Lesage *v.* Lesage, 52 W. Va. 323, 43 S. E. 137; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

A general demurrer admits matters of fact alleged to be true but denies their sufficiency in law to avail the party. Hord *v.* Dishman, 2 Hen. & M. 595.

In Equity—Assumes Truth for Sake of Argument.—It seems that a demurrer in equity does not admit the truth of the bill, but merely assumes the truth for the sake of argument. Hays *v* Heatherly, 36 W. Va. 613, 15 S. E. 223.

"This bill is here upon demurrer, and for the purpose of deciding it, and for no other present purpose, the facts alleged and shown in the bill must be taken as true, subject to such inferences of law as fairly arise therefrom." Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

b. Limitation.

Admits Facts Well Pleaded.—But a demurrer admits only such facts as are well or sufficiently pleaded. Welsh *v.* Ebersole, 75 Va. 651; Reid *v.* Field, 83 Va. 26, 1 S. E. 395; Newberry Land Co. *v.* Newberry, 95 Va. 111, 27 S. E. 897; Shufflebarger *v.* Blanchard, 101 Va. 690, 44 S. E. 951; Hord *v.* Dishman, 2 Hen. & M. 595; Trumbo *v.* Fulk, 103 Va. 73, 48 S. E. 525; Lesage *v.* Lesage, 52 W. Va. 323, 43 S. E. 137; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742; Morgan *v.* Fleming, 24 W. Va. 186.

A demurrer to an answer in mandamus proceedings, as in other cases, admits the truth of all facts sufficiently pleaded. Cummings *v.* Armstrong, 34 W. Va. 11, 11 S. E. 742; Morgan *v.* Fleming, 24 W. Va. 186.

c. What Demurrer Does Not Admit.

But a demurrer does not admit that the construction of a written instrument as averred in the pleading, when the instrument is set forth in the pleading and can be inspected, is the true one; nor that the purpose ascribed to the parties thereto, when the same is not justified by its language, is correct; nor that the parol understanding, which varies or contradicts the written instrument set out in the pleading, and on which it is found, is competent or admissible. Newberry Land Co. *v.* Newberry, 95 Va. 111, 27 S. E. 897.

A demurrer admits all facts well pleaded, but not the pleader's conclusions of law based thereon, which he has introduced into his pleading. Trumbo *v.* Fulk, 103 Va. 73, 48 S. E. 525.

F. IN MANDAMUS PROCEEDINGS.

Upon a demurrer to the return of a mandamus nisi, the court will go back to the first error committed in the pleading, according to the general rule of pleading, and will give judgment against the party committing the first error, hence a motion to quash the writ in such case is unnecessary. Doolittle *v.* County Court, 28 W. Va. 158; Morgan *v.* Fleming, 24 W. Va. 186. See also, Cummings *v.* Armstrong, 34 W. Va. 1, 11 S. E. 742.

A motion to quash puts in issue not only the sufficiency of the alternative writ, but also the sufficiency of the petition on which such writ is based; and, therefore, if the defect, which the defendant seeks to take advantage of, is in the alternative writ itself, and not in the petition, the formal mode of pleading is to demur, and not move to quash, and vice versa, if the defect is in the petition; but, while this is the technical and formal mode of proceeding, the court will nevertheless treat a motion to quash the alternative writ as the equivalent of a demurrer to such writ. The motion to quash in such case is not only the equivalent of a demurrer, but it reaches defects in the pe-

tition in like manner as such motion does the affidavit in an attachment. The motion to quash in this case, therefore, having all the effect of a demurrer and more, it is wholly immaterial whether there was or not, in fact, a demurrer in the record. State *v.* County Court, 33 W. Va. 589, 11 S. E. 72.

G. PLEADINGS AND COLLATERAL DOCUMENTS DRAWN IN QUESTION.

See generally, the title PLEADING.

1. In General.

A demurrer at common law may be taken to any part of the pleadings. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

But the principle is established that when a pleading is demurred to resort can not be had to other pleading for the purpose of supporting or opposing the demurrer. The demurrer stands or falls by the face of the pleading towards which it is directed. But it is not always easy to determine what constitutes the pleading demurred to. Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466; Lockhead *v.* Berkeley Springs, etc., Co., 40 W. Va. 553, 21 S. E. 1031; Columbia, etc., Ass'n *v.* Rockey, 93 Va. 678, 25 S. E. 1009; King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336; Smith *v.* Lloyd, 16 Gratt. 295.

Where the defendant, in an action upon a bond, craved oyer, and demurred, it was held, that in deciding upon the demurrer the court should construe the instrument by itself, and not look to anything else besides the instrument, for explanation. Smith *v.* Lloyd, 16 Gratt. 295.

2. Process.

On a demurrer to a declaration in considering whether the declaration is sufficient the court can not look at the notice served on the defendant to see whether it is such as the statute law required. Kemble *v.* Herndon, 28 W. Va. 524.

3. Bill, Declaration or Petition.

See ante, "Substantial Compliance Sufficient," III, B, 2, b, (1); "Declaration or Bill," III, B, 2, c, (2).

Declaration in Ejectment.—The defendant may demur to the plaintiff's declaration in ejectment, as in personal actions. Va. Code, § 2734; W. Va. Code, ch. 90, § 13.

Cross Bill.—The rule being in equity that only a bill may be demurred to is to be understood as equivalent to a cross bill. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

Where a cross bill seeks relief which is of an equitable nature, if it does not contain all proper allegations which confer an equitable title to such relief, it will be open to demurrer. West Virginia, etc., Co. *v.* Vinal, 14 W. Va. 637.

Amended or Supplemental Bill.—An amended or supplemental bill which sets up new matter, entirely different from the original, is demurrable. McComb *v.* Lobdell, 32 Gratt. 185.

4. Plea, Answer or Replication.

Plea. — See ante, "Form and Substance of Plea," III, B, 2, b, (2); "Plea," III, B, 2, c, (3).

Replication.—See ante, "Matter Set Up in Replication," III, B, 2, b, (3).

Answer in Chancery.—A demurrer to an answer is unknown in chancery practice. Copeland *v.* McCue, 5 W. Va. 264; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

5. Affidavits.

See generally, the title AFFIDAVITS, vol. 1, p. 227.

It is unheard of pleading to demur to an affidavit. Rutter *v.* Sullivan, 25 W. Va. 429.

Where a statute requires a plea to be verified by affidavit and the affidavit is omitted, a demurrer to the plea does not bring the affidavit to the attention of the court, as it is no part of the plea. Lockhead *v.* Berkeley Springs, etc., Co., 40 W. Va. 553, 21 S. E. 1031.

A demurrer to a plea required by

statute to be verified by affidavit does not bring to the attention of the court the lack of the affidavit. The affidavit is no part of the plea. The plaintiff should object to the reception of the plea when tendered because not so verified. He can not make the objection after having taken issue, either of law or fact, on it. Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466.

6. Exhibits.

See generally, the title EXHIBITS.

In passing upon a demurrer to a bill with which written documents are exhibited, as parts thereof, the court is not bound to accept as true and correct the allegations contained in the bill as to what such documents prove, or what is their effect in law, but may look to and go by the documents themselves. Lockhead *v.* Berkeley Springs, etc., Co., 40 W. Va. 553, 21 S. E. 1031.

The whole facts of a case appearing from the records of other ended causes exhibited by the plaintiff with his bill, the court may pass upon it, on a demurrer to a bill, without requiring the defendant to set out his defense in an answer. Young *v.* McClung, 9 Gratt. 336.

7. Bill of Particulars.

See generally, the title BILL OF PARTICULARS, vol. 2, p. 376.

It is no grounds for demurrer that a bill of particulars is omitted (Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368), or that the bill of particulars is too vague (Abell *v.* Penn. Mut. L. Ins., 18 W. Va. 400), as a bill of particulars is no part of the declaration or pleading. Columbia, etc., Ass'n *v.* Rockey, 93 Va. 678, 25 S. E. 1009.

The bill of particulars required by § 3248 of the Virginia Code, 1887, is no part of the declaration, and a demurrer will not lie for defects in such bill. George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

Agreement in Writing That Declaration Shall Be Supplemented by Bill.—However, the rule is otherwise, where the parties agree in writing that the case made by the declaration may be supplemented by the bill of particulars. King *v.* Norfolk, etc., R. Co., 99 Va. 625, 39 S. E. 701.

8. Accounts Filed with Declaration.

In Wright *v.* Smith, 81 Va. 777, accounts filed with a declaration under authority of Virginia Code, 1873, § 13, were held a part of the declaration or pleading.

9. Office Judgments.

See generally, the title JUDGMENTS AND DECREES.

Office Judgments.—On the authority of the case of Syme *v.* Griffin, 4 Hen. & M. 277, it is said that a judgment in the office is allowed to be set aside by a general demurrer to the declaration.

10. Scire Facias.

See generally, the title SCIRE FACIAS.

A demurrer to a scire facias upon a recognizance of special bail, is regular practice. Garland *v.* Ellis, 2 Leigh 555; Vaughan *v.* Wilson, 4 Hen. & M. 480; Cannon *v.* Com., 96 Va. 573, 32 S. E. 33.

Thus, objections to a scire facias to revive a suit, should be by plea, or demurrer, or if, at the hearing, the party does not entitle himself to revive the suit, it may be dismissed. Vaughan *v.* Wilson, 4 Hen. & M. 480.

11. Charter on Insurance Company under Which Policy Issued.

The charter of an insurance company under which the policy is issued is not made a part of the declaration by filing the original policy, or a sworn copy thereof, with the declaration under the provisions of § 3251 of the Virginia Code, as amended, under which the action is brought, and hence the provisions of such charter can not be considered on demurrer. Farmers', etc., Ins. Ass'n *v.* Kinsey, 101 Va. 236, 43 S. E. 338.

12. Private Acts.

In considering the demurrer to the declaration in Hart *v.* Baltimore, etc.,

R. Co., 6 W. Va. 336, it was held, that if the acts of the legislature incorporating the defendant could be considered private acts, it was competent for the court to read and consider the acts on their being brought to its attention by the plaintiff's attorney.

13. Indictments.

See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Upon a demurrer to an indictment advantage may be taken of all defects therein to the same extent as may be done by motion in arrest of judgment. State *v.* Ball, 30 W. Va. 382, 4 S. E. 645; Hampton's Case, 3 Gratt. 592; Boyd's Case, 77 Va. 52; Bailey's Case, 78 Va. 19.

IV. When Properly Interposed.

A. DEFECTS APPARENT ON THE FACE OF THE RECORD.

1. General Rule.

A demurrer properly lies for such defects, and such only, as are apparent upon the face of the pleading. It can not allege matter foreign to the pleading. Bailey's Case, 78 Va. 19; Boyd's Case, 77 Va. 52; Hampton's Case, 3 Gratt. 592; Canon *v.* Com., 96 Va. 573, 32 S. E. 33; Watts *v.* Com., 99 Va. 872, 39 S. E. 706; Harris *v.* Thomas, 1 Hen. & M. 17; Price *v.* Via, 8 Gratt. 79; Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466; Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90; State *v.* Ball, 30 W. Va. 382, 4 S. E. 645; Barr *v.* Clayton, 29 W. Va. 256, 11 S. E. 899; Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

A demurrer will not lie to an objection which is not apparent upon the face of the bill, or documents which form a part of it. If it is not apparent the defendant should show it by plea or answer. Harris *v.* Thomas, 1 Hen. & M. 17; Barr *v.* Clayton, 29 W. Va. 256, 11 S. E. 899.

No objections to an indictment can be taken advantage of unless they are apparent upon its face. Watts *v.* Com., 99 Va. 872, 39 S. E. 706.

2. Collateral Matter.

A demurrer can never be founded on matter collateral to the pleading to which it is opposed, and must therefore as a general rule be decided without reference to extraneous matter. In some cases collateral matter may be reviewed by consent of parties. Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614; Lewis *v.* Hicks, 96 Va. 91, 30 S. E. 466; Cannon *v.* Com., 96 Va. 573, 32 S. E. 33; Price *v.* Via, 8 Gratt. 79.

Upon a demurrer to a scire facias sued out on a forfeited recognizance, the entry of default can not be looked to in aid of the recognizance. The recognizance must stand alone upon a demurrer. Cannon *v.* Com., 96 Va. 573, 32 S. E. 33.

B. GROUNDS FOR DEMURRER.

1. Grounds for Special and General Demurrers Distinguished.

See ante, "Classification," I, B.

2. Want of Jurisdiction.

See generally, the title JURISDICTION.

a. In General.

The question of jurisdiction may always be raised by demurrer, and though no objection has been so taken, the court will dismiss at the hearing if it does not state a cause proper for relief. Ryan *v.* Com., 80 Va. 385; Poindexter *v.* Burwell, 82 Va. 507; Green *v.* Massie, 21 Gratt. 356; Salamone *v.* Keiley, 80 Va. 86; Universal Ins. Co. *v.* Cogbill, 30 Gratt. 72; Switzer *v.* McCulloch, 76 Va. 777; Phillips' Case, 19 Gratt. 519; Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724.

b. Want of Equity in Bill.

See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; EQUITY; JURISDICTION.

In General.—"In general, courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes

of justice. And therefore it may be stated, as a general rule subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold." Hoke *v.* Davis, 33 W. Va. 485, 10 S. E. 821; Lafever *v.* Billmyer, 5 W. Va. 33; Woods *v.* Campbell, 45 W. Va. 203, 32 S. E. 208; Shay *v.* Nolan, 46 W. Va. 299, 33 S. E. 225; Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724; Van Dorn *v.* Lewis County Court, 38 W. Va. 267, 18 S. E. 579; Grafton *v.* Reid, 26 W. Va. 437; Dulany *v.* Smith, 97 Va. 130, 32 S. E. 533.

Adequate Remedy at Law.—The objection that a court of equity is without jurisdiction by reason of the existence of an adequate remedy at law may be raised by demurrer, where it appears on the face of the bill. Alderson *v.* Biggars, 4 Hen. & M. 470; Coles *v.* Hurt, 75 Va. 380; Surber *v.* McClintic, 10 W. Va. 236; Shay *v.* Nolan, 46 W. Va. 299, 33 S. E. 225; Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724.

A married woman brought suit to have a new trustee appointed for property held for her sole and separate use, and at the same time prayed for injunction against a municipality to prevent it from opening a street through the trust property. Held, that a demurrer did not lie to such bill upon the part of the municipality, the court saying: "There can be no question, that equity has jurisdiction under the facts of this case to order a conveyance of the property to another trustee, and under the statute to the party herself; and no question is raised on that subject. But it is claimed, that the city of Wheeling was improperly made a party to the bill. This question has been repeatedly determined by this court. While a person or corporation will not be enjoined from committing a mere trespass, the remedy at law being complete and adequate, yet where any act is about to be done permanent in its nature and affecting the very substance and value of the plaintiff's estate, a court of equity will interpose by injunction to prevent the act. Pierrepoint *v.* Harrisville, 9 W. Va. 215; Wheeling *v.* Campbell, 12 W. Va. 36; Keystone Bridge Co. *v.* Summers, 13 W. Va. 476; Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396." Forsyth *v* Wheeling, 19 W. Va. 318.

A bill in equity, which alleges that the plaintiff is the owner of a tract of land, and exhibits his title papers; that said land is in a state of nature, and covered by valuable growing timber, which timber is very valuable, and makes said land much more valuable than it would be without said growing timber; that the defendants are engaged in cutting and removing and preparing to remove the valuable timber from said land, and have already cut seventy-five pine trees thereon of great value, which trees still remain thereon, and that plaintiff believes that said defendants, if not restrained from trespassing on said land, will continue to cut and remove therefrom the valuable timber thereon, and that said cutting was without his consent or knowledge; that said waste has greatly injured him, and, if defendants were allowed to continue the cutting of said timber, the injury will be of such a nature that it can not be compensated in damages, and his injury will be irreparable, does not show jurisdiction in a court of equity, and will be dismissed on demurrer. Watson *v.* Ferrell, 34 W. Va. 406, 12 S. E. 724.

Bill Seeking Enforcement of Legal Demand.—Wh re a bill in equity seeks nothing further than the enforcement of a legal demand, a demurrer to the bill will be sustained. Hoke *v.* Davis, 33 W. Va. 485, 10 S. E. 820.

Bill Charging Fraud and Insolvency —Injunction Prayed. — See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

But a demurrer will not lie to the equity jurisdiction where a bill alleges that the defendant, who has possession of personal property claimed by the complainant under a contract with the defendant, is insolvent and is fraudulently converting the property to his own use, and asks to enjoin the defendant, and for an account. Brakeley *v.* Tuttle, 3 W. Va. 86.

c. Personal Injury Cases.

See generally, the title VENUE.

Actions for personal injuries are transitory, and in such actions objections to the jurisdiction of the court can not be raised by a demurrer. Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226.

3. Failure to State Facts Constituting or Insufficiency of Cause of Action or Defense.

a. Declaration or Bill Failing to State Facts Constituting a Cause of Action.

That a declaration or bill does not state facts constituting a cause of action is an objection which may properly be raised by a general demurrer. Cook *v.* Simms, 2 Call 39; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250; Dun *v.* Seaboard, etc., R. Co., 78 Va. 645; Saunders *v.* Baltimore, etc., Ass'n, 99 Va. 140, 37 S. E. 775; Northwestern Bank *v.* Nelson, 1 Gratt. 108; Tardy *v.* Creasy, 81 Va. 553; Lefew *v.* Hooper, 82 Va. 946, 1 S. E. 208; Cunningham *v.* Herndon, 2 Call 530; Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372; Goodman *v.* Railway Co., 81 Va. 580; Kent *v.* Cloyd, 30 Gratt. 555; Saunders *v.* Griggs, 81 Va. 506; Mowry *v.* Miller, 3 Leigh 561; Strange *v.* Floyd, 9 Gratt. 474; Carthrae *v.* Brown, 3 Leigh 98; Rutherford *v.* Mayo, 76 Va. 117; Dimmey *v.* Wheeling, etc., R. Co., 27 W. Va. 32; Lafever *v.* Billmyer, 5 W. Va. 33; Childress *v.* Morris, 23 Gratt. 802; Jackson *v.* Hull, 21 W. Va. 601; Hoke *v.* Davis, 33 W. Va. 485, 10 S. E. 820; Jarvis *v.* Martin, 45 W. Va. 347, 31 S. E. 957; Waggener *v.* Point Pleasant, 42 W. Va. 798, 26 S. E. 352; Preston *v.* West, 55 W. Va. 391, 47 N. E. 152; Burkhart *v.* Jennings, 2 W. Va. 242; White *v.* Romans, 29 W. Va. 571, 3 S. E. 14; Shuttleworth *v.* Shuttleworth, 34 W. Va. 17, 11 S. E. 714; Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33; Merchants Bank *v.* Jeffries, 21 W. Va. 504; Knight *v.* Charter, 22 W. Va. 422; Fisher *v.* Seaboard Air Line R. Co., 102 Va. 363, 46 S. E. 381.

Where the presumption of payment arises by reason of the lapse of twenty years' time, a bill seeking enforcement of such stale demand must set up facts and circumstances sufficient to rebut such presumption, or it will be demurrable. Jarvis *v.* Martin, 45 W. Va. 347, 31 S. E. 957; Jackson *v.* Hull, 21 W. Va. 601.

Where a petition has been filed in a case of habeas corpus ad subjiciendum, it is not regular or proper to demur to the petition, but the proper course, ordinarily, is to produce the child, make return, and then move to quash the writ, issued upon insufficient cause. Rust *v.* Vanvacter, 9 W. Va. 600.

A bill filed by a married woman and her husband for the specific performance of a contract for the sale of land belonging to the female plaintiff, is not demurrable simply because it appears upon the face of the deed tendered with the bill that the acknowledgment is dated after the suit had been commenced. Vaught *v.* Cain, 31 W. Va. 424, 7 S. E. 9.

In Cross Bill.—Where a cross bill seeks relief which is of an equitable nature, if it does not contain all proper allegations which confer an equitable title to such relief, it will be open to demurrer. West Virginia, etc., Co. *v.* Vinal, 14 W. Va. 637.

Suit for Assignment of Dower—Failure to State Extent Deprived of Provision by Will.—In Rutherford *v.* Mayo, 76 Va. 117, a bill was filed by a widow to have dower assigned her in a moiety of a certain tract of land and mill, which the testator's son-in-

law had received under the will, and which he had conveyed to a party, the defendant, to whom belonged the other moiety. The bill was framed with a view to relief, under Virginia Code, 1860, ch. 110, § 4, and alleged that "she had been unlawfully deprived of the provision made for her by the will" of the testator. Held, that a demurrer to the bill should have been sustained for want of specification in the bill as to the extent to which she was deprived of the provision made for her by the will.

Act Complained of One Which Defendant Had the Right to Do.—A declaration which charges that a defendant pulled down a building on his lot, and left the partition wall, with communicating doors between that building and the building of the plaintiff, unprotected, exposed, and in a most unsightly condition, but not charging negligence on the part of the defendant, is bad on demurrer, as the act complained of is one which the defendant had the right to do. Fisher *v.* Seaboard Air Line R. Co., 102 Va. 363, 46 S. E. 381.

Where a third count in declaration sets forth that plaintiff put his hand three inches out of the car window, and it struck against the bridge through which the train was passing, it was held, insufficient on demurrer. Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763.

In action of trespass or trespass on the case for torts, if the facts necessary to state a cause of action are stated under a quod cum or after a whereas, such mode of statement must be regarded as recital, and such count is fatally defective on general demurrer. Spiker *v.* Bohrer, 37 W. Va. 258, 16 S. E. 575.

But if a declaration is artificially drawn, beginning for instance quod cum, yet if nothing essential to the action be omitted, and there is a demurrer to the declaration, it will be overruled. Roanoke Nat. Bank *v.* Hambick, 82 Va. 135; Blaine *v.* Chesapeake, etc., R. Co., 9 W. Va. 252; Dorsey *v.* Shepherd, 9 W. Va. 57; Richmond Traction Co. *v.* Hildebrand, 98 Va. 22, 34 S. E. 888; State *v.* Harmon, 15 W. Va. 115.

b. Sufficiency of Matter Set Up in Plea or Defense.

Where the matter set up in the plea or attempted to be set up is not a complete and sufficient defense to the matter set up in the declaration it is demurrable. Bank *v.* Lockwood, 13 W. Va. 395; Reynolds *v.* Hurst, 18 W. Va. 648; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

"That the court below did not err in sustaining the demurrer to said plea, for the reason that taking the allegations and statements of said plea to be true, the defense therein set up, or attempted to be set up, against the plaintiff's demand and claim, in his declaration mentioned, is not good and sufficient, waiving all objection thereto for want of some proper averments and allegations, so as to make the plea complete and sufficient, if the defense set up, or attempted to be set up, in said plea, was a good and sufficient defense in law." Bank *v.* Lockwood, 13 W. Va. 395.

c. In Replication.

See ante, "Matter Set Up in Replication," III, B, 2, b, (3).

4 Plaintiff without Right of Action When Suit Brought.

Where a plaintiff has no right of action at the time of suit brought, his suit must fail, and when this appears on the face of the bill it will be dismissed on demurrer. Keyser *v.* Renner, 87 Va. 249, 12 S. E. 406.

5. Another Suit Pending.

See generally, the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 2, 15; CREDITOR'S SUITS, vol. 3, pp. 780, 808.

Where a lien creditor brings suit to subject the real estate of his debtor

to the payment of his debt, the fact that his bill avers that there is then pending a suit by another creditor, to subject the same real estate to other debts, is not ground for sustaining a demurrer to such bill. See *v.* Rogers, 31 W. Va. 473, 7 S. E. 436.

But where a creditors' bill has been filed against the administrator and legatees, and a creditor not a party to the suit institutes a separate suit for the establishment of his debt, and his bill shows that he had knowledge of the decree there given in the first suit, his suit will be dismissed upon demurrer. Sunders *v.* Griggs, 81 Va. 506; Kent *v.* Cloyd, 30 Gratt. 555.

6. Misjoinder or Nonjoinder of Parties.

See generally, the title PARTIES.

a. Misjoinder.

Formerly misjoinder of parties was a defect fatal on demurrer. Lee *v.* Mutual, etc., Ass'n, 97 Va. 160, 33 S. E. 556; Riverside Cotton Mills *v.* Lanier, 102 Va. 148, 45 S. E. 875; Morrison *v.* Householder, 79 Va. 629; Hurt *v* Jones, 75 Va. 341; Belton *v.* Apperson, 26 Gratt. 207; Holland *v.* Trotter, 22 Gratt. 136; Sillings *v.* Bumgardner, 9 Gratt. 273; Brent *v.* Washington, 18 Gratt. 526; Riley *v.* Kinzel, 85 Va. 480, 7 S. E. 907; Vaiden *v.* Stubblefield, 28 Gratt. 153; Abernathy *v.* Phillips, 82 Va. 769, 1 S. E. 113; Almond *v.* Wilson, 75 Va. 613.

But since the acts of 1895-96, misjoinder of parties is no longer a ground of demurrer. The word may in such statute is construed to mean shall. Va. Code, § 3258a (acts, 1893-4, p. 489; 1895-6, p. 153); Lee *v.* Mutual, etc., Ass'n, 97 Va. 160, 33 S. E. 556; Riverside Cotton Mills *v.* Lanier, 102 Va. 148, 45 S. E. 875.

b. Nonjoinder.

One of the essential qualifications necessary to a bill in chancery is that it should, either in the caption or in the body of the bill, name some person or persons as parties defendant, and describe them as having some interest in the subject matter of the suit, and pray for some relief against them; and these requisites are as essential to a bill of review as to an original bill, and without them a paper purporting to be a bill of review should be dismissed on demurrer, or stricken from the files on motion. Kanawha Valley Bank *v.* Wilson, 35 W. Va. 36, 13 S. E. 58.

If the want of proper parties appears on the face of the bill, it will for that cause be demurrable, and the defect may be taken advantage of by demurrer or at the hearing of the cause. But where the demurrer for such cause is sustained, the plaintiff should have leave to amend his bill. Pappenheimer *v.* Roberts, 24 W. Va. 702.

Although the objection to the bill for want of proper parties is not properly raised in the circuit court by demurrer, plea, or answer, the supreme court will, on its own motion, reverse and remand the cause for want of proper parties, where such defect is apparent upon the face of the bill and exhibits. Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282; Hitchcox *v.* Hitchcox, 39 W. Va. 607, 20 S. E. 595.

Nonjoinder of Plaintiffs. — When a person who ought to join as plaintiff is omitted, if the objection appears upon the pleading the defendant may demur. Prunty *v.* Mitchell, 76 Va. 169.

Joint Obligees.—All the obligees in a joint bond must join in an action thereon, or some sufficient excuse for not joining them must be stated in the declaration, or the objection is fatal to the general demurrer. Strange *v.* Floyd, 9 Gratt. 474.

In a given case a widow filed a bill against X to have dower assigned her in a moiety of a certain tract of land and mill, which her husband's, the testator's son-in-law, had received under the will, and which latter had afterwards sold to X, to whom belonged the other moiety. The bill did not make parties the legatees and devisees, nor the son-in-law and his wife who joined

in the conveyance to X. On demurrer, it was held, that the demurrer should have been sustained for want of proper parties. Rutherford *v.* Mayo, 76 Va. 117.

7. Several Causes of Action Improperly Joined or Separate Offenses Charged.

A misjoinder of causes of action in a declaration is fatal on demurrer, where such objection appears on the face of the declaration. Knotts *v.* McGregor, 47 W. Va. 566, 35 S. E. 899; Malsby *v.* Lanark Co., 55 W. Va. 484, 47 S. E. 359; Wheeling *v.* Trowbridge, 5 W. Va. 354; Creel *v.* Brown, 1 Rob. 265; Henderson *v.* Stringer, 6 Gratt. 130; Grubb *v.* Burford, 98 Va. 553, 37 S. E. 4; Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Misjoinder of Counts.—A misjoinder of counts in a declaration is fatal to the declaration upon demurrer. Malsby *v.* Lanark Co., 55 W. Va. 484, 47 S. E. 359.

Counts Applicable to Trespass or Trespass on the Case.—It is not a cause of demurrer since the statute, Va. Code, 1860, ch. 148, § 7, p. 589, that the declaration contains a count applicable either to trespass or trespass on the case. Parsons *v.* Harper, 16 Gratt. 64; Hood *v.* Maxwell, 1 W. Va. 219; Lively *v.* Ballard, 2 W. Va. 496.

Objection Goes to Whole Declaration.—Upon a demurrer to a declaration in debt for a misjoinder of actions, the objection, if well founded, goes to the whole declaration. Henderson *v.* Stringer, 6 Gratt. 130.

For if the plaintiff has joined in his declaration causes of action which the law does not allow to be joined, the objection is no more applicable to one count, or part of a count, than to any other, but goes to the whole declaration. Henderson *v.* Stringer, 6 Gratt. 130.

Indictment Charging Separate Offenses.—In the case of Kane *v.* The People, in the court of errors of New York, 8 Wend. R. 211, the law is thus stated by the chancellor: "In cases of felony, where two or more distinct and separate offenses are contained in the same indictment, the court, in its discretion, may quash the indictment or compel the prosecutor to elect upon which charge he will proceed; but in point of law, it is no objection that two or more offenses of the same nature and upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. It therefore forms no ground of a motion in arrest of judgment; neither can it be objected by way of demurrer, or on a writ of error." Dowdy *v.* Com., 9 Gratt. 731.

8. Surplusage and Irrelevancy.

Irrelevancy.—A bill in equity, notwithstanding it contains many vague and irrelevant allegations, will not be held bad on demurrer, if taken as a whole it states facts which entitle the plaintiff to relief. Moore *v.* Harper, 27 W. Va. 362.

Surplusage.—In passing on the sufficiency of a declaration on demurrer, superfluous allegations contained therein may always be disregarded. Ocheltree *v.* McClung, 7 W. Va. 232.

And in considering a demurrer to a declaration, where oyer is craved of the bond sued upon, the court can only look at the declaration and bond, and if words in the bond without the addition of extraneous facts, are insensible, they will be treated as surplusage. Smith *v.* Lloyd, 16 Gratt. 295.

9. Statute of Limitations.

See generally, the title LIMITATION OF ACTIONS.

a. General Rule.

It is well established as a general rule that one can not avail himself of the defense of the statute of limitations, either in law or in equity, by demurrer, even though the claim appears on the face of the declaration or bill to be barred; it must be pleaded. Tazewell *v.* Whittle, 13 Gratt. 344; Herrington *v.* Harkins, 1 Rob. 591; Col-

vert *v.* Millstead, 5 Leigh 88; Smith *v.* Pattie, 81 Va. 665; Gibson *v.* Green, 89 Va. 526, 16 S. E. 661; Hubble *v.* Poff, 98 Va. 646, 37 S. E. 277; Riddle *v.* McGinnis, 22 W. Va. 253; Seborn *v.* Beckwith, 30 W. Va. 774, 5 S. E. 450. And as held in these two latter cases, this has been the settled rule in actions at law for more than two hundred years, citing Puckle *v.* Moor (1672), Vent. 191; Gould *v.* Johnson (1702), 2 Lord Raym. 838.

Reason for Rule. — In Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431, it is said, that "The reasons generally given are that it is personal, and may be waived, and must be pleaded, or in some way be shown to be relied on, and that it can not be reached at common law by a demurrer, because the pleader makes out his case as far as he needed at first to go, without withdrawing it from saving clauses, or setting up matters in confession and avoidance of the statutory bar." And a further reason is that it would take from the plaintiff his right to reply by way of confession and avoidance, as he must necessarily join in the demurrer, when tended. The bar of the statute may be removed in some cases after the limitation has affected the remedy, and this the plaintiff should be allowed to show if he so desires.

b. Exceptions.

When the limitation of the statute extinguishes the right as well as the remedy it may be taken advantage of by demurrer. Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Savings Bank *v.* Powhatan Mfg. Co., 102 Va. 274, 46 S. E. 294, distinguishing Hubble *v.* Poff, 98 Va. 646, 37 S. E. 277. See also, McCartney *v.* Tyrer, 94 Va. 198, 26 S. E. 419; Newberger *v.* Wells, 51 W. Va. 624.

Death by Wrongful Act.—See the title DEATH BY WRONGFUL ACT, ante, p. 226.

The institution of an action to recover damages under the statute giving an action for death by wrongful act is a right created by statute, and does not exist independently of it. The period prescribed by the statute for bringing the action is an essential part of the right and to claim the right the statute must be fully complied with. If it appears upon the face of the declaration that the action has not been instituted within the prescribed period, then it is apparent that the conditions upon which the right depends have not been performed, therefore no right can exist, as the statute is absolute and without qualification. This being true, the plaintiff has nothing that he can set up in confession and avoidance which would avail as a defense, consequently a demurrer may be interposed, as the usual cause for refusing it is not present in such case. Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

Bill to Enforce Mechanic's Lien.—See the title MECHANICS' LIENS.

A bill to enforce a mechanic's lien which does not show on its face that the suit was brought within the time prescribed by statute is bad on demurrer. Savings Bank *v.* Powhatan Mfg. Co., 102 Va. 274, 46 S. E. 294; Hubble *v.* Poff, 98 Va. 646, 37 S. E. 277, distinguished.

Adverse Possession. — "One reason given to justify the decree on which it is said the circuit court acted, is that the suit was barred by the statute of limitations. To defeat the right of partition it must appear that there had been ten years hostile—adverse possession, prior to the suit. We can not find this from the bill." Per Brannon, J., in Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90. See also, Layne *v.* Morris, 16 Gratt. 236.

Prosecutions.—See generally, the title CRIMINAL LAW, ante, pp. 1, 28.

If an indictment for an offense, the prosecution of which is by statute limited to a certain time after the offense was committed, shows upon its face

that at the time the indictment was found the prosecution of the offense was barred by such statute, it is fatally defective, and the defendant may take advantage of such defect, by demurrer thereto. State *v.* Ball, 30 W. Va. 382, 4 S. E. 645.

c. Who May Demur.

The general rule is, that when the statute may be availed of, it is a personal privilege of the defendant, and it is optional with him whether he chooses it as a means of defense. The court has no power to interpose ex mero motu, nor can persons who are interested indirectly, as creditors, for instance, compel the defendant to use it as a defense. Smith *v.* Hutchinson, 78 Va. 688; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

However, there are exceptions to this general rule. Thus, as held in McCartney *v.* Tyrer, 94 Va. 198, 26 S. E. 419, where a court of equity has taken possession of a debtor's estate for the purposes of distribution, and proceeds to ascertain the debts and incumbrances to enable it properly to administer and distribute the assets, an exception to the general rule is allowed, and any creditor interested in the fund is permitted to interpose the defense of the statute of limitations. See Smith *v.* Pattie, 81 Va. 654; Tazewell *v.* Whittle, 13 Gratt. 329; Ayre *v.* Burke, 82 Va. 338, 4 S. E. 618; Blair *v.* Carter, 78 Va. 621.

10. Variance.

See generally, the title VARIANCE.

a. Between Declaration and Writ.

Where there is a variance between the writ and the declaration it can only be taken advantage of by plea in abatement. Beckwith *v.* Mollohan, 2 W. Va. 477. See also, Layne *v.* Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123; Hinton *v.* Ballard, 3 W. Va. 582; Roderick *v.* Railroad Co., 7 W. Va. 54; Stephens *v.* White, 2 Wash. 203; Pate *v.* Spotts, 6 Munf. 394.

An amendable variance between the declaration and the writ can only be taken advantage of by plea in abatement. Anderson *v.* Doolittle, 38 W. Va. 629, 18 S. E. 725.

b. In Prohibition—Affidavit and Declaration.

In prohibition, a variance between the affidavit and the declaration, not being a matter in bar of the proceeding, can not be taken advantage of by demurrer to the declaration. Warwick *v.* Mayo, 15 Gratt. 528.

c. Variance between Declaration and Instrument Sued on.

(1) Where Instrument Is a Bond.

To take advantage, by demurrer of a variance between the declaration and a bond declared on, the defendant must crave oyer of the bond. Sterrett *v.* Teaford, 4 Gratt. 84; Duval *v.* Malone, 14 Gratt. 24; Graghill *v.* Page, 2 Hen. & M. 446; Armstrong *v.* Armstrongs, 1 Leigh 491; Jarrett *v.* Jarrett, 7 Leigh 93.

Words Inadvertently Omitted from Instrument Sued on — Endorsement Changed.—When it is obvious on the face of the paper, that a word or phrase has been omitted by mistake, or inadvertence, and such words are obviously and naturally suggested, upon the mere inspection of the paper, as the words the parties must have intended to use to express their meaning, such word, or words of like import, may be supplied. Thus, in Peyton *v.* Harman, 22 Gratt. 643, P. executed his bond to H. for $5,500 payable with interest one year after date. On the bond there was an endorsement that one twenty-fifth of the principal of the bond with the interest due at the end of the year, and so on from year to year, the credit not exceeding twenty-five years in all. H. brought debt upon the bond against P. and declared upon the bond omitting the endorsement. P. craved oyer of the bond and endorsement, and demurred. It was held that the words "to be paid" had been obviously omitted from the endorsement by mistake, and they would be supplied. And the endorse-

ment changed the contract, from the contract to pay in a year to a contract to pay the same amount in twenty-five annual payments; and the demurrer should be sustained.

The rule is that to make a subsequent agreement respecting a bond a part thereof, it must be so engrafted on the bond that the original and the engrafted matter shall constitute inseparable parts of the entire agreement. Otherwise the indorsement must be pleaded as matter of defense. Consequently where the indorsement is not so engrafted as to become part of the bond declared on, the declaration, which does not mention the indorsement, is not demurrable for variance. Carter *v.* Noland, 86 Va. 568, 10 E. E. 605.

In an action of covenant if there be no profert of the deed and the defendant takes oyer, he may, notwithstanding, take advantage of a variance by demurrer. Macon *v.* Crump, 1 Call 581. See also, Bennett *v.* Giles, 6 Leigh 316.

Quære: If there be no profert of the deed, and the defendant takes oyer, he can take advantage of a variance by demurrer. Duval *v.* Malone, 14 Gratt. 24.

(2) Declaration and Contract Sued on —Beneficial Interest Not Disclosed.

The party with whom a contract is made may maintain an action at law thereon in his own name, and, if the recovery be for the benefit of another, that fact may be set out in the declaration, or indorsed on the writ or the declaration, but the statement or indorsement is unnecessary, and is no part of the record, and the fact that the contract sued on is set forth in the declaration and does not disclose the beneficial interest of the party for whose benefit the action is brought does not show a variance between the declaration and the contract, and is no ground for a demurrer. Consumers' Ice Co. *v.* Jennings, 100 Va. 719, 42 S. E. 879, citing Clarksons *v.* Doddridge, 14 Gratt. 42; Fadeley *v.* Williams, 96 Va. 397, 31 S. E. 515.

(3) Lease and Declaration.

Where a written lease of a building provided that the lessee should keep the same in repair except as to "unavoidable accidents, and natural wear and tear," it was held, that the law would not imply a contract on the part of the lessor to repair damages caused by unavoidable accidents, and a demurrer would be sustained setting forth these facts in a special count. Kline *v.* McLain, 33 W. Va. 32, 10 S. E. 11.

(4) Agreement Described and Agreement Itself.

W. and N. entered into a written agreement, which concluded with the words, "witness the following signatures and seals," and had but one scroll which was placed opposite the name of W. as a seal. N.'s name was signed immediately under W.'s name. The declaration described the said writing as "signed by the said defendant and said plaintiff, and sealed with the seal of said defendant and the said plaintiff." Held, on oyer of the agreement, and demurrer to the declaration for alleged variance between the agreement described, and the agreement itself, that there was no variance; and that the one scroll must be taken as the adopted scroll of both parties to said agreement. Norvell *v.* Walker, 9 W. Va. 447.

Error in Stating Amount of Note Sued on.—And a count in a declaration on a promissory note, alleging that the maker, by his promissory note, promised to pay the plaintiff $6,000 (meaning and intending thereby $4,000) by reason whereby he became liable to pay $4,000, is bad on general demurrer. Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

d. Variance in Counts of Declaration.

After issue joined in ejectment on the title only, and a verdict for the plaintiff, for the land in one of the counts in the declaration mentioned, it is no ground for arrest of judgment,

that the two counts laid demises of the same land from different persons. See Rev. Va. Code, 1st vol., ch. 76, § 35, p. 112. Quære, would a demurrer to the declaration in this case have been sustained? Throckmorton *v.* Cooper, 3 Munf. 93.

In an action to recover damages for refusal to receive and pay for hides contracted for, a declaration which alleges the sale of 3,000 hides, and tender of 4,000 hides is not bad on demurrer. The discrepancy could not have affected the merits of the cause, as the defendant was under no obligation to receive the additional number. The declaration might have been amended at the bar. American Hide, etc., Co. *v.* Chalkley, 101 Va. 458, 44 S. E. 705.

e. Misnomer.

It is no cause for demurrer, in an action of debt on a negotiable note, that a party defendant is described in the declaration as "H. D. McClintic." If there be any misnomer it should be pleaded in abatement, or the defendant on his own motion and affidavit should have the declaration amended by inserting the proper name. Handley *v.* Ludington, 4 W. Va. 53.

In the prayer of a bill, parties are described as "Whitley & McConkey," and in the charging part the same parties are prayed to be made defendants, except that these parties are described as "McConkey & Co." In the first part of the decree, they are styled "McConkey & Co.," and in the latter part they are called "Whitely & McConkey." It being apparent that they are the same parties, there is no error in overruling a demurrer for that cause. Highland *v.* Highland, 5 W. Va. 63.

Defect Must Be Apparent on Face of Record.—Where in a declaration on a policy of insurance the name of the plaintiff is different from the name of the person to whom the policy sued on appears to have issued, but the variance does not appear on the face of the declaration, such variance can not be reached by a demurrer to the declaration. Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

11. Misnomer.

See ante, "Variance," IV, B, 10.

12. Want of Title.

It is a fundamental rule that where a bill in equity fails to show in the party suing an interest in the subject matter and a proper title to institute a suit concerning it, the bill is demurrable. Carter *v.* Carter, 82 Va. 624; Keyser *v.* Renner, 87 Va. 249, 12 S. E. 406; Switzer *v.* McCulloch, 76 Va. 777. Preston *v.* West, 55 W. Va. 391, 47 S. E. 152. If not apparent it may be taken advantage of by plea or answer. Barr *v.* Clayton, 29 W. Va. 256, 11 S. E. 899.

A bill which makes a person a party in the caption thereof but contains no allegation showing such person's interest or claim to interest in the subject matter in controversy, is demurrable. Preston *v.* West, 55 W. Va. 391, 47 S. E. 152.

13. Omission of Names of Members of Firm—Suit against Partnership.

Where a bill in a chancery makes the individuals composing a firm defendants, the bill ought to set out the full names of the members of the firm, or allege that their names in full are unknown, and could not be ascertained by the plaintiff after diligent inquiry; and, if it fails to do so, the defendant should be excused by the court from answering or demurring to such bill until proper insertions be made in the bill of the names of the individuals constituting the firm, or it be made to appear to the court that their names can not be ascertained. But such defect is not a good ground for a general demurrer. Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. 847.

14. Duplicity.

Duplicity in a pleading relates to the form and not to the substance, and hence can be taken advantage of only by special demurrer. It can not be

taken advantage of by a general demurrer. Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457; Smith *v.* Lloyd, 16 Gratt. 295; Kennaird *v.* Jones, 9 Gratt. 183; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Burkhart *v.* Jennings, 2 W. Va. 257; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Sweeney *v.* Baker, 13 W. Va. 200.

But as special demurrers have been abolished by statute, mere duplicity is no longer a ground of demurrer. Until the revision of the Virginia Code of 1849, which took effect July 1, 1850, duplicity in pleading could be taken advantage of by special demurrers. The Code of 1849 virtually abolished special demurrers, except as to pleas in abatement, so that neither in Virginia nor West Virginia (see W. Va. Code, 1899, ch. 125, § 29; Va. Code, 1887, § 3272), can duplicity, except as to pleas in abatement, be reached by demurrer. Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457; Fairfax *v.* Lewis, 11 Leigh 243; Smith *v.* Lloyd, 16 Gratt. 295; Mantz *v.* Hendley, 2 Hen. & M. 308; Cunningham *v.* Smith, 10 Gratt. 255; Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207; Mutual Fire Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209; Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94; Sweeney *v.* Baker, 13 W. Va. 158; Poling *v.* Maddox, 41 W. Va. 779, 24 S. E. 999; Martin *v.* Monongahela R. Co., 48 W. Va. 542, 37 S. E. 563; Kern *v.* Zeigler, 13 W. Va. 715; Reynolds *v.* Hurst, 18 W. Va. 651; Spiker *v* Bohrer, 37 W. Va. 264, 16 S. E. 575; Cook *v.* Dorsey, 38 W. Va. 200, 18 S. E. 468.

15. Indefiniteness and Uncertainty.

A bill is demurrable on the ground that it lacks certainty and precision. Cleaver *v.* Matthews, 83 Va. 801, 3 S. E. 439; Fisher *v.* Seaboard Air Line R. Co., 102 Va. 363, 46 S. E. 381; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

In the action of trespass to realty, or an action on the case in lieu thereof under the statute, the place where the acts complained of were done is material and traversable, and the allegations thereof must in some way, either by the name of the land or close, by some or all of its abuttals, by naming a particular locality, or in some other way, designate or describe such locus in quo with a reasonable degree of definiteness; otherwise, the declaration will be bad on demurrer. McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

A declaration which simply charges that the plaintiff owned certain property and that the defendant, a railroad company, so "unskillfully, carelessly and negligently ran its trains and locomotives along and upon the trestle of defendant adjacent to plaintiff's premises" that they were injured thereby, but does not point out the acts of negligence or carelessness with such reasonable certainty as to enable the defendant to make defense thereto, is bad on demurrer. Fisher *v.* Seaboard Air Line R. Co., 102 Va. 363, 46 S. E. 381.

Action on Official Bond.—A demurrer to a declaration on an official bond will not lie where the books and papers are destroyed, and other information is in possession of the adverse party, and the breaches are as specific as practicable under the circumstances. Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

16. Pleading Inartificially Drawn.

Where a declaration though inartificially commencing the statement of the cause of action with a quod cum, yet states the essential averments in direct and positive terms, it is not demurrable. Roanoke Nat. Bank *v.* Hambrick, 82 Va. 135.

17. Amended Bill—When Consistent with Original.

An amended bill, which is not repugnant to the original bill, presenting no new case, and is only ancillary to the original bill in presenting the case

made by it more fully and accurately with additional averments, to the end that there may be a decision on the merits, and complete justice done between the parties, is not demurrable as inconsistent with the original bill. Linn *v.* Carson, 32 Gratt. 170.

18. Multifariousness.

See generally, the title MULTIFARIOUSNESS.

In Virginia and West Virginia the objection that pleadings in chancery are multifarious is usually raised by demurrer. Dunn *v.* Dunn, 26 Gratt. 291; Wells *v.* Sewell, etc., Co., 89 Va. 708, 17 S. E. 2; Matthews *v.* Jenkins, 80 Va. 463; Universal Life Ins. Co. *v.* Devore, 83 Va. 267, 2 S. E. 433; Almond *v.* Wilson, 75 Va. 613; Garrison *v.* Hill, 75 Va. 150; Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

And a demurrer in the form prescribed by the statute, assigning no grounds inserted in the answer, is sufficient. Dunn *v.* Dunn, 26 Gratt. 291; Matthews *v.* Jenkins, 80 Va. 463; Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

Though a bill be multifarious, and but vaguely state the matter on which relief is sought, consent by the parties, to an interlocutory decree that the cause be referred to a commissioner, to audit, state and settle an account of the amount due each of the plaintiffs, is a waiver of any objection to such irregularity; and a demurrer thereafter, for such cause, is properly disallowed. Rittenhouse *v.* Harman, 7 W. Va. 360.

19. Laches.

See generally, the title LACHES.

Since the disuse of special replications in equity practice, if a bill in equity shows on its face that the relief it prays for is barred by the lapse of time, advantage may be taken of such bar by demurrer as well as by plea. Jackson *v.* Hull, 21 W. Va. 601; Paxton *v.* Paxton, 38 W. Va. 616, 18 S. E. 765; Whittaker *v.* Southwestern Va. Imp. Co., 34 W. Va. 217, 12 S. E. 507; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

When a bill in equity discloses on its face laches the bill is for that reason demurrable, unless sufficient facts are set forth in it to avoid laches. Newberger *v.* Wells, 51 W. Va. 624, 42 S. E. 625.

Right to Amend to Explain Laches.—A decree sustaining a demurrer to a bill upon the ground of laches, whereby the plaintiff is completely taken by surprise, should be set aside on his motion, when, during the same term of the court, he asks leave to file an amended bill, which fully explains any charge of laches. Cottrell *v.* Watkins, 89 Va. 801, 17 S. E. 328. See also, Wayt *v.* Carwithen, 21 W. Va. 516.

20. Defective Construction—Bill Not Signed.

A paper writing purporting to be a bill in chancery, original or amended, not signed by anyone, is demurrable, and should be stricken from the record unless properly amended by leave of court. Dever *v.* Willis, 42 W. Va. 365, 26 S. E. 176.

21. Departure.

"A learned author lays it down that the only mode of taking advantage of a departure is by demurrer. 4 Minor Inst. 1040. Be that as it may, here there is no departure." Virginia Fire, etc., Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794.

22. Insufficient, Improper or Omitted Allegations.

a. In General.

It is an elementary rule in pleading that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant may be distinctly informed of the specific grounds of the action, and thus be able to answer by a direct and unequivocal plea with evidence to support it. A

case in which the declaration fails to conform in its averments to the essential requirements of this rule, is therefore held fatally defective and insufficient on general demurrer. White *v.* Romans, 29 W. Va. 571, 3 S. E. 14; McKenzie *v.* Ohio River R. Co., 27 W. Va. 306; Shaffer *v.* Fetty, 30 W. Va. 248, 4 S. E. 278; Boggs *v.* Slack, 53 W. Va. 536, 44 S. E. 777.

Omission of "This He Is Ready to Verify" or Equivalents.—No demurrer shall be sustained because of the omission in any pleading of the words, "this he is ready to verify," or "this he is ready to verify by the record," or "as appears by the record;" but the opposite party may be excused from replying, demurring, or otherwise answering to any pleading which ought to have, but has not, such words therein, until they are inserted. Here § 31, ch. 171, (§ 29, ch. 125) Code, 1849, ended, it evidently had reference to common-law demurrers only. "This § 31, p. (29), was so framed as to prevent a demurrer being sustained to any pleading, for such matters of form as theretofore were required to be specially alleged as causes of demurrer, and which, if so alleged, were available; its effect was to abolish special demurrers." 2 Rev. Code, 1849, p. 650, Note. Hayes *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223. See also, Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94.

b. In Declaration, Bill or Petition.

Malicious Arrest or Prosecution—Malicious Conduct.—See generally, the titles FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

A declaration for malicious arrest or prosecution must set forth the alleged malicious conduct of the defendant on which it is predicated, otherwise it is demurrable. Tavenner *v.* Morehead, 41 W. Va. 116, 23 S. E. 673.

Malicious Prosecution — Elements Substantially Charged.—In an action for malicious prosecution, the fourth count of the declaration substantially alleged that maliciously, and without any probable cause, the defendant had plaintiff arrested on a warrant procured by defendant from a United States commissioner, by whom, upon consideration of all the evidence, he, the plaintiff, was acquitted and discharged, and that the prosecution was wholly ended and determined. To this count defendant demurred, but the demurrer was overruled. Jones *v.* Finch, 84 Va. 204, 4 S. E. 342.

Refusal to Perform Contract.—See generally, the title CONTRACTS, vol. 3, pp. 307, 451.

"Another ground of demurrer is that the action was brought for an anticipatory breach or renunciation of the contract, and that the declaration does not aver, as is required in such cases, a distinct, unequivocal, and absolute refusal to perform the contract on the part of the defendant." Per Buchanan, J., in Lee *v.* Mutual, etc., Life Ass'n, 97 Va. 162, 33 S. E. 556.

Declaration Charging Greater Duty than Law Imposes.—Where the declaration alleges that it was the duty of defendants to have kept the brakes, etc., "in sufficient repair;" it is not demurrable as charging a higher duty than the law imposes. Goodman *v.* Richmond, etc., R. Co., 81 Va. 580; Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 14 S. E. 372.

Action on Bond to Stay Proceedings—Omitted Averments.—In declaring on a bond executed to stay proceedings, the declaration may allege as a fact that the supreme court of appeals had awarded a writ of error and supersedeas to said judgment, to take effect when the defendant below, or some one for him, executed before the clerk of the circuit court, with good security, a bond in the penalty of $1,500, with the condition as required by law. And this bond was accordingly executed to give effect to such writ of error and supersedeas, and such fact might be proven by other

evidence than the bond itself. But a declaration on such bond can not be demurred to because it fails to allege these facts, if it set forth correctly the bond and its condition, and properly alleges the breach of the condition; for the bond itself, on its face, contains evidence from which the legal inference is that a writ of error and supersedeas had been awarded to such judgment. State *v.* Dotts, 31 W. Va. 819, 8 S. E. 392.

An Action on Official Bond—Failure to Aver Order of Court to Make Payment to Successor.—See generally, the title OFFICIAL BONDS.

A declaration in an action upon a sheriff's official bond, for the use of the county court of his county, for failing to pay over moneys received by him in his official capacity for the use of such county, which fails to aver that, before such action was commenced, the county court had, by its order entered of record, or by a draft made in pursuance thereof, ordered him to pay such moneys to his successor in office, or to some other person, and that said sheriff had notice thereof, is, upon general demurrer, fatally defective. State *v.* Hays, 30 W. Va. 107, 3 S. E. 177.

Action on Bond to Several Obligees—Failure to Aver Nonpayment to All.—See generally, the title BONDS, vol. 2, pp. 507, 553.

In an action on a bond to more than one obligee the nonpayment of the debt to all the obligees must be averred in substance in the declaration; or the objection will be fatal on general demurrer. Strange *v.* Floyd, 9 Gratt. 474.

Action for Escape of Slave—Omission of Name of Justice Issuing Warrant.—See generally, the title SLAVES.

In an action on the case, by the owner of a slave committed to jail for safekeeping under the fourth section of the act passed February 25, 1824, Supp. to Rev. Code, ch. 179, against the sheriff for suffering the slave to escape, the declaration omits to state the name of the justice who issued the warrant of commitment. Held, the objection is not available on general demurrer. Burley *v.* Griffith, 8 Leigh 442.

Action by Foreign Corporation—Failure to Aver Compliance with State Laws.—It is not necessary for a foreign corporation, in order to sustain an action in this state, to set forth in its complaint a compliance with the laws of the state which entitles it to do business in the state. This defense, if available, is a matter to be pleaded and proved by the defendant. It does not arise on demurrer. Nickels *v.* People's Bldg., etc., Ass'n, 93 Va. 380, 25 S. E. 8.

Debt on Bond of Accountant—Failure to Allege Time, Place, Names or Sums of Money Misappropriated.—In Allison *v.* Farmers' Bank, 6 Rand. 204, the demurrer to a declaration in debt upon the bond of an accountant was overruled, although the declaration did not state in a single instance the time or place, names or sums, of the money which had been misappropriated. In cases of this character, where the evidence must of necessity be general, and an attempt to state the breaches of the condition with exactness of detail will lead to great prolixity of pleading, some generality of statement, in the interest of justice, must be permitted. See also, 3 Rob. Pr. 593; 4 Minor's Inst. 584, 988; Elam *v.* Commercial Bank, 86 Va. 94, 9 S. E. 498.

Slander—Failure to Aver Action under Statute.—See generally, the title LIBEL AND SLANDER.

Where a declaration in slander does not show by the proper averments, that the action is under the statute, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such charge as constitutes defamation at the common law. Hogan *v.* Wilmoth, 16 Gratt. 80.

Libel — Allegations in Connection with Innuendo.—The inducements in a declaration in a libel suit was, that the plaintiff had been the general superintendent of a certain corporation. The libelous writing was alleged to be as follows: "The plaintiff was, through his own and his brothers' influence, placed and retained in the general management of said corporation during the years of 1871, 1872 and 1873 for their own private and individual gain, and not the corporation's; that especially during the year 1873 the plaintiff in the libel suit did use, and employ, the goods, money, means and credit of the said corporation for his own use, and his brothers' private use, business and benefit; that he took the goods and money of the said corporation to pay his own employees; that he borrowed money, and used it in his own business, and gave said corporation's notes therefor; that he and his wife purchased goods, wares and merchandise of divers persons and at various times during the years 1871 and 1872, and especially during the year 1873, for their own and friends' use, and had them charged to the corporation." The allegations being set forth in the declaration, the innuendo was: "Thereby meaning that the plaintiff had embezzled the goods and money of said corporation." The allegations without any innuendo would be libelous in themselves; and the innuendo improperly extended the meaning of these words. And if the publication of these words had been all that was complained of in the declaration, the general demurrer to the declaration ought to have been sustained. Johnson *v.* Brown, 13 W. Va. 71.

But if such a declaration alleged the publication of a writing in these words: "The said plaintiff in the slander suit, and others, have been, and are, conspiring to defraud the other stockholders in said corporation, to divert the means, money and credit of the corporation to their own individual use and ends, and against the interest and welfare of the other stockholders in the said corporation;" and the innuendo is, "thereby meaning, that the plaintiff, while acting as the general superintendent and agent of said corporation, defrauded the said corporation, and conspired with other persons to defraud and cheat said corporation," this language without any innuendo was libelous; and the innuendo did not extend the meaning of the words. And as this allegation is in its nature distinct and divisible from the others, the defendant could not properly demur to the whole declaration, and such a demurrer ought to be overruled. Johnson *v.* Brown, 13 W. Va. 71.

Action of Debt—Nonpayment Not Averred.—A general demurrer will lie to a count in a declaration, in an action of debt which fails to aver nonpayment of the debt. Simmons *v.* Trumbo, 9 W. Va. 358.

And in Vandiver *v.* Hyre, 5 W. Va. 414, it was held that the demurrer, which was entered after the bond had been introduced in evidence and oyer had been prayed and allowed, should have been sustained, because it failed to allege the nonpayment of the debt by the co-obligors, against whom suit had been brought. In the subsequent case of Reynolds *v.* Hurst, 18 W. Va. 648, this case was directly overruled, the court saying: "I am of the opinion to overrule the case of Vandiver *v.* Hyre, 5 W. Va. 414, and to hold, that if there had been an averment of the nonpayment of the penalty of the bond on the defendant, in this case it would have been sufficient without averring nonpayment by the other parties, who signed this bond."

Omission of Sum for Which Note Was Given.—In an action upon a protested negotiable note against the makers and endorsers, the accidental omission of the sum for which the note was given, in the description of it in the declaration, where it appears from other parts of the declaration, is not

ground of demurrer. Archer *v.* Ward, 9 Gratt. 622.

Wrongful Demand of Interest.—In debt on a decree for money which does not give running interest thereon, if the declaration demands interest from the date of the decree, as part of the debt, the declaration will be held bad on general demurrer, for demanding interest as part of the debt. Shelton *v.* Welsh, 7 Leigh 175.

Covenant—Eviction.—See generally, the title COVENANT, ACTION OF, vol. 3, pp. 731, 735.

A declaration not averring that the plaintiff was evicted, or kept out of possession by one in possession under paramount title, is bad on demurrer. Marbury *v.* Thornton, 82 Va. 702, 1 S. E. 909.

And a demurrer lies to an action of covenant on a trust deed executed merely as collateral security for the payment of a promissory note. Wolf *v.* Violett, 78 Va. 57.

Trespass on the Case—Allegation That Accident Occurred "at, Near or upon the Crossing."—See generally, the title TRESPASS.

It is proper to overrule a demurrer to a declaration grounded on the statement that the place of the accident was "at, near, or upon the crossing." Tyler *v.* Kelley, 89 Va. 282, 15 S. E. 509.

Trespass—Sufficiency of Allegations.—A declaration in an action of trespass, for assault and battery, and false imprisonment, which alleges the cause of complaint sufficiently to make known to the defendant what he is to answer to, so that judgment, according to law and the very right of the case, could be given, is sufficient, in substance, and a demurrer thereto should be overruled. Carskadon *v.* Williams, 7 W. Va. 1.

Assumpsit on Policy of Insurance—Allegation of Interest in Property.—See generally, the title ASSUMPSIT, vol. 2, pp. 1, 45.

In an action of assumpsit on a policy of insurance, it is necessary for the plaintiff to allege an interest in the property insured, which is insufficiently done by the allegation that the defendant insured the plaintiff's property. Such a declaration having alleged that the loss was to be paid in sixty days after proof and notice given the defendant, in the manner required by the policy, it is necessary for the declaration to allege this manner, and that such proof and notice were accordingly given. And a failure to make these allegations, or the allegation of interest, is fatal to the declaration on general demurrer. Quarrier *v.* Peabody Ins. Company, 10 W. Va. 507.

Bill by Administrator to Enforce Contract for Sale of Decedent's Land—Failure to Allege Authority.—A bill filed by administrators for the purpose of enforcing a contract made by them for the sale of their decedent's land which fails to allege their authority to sell the land, and to which the heirs of the owner are not made parties, is bad on demurrer. But if the purchaser makes no objection to these defects, and answers, setting up a defense on the merits, he can not make the objection for the first time in the supreme court, especially when it appears from a deed filed as an escrow with the bill that the heirs authorized the sale, were parties to the contract of sale, and have made a deed to the purchaser with covenants of general warranty to be delivered to him when all the purchase money is paid. Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512.

Bill to Subject Separate Estate—Failure to Aver Possession of Separate Estate.—See generally, the title SEPARATE ESTATE OF MARRIED WOMEN.

Where a bill against husband and wife to subject her separate estate to judgments against them, fails to charge that, at the time she signed the notes whereon the judgments were had, she had separate property, and that she signed them with intent, expressed or

implied, to charge it, held, a demurrer lies. McDonald *v.* Hurst, 86 Va. 885, 11 S. E. 536.

Bill to Set Aside Tax Deed—Insufficiency of Statutory Grounds.—A bill in chancery, filed for the purpose of setting aside a tax deed for mere irregularities, which fails to allege sufficient statutory grounds therefor, is demurrable. Gerke Brewing Co. *v.* St. Clair, 46 W. Va. 93, 33 S. E. 122.

Bill against Nonresident Defendant—Failure to Aver That Attachment Issued.—A demurrer to a bill against an absent defendant will not lie for the failure to aver that an attachment had issued; because the statute in terms provides that this process may issue after the institution of the suit. O'Brien *v.* Stephens, 11 Gratt. 610.

c. Plea.

Fraudulent Misrepresentation — No Averment of Injury.—Where a plea avers no injury to a defendant from the fraudulent misrepresentation as to the lot referred to in it, a demurrer lies to the plea. Lake *v.* Tyree, 90 Va. 719, 19 S. E. 787.

d. In Indictment.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Attempt to Administer Poison—Insufficiency of Charge.—An indictment for an attempt to administer poison under Va. Code, 1887, § 3699, that does not allege such acts as, in a legal sense, constitute an attempt to commit the offense charged, but only such as show preparation, is demurrable. Hicks *v.* Com., 86 Va. 223, 9 S. E. 1024.

Ownership.—It is proper to overrule a demurrer to an indictment charging that "the prisoner, on, etc., a certain mill house not adjoining to or occupied with the dwelling-house of F," etc., as it sufficiently alleges the ownership of the mill house to be in F, and is sufficient in law. Webster *v.* Com., 80 Va. 598. See also, Gedney *v.* Com., 14 Gratt. 318; Hausenfluck *v.* Com., 85 Va. 702, 8 S. E. 683.

Time.—As a general rule, time of commission of offense, as laid in an indictment, is not material, and does not confine the proof to the time laid; but where the time laid is provable by record, and in an indictment for perjury, the time must be truly and precisely laid, and failure so to state it renders the indictment demurrable. Va. Code, 1873, ch. 201, § 5; Rhodes *v.* Com., 78 Va. 692.

So an indictment found on the eighth day of April, 1884, for adultery and fornication, which charged the defendant with committing the offense on the tenth day of March, 1883, upon general demurrer thereto is fatally defective. State *v.* Ball, 30 W. Va. 382, 4 S. E. 645.

Felonious Taking — Omission of "Without Consent of Owner."—An indictment under the statute, 1 Rev. Va. Code, ch. 111, § 30, for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of his property, was held fatally defective, after verdict, for want of an averment, that the slave was so taken and removed without the consent of the owner. Com. *v.* Peas, 2 Gratt. 629.

Perjury—Averments of Materiality of Evidence Omitted.—An indictment for perjury must show that the evidence which the defendant gave was material. And therefore if the evidence which the defendant gave before the grand jury is not shown clearly on the face of the indictment to relate to an offense committed within the county, the indictment is defective. Com. *v.* Pickering, 8 Gratt. 628.

V. Right to Demur.

Parties.—A demurrer at common law may be taken by either party, and to any part of the pleadings, until issue

joined. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

Strangers to Proceedings.—One not a party to a bill can make no defense to it by demurrer. Gall *v.* Gall, 50 W. Va. 523, 40 S. E. 380, citing Moseley *v.* Cocke, 7 Leigh 225; Shinn *v.* Board of Education, 39 W. Va. 497, 20 S. E. 604.

Party against Whom Specific Performance Is Sought.—If a party holding a quasi trusteeship, by reason of holding an instrument as an escrow, does not demur for being made a party to a bill for specific performance of the instrument, it is not for the party against whom the specific performance is sought to demur. Davis *v.* Henry, 4 W. Va. 571.

Arbitrators—In Suit to Set Aside Award.—If the arbitrators be made parties to a suit for setting aside their award, they may demur to the bill. Shermer *v.* Beale, 1 Wash. 11.

Personal Representative—Injunction to Stay Judgment Obtained after Decease of Plaintiff.—An injunction ought not to be granted on the ground that the plaintiff at law was dead before the judgment was obtained in his name. But this error should be rectified by a writ of error coram nobis. If an injunction be granted in such case, the legal representative of the decedent may demur to the bill, and the demurrer ought to be sustained. Williamson *v.* Appleberry, 1 Hen. & M. 206.

Executor or Residuary Legatee.—In a chancery suit by a widow against the executor of the husband and the residuary legatees of the latter, to surcharge and falsify certain settlements of the executorial accounts, it was held, that in such suit the executor or residuary legatee could not demur to the bill, because a specific legatee was improperly made a codefendant. Seabright *v.* Seabright, 28 W. Va. 414.

VI. Filing.

A. TIME OF FILING.

The general rule is that after the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance. Stephens' Pleading, p. 137; 4 Min. Inst. (3d Ed.) 1101.

This being the requirement the question is raised at what time must a demurrer be filed to comply therewith. In Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94, it is held that a general demurrer is a plea, and may be filed within the same time that any other plea may be received where no other plea has been entered. See also, Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

After Issue Joined on Plea.—But after issue joined on the plea, it is too late to file a special demurrer. Roane *v.* Drummond, 6 Rand. 182. See also, Jarrett *v.* Nickell, 4 W. Va. 276.

After Court of Appeals Has Passed upon Case.—And after the court of appeals has passed upon a case, and remanded the cause for a new trial upon the general issue, a demurrer to the declaration, or a plea in abatement upon the ground that the Christian names of the respective parties are not mentioned therein, ought not to be received. Lanier *v.* Cocke, 6 Munf. 580.

After Withdrawal of Answer.—Where there has been no unreasonable delay in making the motion, the court may, at its discretion, allow an answer to be withdrawn and a demurrer filed to the bill. Weisiger *v.* Richmond, etc., Co., 90 Va. 795, 20 S. E. 361.

B. FILING AT SAME TIME WITH OTHER PLEADINGS OR MOTIONS.

1. Plea and Demurrer.

The common law did not allow a party to demur and plead to the same matter. But this rule has been changed by statute so as to allow a defendant to plead as many several matters, whether of law or fact, as he shall think necessary. Va. Code, 1887, § 3264; W. Va. Code, 1899, ch. 125, § 21; Nabenbousch *v.* Sharer, 2 W. Va.

285; Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 470; Dunn *v.* Dunn, 26 Gratt. 291; Bassett *v.* Cunningham, 7 Leigh 403; Reynolds *v.* Bank, 6 Gratt. 184; O'Bannon *v.* Saunders, 24 Gratt. 138.

Leave of Court—Necessity.—No previous leave of court is required, and, therefore, the defendant is at liberty to present pleas repugnant one to the other; or he may also plead and demur at the same time to the same declaration. Waller *v.* Ellis, 2 Munf. 97; Bassett *v.* Cunningham, 7 Leigh 407; Maggort *v.* Hansbarger, 8 Leigh 532.

2. Answer and Demurrer.

A defendant in chancery in Virginia, may at the same time, answer and demur to the same matter in the bill. Bassett *v.* Cunningham, 7 Leigh 402; Rosset *v.* Greer, 3 W. Va. 1.

3. Demurrer with Replication or Subsequent Pleadings.

But as to the subsequent stages of the pleading beyond the pleas of the defendant, there has been no change made in the common law by the statute. The privilege is extended to the defendant only, and may be taken advantage of only at the one stage of the pleading. Stone *v.* Patterson, 6 Call 71; Syme *v.* Griffin, 4 Hen. & M. 277; James River, etc., Co. *v.* Robinson, 16 Gratt. 434.

The plaintiff can make but one answer, either of law or fact at any stage, of each plea. Lang *v.* Lewis, 1 Rand. 277.

In Eppes *v.* Smith, 4 Munf. 466, it was improperly held, that the plaintiff could file a demurrer and general replication to the same plea.

And in Jones *v.* Stevenson, 5 Munf. 1, it was left a query; but in a subsequent case the query is answered in the negative, and the case of Eppes *v.* Smith, 4 Munf. 466, overruled. See Lang *v.* Lewis, 1 Rand. 277; Chesapeake, etc., R. Co. *v.* American Exchange Bank, 92 Va. 495, 23 S. E. 935.

Under the Act of 1792—In Replevin.—Under the act of 1792 (Rev. Va. Code, vol. 1, ch. 66, § 40), the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law, or fact, as he shall think necessary for his defense, notwithstanding such several matters be inconsistent with each other. Waller *v.* Ellis, 2 Munf. 97.

4. Effect of Filing Demurrer and Other Pleading after First Stage of Pleading.

If the plaintiff both demur and plead to the same plea, or the defendant do likewise after the first stage of the pleading, the question arises as to the mode in which this objection can be taken advantage of. It is held, in Cunningham *v.* Smith, 10 Gratt. 255, that duplicity can not be taken advantage of by general demurrer; and by Virginia Code, 1887, § 3272, special demurrers have been abolished except as to pleas in abatement. There is authority in both Virginia and West Virginia for the view that duplicity can only be taken advantage of by special demurrer. Grayson *v.* Buchanan, 88 Va. 251, 13 S. E. 457, is authority for the proposition that duplicity can only be taken advantage of at common law by a special demurrer, and, this is not available now in Virginia, except as to pleas in abatement. And it is intimated in Sweeney *v.* Baker, 13 W. Va. 158, and in Coyle *v.* Baltimore, etc., R. Co., 11 W. Va. 94, that the objection of duplicity can only be brought to the notice of the court by special demurrer. However, in Little Kanawha, etc., R. Co. *v.* Rice, 9 W. Va. 636, a special plea was rejected because it was double; and in Harris *v.* Harris, 23 Gratt. 737, it was held, that the ruling of the lower court rejecting a plea presenting several distinct issues of fact should be sustained. See also, O'Bannon *v.* Saunders, 24 Gratt. 138; Va. Fire, etc., Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794. Though the cases until recently have been unsettled in regard to the course to be pursued in order to take advan-

tage of duplicity, it is now resolved, at least in Virginia, by the recent case of Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320. It is held, in this case, that as special demurrers have been abolished, a motion to strike out or reject can be used to obviate faults in pleading, such as duplicity and the like, which can not now be raised by demurrer. See also, Reed *v.* Hanna, 3 Rand. 56.

VII. Form and Requisites.

A. FORM IN GENERAL.

The form of a demurrer may be: "The defendant (or plaintiff) says, that the declaration (or plea, etc.), is not sufficient in law." Va. Code (1887), § 3971; W. Va. Code, 1899, ch. 125, § 28; Reid *v.* Field, 83 Va. 26, 1 S. E. 395. This form is sufficient and the demurrer need not specify the causes. Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468.

A demurrer to a bill in equity, in the form prescribed in the statute, is sufficient. Jones *v.* Clark, 25 Gratt. 642.

Inserted in the Answer—Sufficiency.—A demurrer in the form prescribed by statute, and assigning no grounds, inserted in the answer is sufficient. Dunn *v.* Dunn, 26 Gratt. 291; Matthews *v.* Jenkins, 80 Va. 463.

But a statement in the answer of a defendant that he reserves "unto himself all just exceptions to the many deficiencies by a demurrer to a bill" is not a demurrer to the bill. Matney *v.* Ratliff, 96 Va. 231, 31 S. E. 512.

Sufficiency of Recital of Record of Appearance and Demurrer.—It is sufficient that the record recites that the defendants appeared and demurred to the plaintiff's bill, the language being equivalent to its being said, that "the bill is not sufficient in law. Stewart *v.* Jackson, 8 W. Va. 29.

B. NECESSITY OF WRITING.

In Civil Cases.—A demurrer must in all civil cases be in writing. Va. Code, (1887), § 3271.

In Criminal Cases.—As provided by statute demurrers in criminal cases may be ore tenus. Va. Code (1887), § 3271.

C. SPECIFICATION OF GROUNDS.

It seems that demurrers to bills in equity were always subject to certain rules of pleading and practice, which always required them to express the several causes of demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

A general demurrer to a bill by a defendant who has not been required to state the grounds of his demurrer may be sustained by the court upon any valid ground, although such ground had not been suggested by the defendant, and others had been. Granite Bldg. Co. *v.* Saville, 101 Va. 217, 43 S. E. 351.

"The point is made in the petition for appeal that the court dismissed the bill upon a ground not raised by the demurrer. The defendant was not required to assign grounds of demurrer. It is true that the defendant voluntarily suggested several grounds upon which it thought the demurrer should be sustained, but the demurrer was general, and went to the foundation of the whole bill. It was, therefore, competent for the court to sustain the demurrer upon any valid ground, although such ground had not been suggested by the defendant." Granite Bldg. Co. *v.* Saville, 101 Va. 219, 43 S. E. 351.

A pleading, when presented, is presumed to be sufficient, and it is the duty of a demurrant, if he thinks it insufficient, and desires to take advantage of it, at least to call the attention of the court to the defects or imperfections in such pleading; and, unless he does so, the court is authorized, under the statute, to make such failure to appear upon the record, and when it is made to so appear the action of the court in overruling the demurrer is conclusive as to him. Koontz *v.* Koontz, 47 W. Va. 31, 34 S. E. 752.

The West Virginia Code, 1899, ch. 425, § 29, does not require causes of demurrer to be specified in a written demurrer; but, if none are assigned, it gives the court the right to ask an assignment of causes ore tenus or written, or, on overruling the demurrer, to state that none were assigned. Cook *v.* Dorsey, 38 W. Va. 196, 18 S. E. 468. See Poll. Suppl. Va. Code (1900), § 3271.

Thus when a demurrer to a declaration is overruled, and the order overruling it shows the fact that nothing was alleged by the demurrant in support of his demurrer, and final judgment is obtained by the plaintiff in the case, the judgment will not be reversed by reason of any defect in the declaration. Koontz *v.* Koontz, 47 W. Va. 31, 34 S. E. 752.

VIII. Answer or Plea as Overruling.

See ante, "Filing at Same Time with Other Pleadings or Motions," VI, B.

IX. Hearing of Demurrer.

A. TIME FOR ARGUMENT AND HEARING.

Setting Time for Argument.—"Section 30, ch. 125, relied upon by plaintiff, reads as follows: 'A plaintiff in equity may have any plea or demurrer set down to be argued. If the same be overruled, no other plea or demurrer shall afterwards be received, but there shall be a rule upon the defendant to answer the bill; and, if he fails to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein.' The Code of 1849 (1860) stopped with the clause, 'there shall be a rule upon the defendant to answer the bill;' but the Code of 1868, which took effect 1st April, 1869, added for the first time the clause as we now have it: 'And if he fail to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein.'" Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

A plaintiff in equity may have any plea or demurrer set down to be argued. W. Va. Code, 1899, ch. 125, § 30; Va. Code, 1887, § 3272; Billingsley *v.* Manear, 47 W. Va. 785, 35 S. E. 847; Capehart *v.* Hale, 6 W. Va. 547; Dorsey *v.* Shepherd, 9 W. Va. 57; Nichols *v.* Nichols, 8 W. Va. 174; Sutton *v.* Gatewood, 6 Munf. 398; Northwestern Bank *v.* Nelson, 1 Gratt. 108.

Consent of Parties to Hearing.—The Virginia Code of 1887, § 3262, provides that any cause ready for hearing may, with consent of parties, be heard. Under the provisions of this section the court can not, at a special term, without such consent, hear a demurrer to a bill. Fowler *v.* Mosher, 85 Va. 421, 7 S. E. 542.

B. ORDER IN WHICH HEARD.

Whenever there is an issue in fact, and also a demurrer, the demurrer ought regularly first to be decided. Jones *v.* Stevenson, 5 Munf. 1. But an irregularity in this respect is not sufficient to reverse a judgment to which there is no objection. Jones *v.* Stevenson, 5 Munf. 1.

Though where there is an issue in fact and also a demurrer, it is irregular to try the issue of fact before judgment on the demurrer, yet, if it appear that the demurrer ought to have been overruled, and so no inconvenience has ensued from that irregularity, it is not sufficient cause to reverse the judgment. Creel *v.* Brown, 1 Rob. 266, citing principal case, and Green *v.* Dulany, 2 Munf. 518. But in this case (Creel *v.* Brown), there was a demurrer to the declaration, and an issue in fact; and a verdict was found for the plaintiff, without any judgment on the demurrer, otherwise than by implication from the facts that final judgment was given for the plaintiff after the verdict. The court of appeals held,

that the demurrer ought to have been sustained, and therefore that the judgment must be reversed, the verdict set aside and the cause remanded to the lower court, in order that it might proceed to judgment on the demurrer, unless the plaintiff should on leave obtained from the court amend his declaration. Jones *v.* Stevenson, 5 Munf. 1.

Where a defendant has both demurred to and answered a bill the correct practice is to dispose of the demurrer before entering any decree on the main issues in the case, and where such decrees are entered, without noticing the demurrer, it will, in the absence of evidence to the contrary, be regarded as having been overruled. But even where it appears that the decision on the demurrer was expressly reserved for future consideration, a decree of reference will be reversed where this court can see that the bill stated a good case, and that the demurrer should have been overruled. Deckert *v.* Chesapeake, etc., R. Co., 101 Va. 804, 45 S. E. 799.

C. QUESTIONS RAISED AND DETERMINABLE.

Character of Defects.—On a general demurrer no defect in a plea that is not matter of substance will be regarded. Hord *v.* Dishman, 2 Hen. & M. 595.

Whether Certain Work Constitutes a Nuisance.—Whether or not the work in which city officials are engaged when a nuisance, complained of, is created, is within the powers of the city, may be raised by demurrer to the declaration, as judicial notice will be taken of its character. Duncan *v.* Lynchburg, 2 Va. Dec. 700.

D. REFUSAL TO CONSIDER DEMURRER.

When Filed to Affidavit.—"Section 41 of ch. 125 of the Code as amended by ch. 76 of the acts of 1875 provides, that where plaintiffs or defendants sue or are sued as partners, and the names of the partners are set out in the declaration, it is not necessary to prove the partnership, unless with the pleading, which puts the matter in issue, there be an affidavit denying such partnership. Here the defendants pleaded nonassumpsit and filed affidavits denying the partnership. It is unheard of pleading to demur to an affidavit. The demurrer was therefore immaterial pleading, and no error was committed in trying the case without noticing the demurrer." Rutter *v.* Sullivan, 25 W. Va. 429.

In Appellate.—Where the grounds of demurrer in an action at law have been stated in writing, in accordance with the statute, but they are not copied into the record, the appellate court will treat the case as if there had been no demurrer. Lane *v.* Bauserman, 103 Va. 146, 48 S. E. 857.

E. AMENDMENT AT HEARING TO CURE DEFECTS.

"On hearing the demurrer, the court will, when it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires it, makes a special order, at the hearing of the demurrer, adapted to the circumstances of the case." Tidball *v.* Bank, 98 Va. 774, 37 S. E. 318.

X. Judgment on Demurrer.

A. RENDERED AGAINST PARTY COMMITTING FIRST FAULT IN PLEADING.

On demurrer, judgment is always given against the party that commits the first fault in pleading. Doolittle *v.* County Court, 28 Va. 158; Fisher *v.* Charleston, 17 W. Va. 614; Day *v.* Pickett, 4 Munf. 104; Baird *v.* Mattox, 1 Call 261; Kirtley *v.* Deck, 3 Hen. & M. 388; Callis *v.* Waddy, 2 Munf. 511. See also, ante, "As Searching the Record," III, D.

In Mandamus.—The rule that a demurrer reaches back to the first fault in the pleadings of every party, is as

applicable to pleadings in mandamus cases, as it is in ordinary suits at law. Doolittle *v.* County Court, 28 W. Va. 158; Fisher *v.* Charleston, 17 W. Va. 614.

B. JUDGMENT SUSTAINING.

1. In General.

To justify the court in sustaining a demurrer to a bill, the ground of the demurrer must be a short dry point of law, upon which it is clear, that the bill should be dismissed with costs at the hearing. Tavenner *v.* Barrett, 21 W. Va. 657.

2. Dismissal of Bill.

See generally, the titles DISMISSAL, DISCONTINUANCE AND NONSUIT; FORMER ADJUDICATION OR RES ADJUDICATA.

In General.—Ordinarily it is considered premature upon a general demurrer wholly to dismiss the bill, unless the complainant's case is, upon his own showing, radically such that no discovery or proof properly called for by, or founded upon the allegations in the bill, can possibly make out a proper subject of equitable jurisdiction. Pryor *v.* Adams, 1 Call 382; Bullock *v.* Goodall, 3 Call 44; Goodall *v.* Bullock, Wythe 328; Meade *v.* Grigsby, 26 Gratt. 615; Lockhead *v.* Berkeley Springs, etc., Co., 40 W. Va. 553, 21 S. E. 1031.

Although said married woman be sued jointly with her husband on such note, and a demurrer is sustained as to the husband, and the bill is dismissed as to him, the cause may proceed to final decree against the separate estate of the wife. Skidmore *v.* Jett, 39 W. Va. 544, 20 S. E. 573.

The rule formerly was that, after a demurrer to the whole bill had been argued and allowed, the bill was out of court, and therefore could not be regularly amended; but he may now amend (See § 12, ch. 125), and this is permitted literally, as far as promotive of the ends of substantial justice; and, upon overruling the demurrer, leave is always given to the defendant to file his answer. Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398.

Operation of Decree as Construed by Appellate Court.—Although the language of a decree states that a demurrer to a bill is sustained, and nothing is said about amendment, the supreme court will not hold such language to operate a dismissal of the bill, where it appears that it was not so intended by the trial court, which refused to dismiss the bill, and, in accordance with defendant's request, directed it to be consolidated with a prior suit brought by another person against the same defendant to accomplish the same result. Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554.

Dismissal as Barring Another Suit.—Defendant files an answer to a bill of recovery, in which, without responding to the allegations and interrogatories of the bill, he states that the same plaintiffs had heretofore filed a bill against him for the same subject matter, and that upon a demurrer thereto the same had been dismissed by a decree of the court, which decree remained in full force and unreserved; and he sets up that decree in bar to the last suit. Quære, if a bill dismissed upon demurrer is a bar to another suit upon the same subject matter. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

Dismissal without Prejudice.—Dismission of suit on its merits at the hearing, whether on plea in bar or demurrer for want of equity or cause of action, is a bar to another suit for the same subject matter between the same parties, unless the dismission be "without prejudice," etc. Durant *v.* Essex Co., 7 Wall. 107; Payne *v.* Grant, 81 Va. 164.

3. As Adjudicating Rights.

a. Of Plaintiff.

Where a plea is clearly insufficient and demurrable, instead of overruling the plaintiff's demurrer to the plea and giving judgment for the defendant, the

court should sustain the demurrer and give judgment for the plaintiff for the debt in the declaration mentioned, unless the defendant withdraws his plea and asks to plead a sufficient plea in lieu thereof, which, if asked, should be granted. Reid *v.* Field, 83 Va. 33, 1 S E. 395.

In Skipwith *v.* Morton, 2 Call 277, it was held, that if to a suit upon a bill of exchange dated 1775, the defendant pleads tender of the interest in paper money and without confessing the action as to the principal or saying anything in bar of it, such plea is bad, yet the defendant may give such tender in evidence to extinguish the interest on the plea of payment, but if he withdraws the plea of payment he relinquishes the evidence, and therefore if there be a demurrer to the plea of tender final judgment will be rendered for the plaintiff.

b. Of Defendant.

In such an action of assumpsit defendant pleads nonassumpsit, and a special plea of the former judgment, vouching the record, to which special plea plaintiff demurs. The court sustains the demurrer, and the plaintiff not replying further to the special plea, the court may render judgment for the defendant without trying the issue upon the plea of nonassumpsit. Huff *v.* Broyles, 26 Gratt. 283.

4. Pleading or Replying after Judgment.

Plea.—If there be one or more pleas, and the demurrer thereto be sustained, the party may plead further if he has any other defense, but, if not, judgment may be rendered, if it is such a case as that judgment by default or without a jury might have been rendered on it; otherwise, a writ of inquiry, or its equivalent, must be executed. Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996.

Where there is but one plea, and the demurrer to that plea be sustained, the defendant if he has any other defense, may plead further. Clarke *v.* Day, 2 Leigh 172; Chesapeake, etc., R. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

Replication.—In debt on a bond in a penalty, with condition for the payment of a less sum, by installments, upon certain prescribed conditions, the plaintiff in his declaration claimed the penalty, and made no mention of the condition. The defendant pleaded payment. The plaintiff replied, setting forth the condition of the bond, and averring nonpayment of the sum mentioned in the condition at the time therein specified. Held, on general demurrer, that the replication was bad, and the cause was remanded with leave to the plaintiff to file a new replication. Mitchell *v.* Thompson, 2 Pat. & H. 424.

5. Effect of Error in Sustaining.

When Cause Heard on Merits.—Where a cause is heard on its merits, without objection, and a demurrer to the bill has been entered, and all material allegations of the bill are denied in the answer and are not sustained by the proof, and the injunction is dissolved and the bill dismissed, there is no error of which the plaintiff can complain, although it may appear in the order dissolving the injunction and dismissing the bill, that the demurrer was sustained, even if the latter was improperly done. Tilden *v.* Maslin, 5 W. Va. 377.

In Appellate Court.—Where the trial court has, upon the prayer of a defendant, treated his answer (to which no replication has been filed) as a cross bill, and, subsequently, has erroneously sustained a demurrer to such cross bill, and treated the paper so filed as eliminated from the record for all purposes, the supreme court, upon an appeal, although reversing the ruling on the demurrer, will not give the defendant the relief to which he would have been entitled as upon an answer to which there was no replication, but will remand the cause to the trial court, with leave to the complainants to answer the cross

bill, and set up their defense, if any they may have. Spoor *v.* Tilson, 97 Va. 279, 33 S. E. 609.

Improperly Sustaining When Leave to Amend Should Have Been Given.—A bill in chancery by proper allegations should show on its face, that proper parties are made to the suit; and if it claims to have set aside a sale made under a decree in another chancery cause, which is ended, for fraud or for other reasons, and that a resale should be made of the land, and the proceeds should be distributed among the parties entitled to such proceeds, so much of the substance of such chancery cause and the decrees in it, as will fully show the character of such suit and its objects, and especially as will show the parties interested in such suit and sale and the disposition of such proceeds, if made by the court, should be set out, so as to give the court definite information as to these matters. If this be not done, where there is a demurrer to such bill setting out as grounds of demurrer only such grounds, as affect the merits of the cause, and not that the proper parties do not appear to be before the court, and the bill shows on its face a cause, which should be considered on its merits, if the proper parties appeared to be before the court, and these necessary allegations were made, the court should give leave to the plaintiff to amend the bill, and not decide the cause, while in this condition, by sustaining the demurrer and dismissing the bill; and if it does, and the plaintiff appeals, the decree will be reversed, and costs will be given to the appellants, but if the court does give the plaintiff leave to amend his bill and he declines to do so and appeals to this court, such decree of the circuit court will be affirmed. McKay *v.* McKay, 28 W. Va. 514.

Where Error Not Prejudicial.—A plaintiff is not injured by sustaining a demurrer to two counts of a declaration where all the evidence that could have been given in under those counts can be given in under remaining counts of the declaration. McCoy *v.* Norfolk, etc., R. Co., 99 Va. 132, 37 S. E. 788.

Where a declaration contains the common counts in assumpsit and also a special count, and on demurrer to the declaration and each count thereof the court sustains the demurrer to the special count erroneously, but the facts stated in the special count, and on which it is based, are such as could be proven by the plaintiff on the trial of the issue on the common counts, and it affirmatively appears from the record, that an attempt was made to prove them on the trial, or it otherwise appears from the record, that on the trial of the case no injury could have arisen to the plaintiff from the error of the court in sustaining the demurrer to the special count, the supreme court will not reverse the judgment below for such error. Moore *v.* Wetzel Co., 18 W. Va. 630.

Setting Aside Order Sustaining at Subsequent Term.—Where additional statements are filed by the plaintiff in an action upon an insurance policy, which are necessary in order to allow the plaintiff to show material facts therein stated bearing upon the waiver by the defendant of conditions contained in the policy, and the court erroneously sustains a demurrer to such statements, and thereby precludes the plaintiff from producing testimony upon such points, the court may at a subsequent term set aside the order sustaining said demurrer. Rheims *v.* Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670.

6. Waiver of Error.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

Replying De Novo after Demurrer Sustained.—It seems that where the plaintiff replies de novo after a demurrer is sustained to his original replication, he waives any right he might have had to question the correctness of

the decision of the court on the demurrer. Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 289, 2 S. E. 511, citing Clearwater *v.* Merredith, 1 Wall. 25.

Amending Declaration or Bill and Going to Trial on Merits.—See generally, the title AMENDMENTS, vol. 1, p. 316.

By amending a declaration and going to trial on the merits, the right to object to the ruling of the court on the demurrer is waived. Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 289, 2 S. E. 511, citing Hopkins *v.* Richardson, 9 Gratt. 485.

Where a demurrer has been sustained to a bill, and the bill amended, the plaintiff waives his right to appeal on that ground. Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7.

7. Amendment.

In General.—The rule formerly was that, after a demurrer to the whole bill had been argued and allowed, the bill was out of court, and therefore could not be regularly amended; but the plaintiff may now amend (see § 12, ch. 125), and this is permitted literally, as far as promotive of the ends of substantial justice. Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398.

Because a demurrer in equity does not admit the truth of the bill, it merely assumes the truth for the sake of argument. If it be overruled, therefore, it does not follow that the plaintiff is entitled to a decree. The bill must be proved, or be taken pro confesso by a rule to answer, as provided in § 29; also, in § 41, ch. 125. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 226.

On Special Demurrer to Bill.—On a special demurrer to a bill the plaintiff may have leave to amend on payment of costs. Rose *v.* King, 4 Hen. & M. 475.

Plaintiff Entitled to Relief — Title Not Set Out. — If a bill on its face shows that the plaintiff would be entitled to relief, if he had set out his title to the subject of controversy which he had apparently failed to do accidentally, he ought to be permitted to amend his bill before it is dismissed on demurrer. Shonk *v.* Knight, 12 W. Va. 667.

When Judgment Overruled by Appellate Court.—Where a demurrer to a declaration is overruled in a lower court and the appellate court reverses the judgment, the cause will be sent back with directions that the plaintiff shall have leave to amend his declaration. Fitzhugh *v.* Fitzhugh, 11 Gratt. 300; Hamtramck *v.* Selden, 12 Gratt. 28; Cromer *v.* Cromer, 29 Gratt. 286; Reid *v.* Field, 83 Va. 26, 1 S. E. 395. See in accord Hale *v.* Crow, 9 Gratt. 263; Strange *v.* Floyd, 9 Gratt. 474; White *v.* Toncray, 5 Gratt. 179.

Amendment of Replication.—In an action of detinue, a replication to defendant's plea of the statute of limitations being insufficient, a demurrer thereto was sustained, and the action dismissed. The declaration contained the averments for the lack of which the replication was defective. Held, that the judgment dismissing the action was erroneous; that plaintiff should have had leave to amend his replication. Morris *v.* Lyon, 1 Va. Dec. 615.

When Amendment Improper.—If a dog tax be assessed by a county court under the 23d chapter of the acts of 1881, and a bill be filed by several owners of dogs in a particular district in the county for themselves and all other owners of dogs in that particular district to enjoin the collection of such dog tax in said district then in the hands of a constable of such district for collection, in which the county court of the county, the sheriff of the county, to whom under the law the tax is to be paid over, and the constable of the district, whose duty it is to collect the tax, are made defendants, such bill ought to be dismissed on demurrer, even though this act of the legislature was unconstitutional and the tax illegal, because there are neither proper parties to such bill, plain-

tiffs or defendants, nor is the object of such bill one which ought to be granted; the injury, if this dog tax be illegal, is common to all the owners of dogs in the county; and if these plaintiffs had filed a bill on behalf of themselves and all other owners of dogs in the county subject to this tax, they might sustain their suit to enjoin the collection of any part of such illegal tax in any part of the county. But the bill as filed was so essentially different from the bill, which should have been filed, that on sustaining a demurrer to such bill the court ought not to allow it to be amended and converted into the bill, which as stated above could be sustained, as this should be regarded as a distinct suit and not as an amendment to the original bill. Williams *v.* County Court, 26 W. Va. 488.

Remand by Appellate Court.—When the name of a plaintiff in a suit in equity is not stated in the bill, as required by the chancery practice before the Code of West Virginia took effect, or as authorized by the Code, and the defendant demurs and answers, and the court, without other action on the demurrer, decreed in favor of the plaintiff, the supreme court will reverse the decree. But when the plaintiff, by the allegations and proof, shows that he is entitled to relief, the supreme court will remand the cause to the circuit court with leave to plaintiff to amend his bill. If he fails to amend, the circuit court will dismiss the bill. Houston *v.* McCluney, 8 W. Va. 136.

Where the court below sustains a demurrer to a defective bill and sufficient appears in the bill to show, that it can be amended so as to show a cause for relief in equity, and the court did not give leave to amend, for this reason the decree will be reversed with costs to the appellants, and the cause will be remanded with leave to amend the bill. Norris *v.* Lemen, 28 W. Va. 336; Lamb *v.* Cecil, 25 W. Va. 288; White *v.* Kennedy, 23 W. Va. 227.

It is held in Rigg *v.* Parsons, 29 W. Va. 522, 2 S. E. 81, that where an inferior court properly sustains a demurrer to a declaration, and enters judgment in the action for the defendant, without giving leave to the plaintiff to amend, the appellate court will, if the defect in the declaration appears to be amendable, reverse the judgment, and remand the case, with directions to grant leave to the plaintiff to amend if he elects to do so.

Summons to Answer Amended Bill.—When a demurrer to a bill has been sustained, and leave granted plaintiff to file an amended bill at rules, it is error to quash a writ of summons issued in the cause to answer such amended bill "upon the ground that such process issued before the amended bill was filed at rules." Wilson *v.* Maddox, 46 W. Va. 641, 33 S. E. 775.

Effect of Amending or Substituting.—But it is a well-settled rule that where a demurrer to a declaration or plea, has been sustained and the party is permitted to amend or substitute, which he does, and goes to trial on the merits, he waives all exceptions to the ruling of the court in sustaining the demurrer, and can not take advantage in an appellate court of any grounds of exception to the ruling of the lower court in sustaining the demurrer. These are the terms which are imposed by the court in granting the amendment or substitution. Harris *v.* Norfolk, etc., R. Co., 88 Va. 560, 14 S. E. 535; Roanoke, etc., Co. *v.* Karn, 80 Va. 589; Darracott *v.* Chesapeake, etc., R. Co., 83 Va. 289, 2 S. E. 511; Hopkins *v.* Richardson, 9 Gratt. 435; Connell *v.* Chesapeake, etc., R. Co., 93 Va. 44, 24 S. E. 467; Birckhead *v.* Chesapeake, etc., R. Co., 95 Va. 648, 29 S. E. 678.

It is said, that the only case where it might profit the defendant not to demur, is where the declaration does not state any cause of action at all, "not merely states it defectively." Where if a verdict were against him he could move in arrest of judgment; if

the motion be sustained, final judgment will be entered for the defendant and of course it would be too late for the plaintiff to amend. Roanoke, etc., Co. *v.* Karn, 80 Va. 589.

C. JUDGMENT OVERRULING.

1. Presumption.

Where the decree on record does not show that a demurrer has been overruled, that must be presumed, if the court has decided on the merits for the plaintiff. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232; State *v.* Hall, 40 W. Va. 455, 21 S. E. 760; Bantz *v.* Basnett, 12 W. Va. 772; Sav. Bank *v.* Powhatan Clay Mfg. Co., 102 Va. 274, 46 S. E. 294; Miller *v.* Black Rock Springs Imp. Co., 99 Va. 747, 40 S. E. 27; Fugate *v.* Moore, 86 Va. 1045, 11 S. E. 1063; Matthews *v.* Jenkins, 80 Va. 463; Craig *v.* Craig, 54 W. Va. 183, 46 S. E. 371; Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521; Hinchman *v.* Ballard, 7 W. Va. 152.

"The further contention that the plea could not be sustained because it does not show that the cause did not go off on the demurrer, can not be maintained, because of the rule universally recognized that, if no mention is made of the demurrer in the decree disposing of the main issue, it will be taken as overruled." Per Cardwell, J., in Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

Where the principles of a cause have been adjudicated, the court is presumed to have overruled a demurrer to the bill. Fugate *v.* Moore, 86 Va. 1045, 11 S. E. 1063.

Where a demurrer is filed to a bill and the court proceeds to adjudicate, and does adjudicate, the principles of the cause, in favor of the plaintiff, without first acting pro forma upon the demurrer, it will be considered that the court in rendering the decree adjudicating the principles of the cause considered the sufficiency of the bill, and substantially overruled the demurrer thereto, and the supreme court will not reverse the decree, adjudicating the principles of the cause, for this cause alone. Hinchman *v.* Ballard, 7 W. Va. 152.

When a court decrees upon a bill without any words overruling a demurrer, it is to be treated as overruling the demurrer. Fluharty *v.* Mills, 49 W. Va. 446, 38 S. E. 521.

2. When Demanded.

See ante, "Pleading Good in Part," III, B, 2, c.

A general demurrer to a bill in equity is properly overruled, if the bill as a whole states facts which entitle the plaintiff to relief. Miller *v.* Hare, 43 W. Va. 647, 28 S. E. 722; Taylor *v.* Stringer, 1 Gratt. 159; Miller *v.* Richmond, etc., Co., 1 Va. Dec. 351.

A demurrer to a bill is properly overruled where the plaintiff by his bill makes such a cause that, if true, entitled him to relief against the defendant. Snodgrass *v.* Wolf, 11 W. Va. 158.

In Action on Award.—In an action on an award, if upon the face of the submission, it does not clearly appear that the award does not cover the whole matter submitted, a demurrer to the declaration will not be sustained; but the defendant will be left to his plea of "no award;" to which the plaintiff may reply and show that the award does cover the whole matter submitted. Price *v.* Via, 8 Gratt. 79.

So if the parties may have waived a decision on one branch of the matters submitted, and requested the arbitrators to decide the other matters, though this is not stated in the declaration, a demurrer will not be sustained; but the plaintiff will be allowed to reply the facts to the plea of "no award." Price *v.* Via, 8 Gratt. 79.

Based on Question of Law.—To justify the court in sustaining a demurrer to a bill, the ground of the demurrer must be a short dry point of law, upon which it is clear, that the bill will be dismissed with costs at the hearing; if

the evidence to be taken might sustain the relief asked with some modification, the demurrer ought to be overruled, and the case stand to the hearing to be disposed of on its merits. Tavenner *v.* Barrett, 21 W. Va. 657.

Plea Designed to Entrap.—In an action of debt on a sheriff's official bond in the name of a certain A, successor of a certain B, governor of Virginia, to whom the bond was given, there was a plea, that A was not, and that a certain C was, the successor of B, and there was a demurrer to the plea. The court held that though the plea was obviously designed to entrap, the demurrer should be overruled. Bennett *v.* Giles, 6 Leigh 316.

3. Overruling by Consent.

Query, wnether when the record shows that a demurrer is overruled by consent, the party demurring is precluded from taking any advantage of defects in the declaration. Trimble *v.* Shaffer, 3 W. Va. 614.

4. Judgment on Verdict as Overruling.

The judgment on a verdict virtually overrules all demurrers to the declaration, and each count thereof. Fleming, etc., Co. *v.* South Penn, etc., Co., 37 W. Va. 645, 17 S. E. 203; Hood *v.* Maxwell, 1 W. Va. 219.

5. Defects Cured.

Where there has been a demurrer to any pleading and the same has been overruled, § 3246 of the Virginia Code, 1887, cures no defect, imperfection or omission therein, except such as could not have been regarded on demurrer. Thus, where a declaration in assumpsit is deficient for its failure to show any consideration, and the demurrer thereto is overruled, the defect is not cured by the Virginia Code 1887, § 3246, providing that no action shall abate for want of form where the declaration sets forth sufficient matter of substance for the court to proceed on the merits, as the statute only applies to such defects as could not be cured on demurrer. Southern R. Co. *v.* Willcox, 98 Va. 222, 35 S. E. 355; W. Va. Code, 1899, ch. 134, § 3.

6. As Adjudicating Rights.

a. Of Plaintiff.

Although a demurrer may have been overruled to a cross bill asking a rescission of a contract of sale of land set up in the original bill, the court may, if the pleadings and proof justify it, render a personal decree in favor of the complainant in the original bill for the amount of purchase money due him, and, at the same time, refer the cause to a commissioner to ascertain the liens on the land and their respective priorities. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

b. Of Defendant.

In General.—If a defendant plead and demur to the whole declaration; and the demurrer be overruled, judgment ought not to be entered, without first trying the issues joined on the other pleas. Waller *v.* Ellis, 2 Munf. 88.

Bill to Set Aside Tax Deed.—Where a sheriff appends to his list of lands sold for nonpayment of taxes the affidavit "that I am not directly interested in the purchase of any of said real estate," instead of the affidavit required by the statute (W. Va. Code, ch. 31, § 13), "That I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," such sale is absolutely void (Code, ch. 31, § 9); and if, after the expiration of the year to redeem, but before the purchaser has obtained his deed, the owner of the land offers to redeem, and the purchaser refuses, and afterwards obtains a deed from the clerk, a bill brought to set aside said tax deed, alleging the above facts, and accompanied with the necessary money, is good on demurrer. On overruling the demurrer in such a case, the court should not at once decree against defendant as upon a bill taken

for confessed, but should award a rule to answer, which rule, however, need not be served. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

7. Order Overruling.

Facts Stated in Order.—By the act of March 6, 1882, in general re-enactment, with some amendments, of ch. 125 to § 29, already quoted in part, were added these words: "If nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order; and, if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleadings so demurred to." All this, of course, relates to common-law actions alone. It was not necessary in regard to demurrers to bills in equity, which were already subject to certain rules of pleading and practice, which always required the demurrer to express the several causes of demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

When Not Appealable.—In a given case it was held, that an order overruling a demurrer to the bill filed was not appealable, as it did not adjudicate the principles of the cause, but merely declared that if the plaintiffs established the case made in the bill, they might be entitled to the relief sought. Lancaster *v.* Lancaster, 86 Va. 201, 9 S. E. 988.

As Affording Grounds for Appeal or Error — Decretal Order.—A decretal order overruling a demurrer to an ordinary bill in chancery, is not an adjudication of the principles of the cause, and does not come within either of the classes of appeal authorized by statute, and is therefor not an appealable order. Buehler *v.* Cheuvront, 15 W. Va. 479.

An order overruling a demurrer to a bill is not appealable. Parsons *v.* Snider, 42 W. Va. 517, 26 S. E. 285.

Refusal to Receive as Equivalent.—After issue joined, a defendant tendered a demurrer to the declaration, which was objected to because it came too late, and the objection was sustained; and it was held that the refusal was equivalent to overruling the demurrer after it had been filed. For if a declaration is sufficient to enable the court to proceed to judgment according to law and the very right of the case, a demurrer should be overruled; and as in such case a defendant's rights can not be prejudiced by overruling the demurrer, he is not injured by the refusal, as he has the same remedy in either case. Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293. See also, Lane *v.* Black, 21 W. Va. 617.

8. Right to Plead after Demurrer Overruled.

a. Right to Offer Second Demurrer.

See post, "Demurrer or Plea after Demurrer Overruled," X, C, 8, c, (1).

After a demurrer has been overruled, a second demurrer will not be allowed, for it would be, in effect, to rehear the case on the first demurrer; as on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and, if good, will support the demurrer. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

The object of pleading is to bring the parties to an issue. If the same plea could again and again be offered, and the court required to consider it after it has once been rejected or overruled, all efforts to reach an issue and trial would be futile. In such case the demurrer having been considered by the circuit court and overruled, it would be clearly erroneous at a subsequent term to entertain the demurrant a second time, sustain the demurrer and dismiss the bill as it did by its decree of May 18th, 1881. Hoge *v.* Junkin, 79 Va. 220.

b. Withdrawal of Demurrer and Replying.

It is the practice in Virginia, when the plaintiff demurs to the defendant's

plea and the demurrer is overruled, to permit the plaintiff to withdraw the demurrer and reply to the plea by traverse, or by way of confession and avoidance. And where a plea in bar is to the whole declaration, and upon demurrer the court is of opinion that the plea is sufficient, unless the plaintiff move for leave to withdraw his demurrer, and reply, the demurrer will be overruled and final judgment entered for the defendant. Maggort *v.* Hansbarger, 8 Leigh 532. But it is hazardous for the plaintiff to demur to a plea, since, if his demurrer is overruled, and he then obtains leave to withdraw it, and traverses the plea, or replies by way of confession and avoidance, he is considered to have waived his demurrer, and can not object to the legal sufficiency of the plea in the appellate court. The proper course for the plaintiff to pursue in order to avoid this is, instead of demurring, to object to the reception of the plea and move to reject it; and if his motion is overruled he may except to the opinion of the court, and make his exception a part of the record by a bill of exceptions, and then reply to the plea in point of fact. In this way there is no waiver and the plaintiff saves to himself in the appellate court, the benefit of his objection to the plea. Harris *v.* Harris, 23 Gratt. 737; Reid *v.* Field, 83 Va. 26, 1 S. E. 395; Va. Fire, etc., Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973. The defendant, however, by Va. Code, 1887, § 3264, is permitted to accompany his demurrer with as many several pleas as he wishes, and if the demurrer is overruled, he can, of course, fall back upon the pleas filed. And judgment ought not to be entered without first trying the issues joined on the pleas. Waller *v.* Ellis, 2 Munf. 88.

c. In Equity.

(1) Demurrer or Plea after Demurrer Overruled.

The plaintiff in equity may have any plea or demurrer set down to be argued. If the same be overruled, no other plea or demurrer shall afterwards be received. W. Va. Code, 1899, ch. 125, § 30; Va. Code, 1887, § 3273; Northwestern Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398; Reynolds *v.* Bank, 6 Gratt. 174; Park *v.* Petroleum Co., 25 W. Va. 109; Pecks *v.* Chambers, 8 W. Va. 210; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Capehart *v.* Hale, 6 W. Va. 547; Dorsey *v.* Shepherd, 9 W. Va. 57; Nichols *v.* Nichols, 8 W. Va. 174. See also, ante, "Right to Offer Second Demurrer," X, C, 8, a.

(2) Answer after Demurrer Overruled.

(a) In General.

Where in equity a complainant has any plea or demurrer set down to be argued, if the same be overruled, no other plea or demurrer shall afterwards be received, but there shall be a rule for the defendant to answer the bill. W. Va. Code, 1899, ch. 125, § 30; Va. Code, 1887, § 3273; Northwestern Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398; Reynolds *v.* Bank, 6 Gratt. 174; Park *v.* Petroleum Co., 25 W. Va. 109; Pecks *v.* Chambers, 8 W. Va. 210; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Capehart *v.* Hale, 6 W. Va. 547; Dorsey *v.* Shepherd, 9 W. Va. 57; Nichols *v.* Nichols, 8 W. Va. 174; Billingsley *v.* Manear, 47 W. Va. 785, 35 S. E. 847.

(b) Rule to Answer.

(aa) Right to Have Rule.

When the demurrer to a bill in chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an answer, as he is entitled, on obtaining leave, to put in an answer to the bill. W. Va. Code, 1899, ch. 125, § 30; Va. Code, 1887, § 3273; Northwestern Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398; Reynolds *v.* The Bank, 6 Gratt. 174; Park *v.* Petroleum Co., 25 W. Va. 109; Pecks *v.* Chambers, 8 W. Va. 210; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223;

Capehart *v.* Hale, 6 W. Va. 547; Dorsey *v.* Shepherd, 9 W. Va. 57; Nichols *v.* Nichols, 8 W. Va. 174; Moore *v.* Smith, 26 W. Va. 379.

A court of equity under the provisions of ch. 71, § 30, of acts of 1882 (ch. 125, § 30, W. Va. Code), when it overrules a demurrer, can not enter a decree on the merits of the case set out in the bill, but it should give a rule upon the defendant to answer the bill in a specified time, and if the defendant fails to answer the bill on the day specified in the order, the court may then and not till then enter a decree upon the merits of the case as stated in the bill. And although, when the demurrer is overruled, a rule be given to answer the bill but no day be specified in the order, the court can not enter a decree on the merits of the cause at a subsequent day of the term, if no answer be filed. Moore *v.* Smith, 26 W. Va. 379.

To Original or Amended Bill.—When a demurrer to an original or amended bill is overruled the defendant is entitled to a rule to answer the bill. Billingsley *v.* Manear, 47 W. Va. 785, 35 S. E. 847.

Right Regulated by Statute.—Leave to answer is usually regulated by statute. See Va. Code (1887), § 3264; W. Va. Code, 1899, ch. 125, § 20; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

(bb) Service of Rule.

When a demurrer to an original or amended bill is overruled and a rule is given to answer the bill, such rule need not be served. Billingsley *v.* Manear, 47 W. Va. 785, 35 S. E. 847.

(cc) Waiver of Rule.

A decree overruling a demurrer by the defendant to the plaintiff's bill uses these words, "and the defendant not asking further time to answer said bill." It was held, that these words, as construed by the context, are equivalent to the words, "and the defendant not desiring further time," etc., and therefore operated as a waiver of a rule upon the defendant to answer the bill. Mitchell *v.* Evans, 29 W. Va. 569, 2 S. E. 84.

(c) Time Given in Which to Answer.

(aa) Reasonable Time.

When a demurrer to a bill is overruled, a time reasonable under the circumstances of the case must be given for answer. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

(bb) Excepting to Time Given.

When a demurrer to a bill is overruled and the time is fixed for answer to be made, objection to its shortness must be made, else the point is waived. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

(cc) Order of Reference Prior to Lapse of Time.

If the court overrule a demurrer to a bill and give the defendant a certain time, in which to answer the bill, it can not properly make an order of reference to a commissioner, till the time has elapsed, which was given to the defendant in which to answer. Moreland *v.* Metz, 24 W. Va. 119.

Where a demurrer to a bill in equity is overruled, and no day is given the defendant in which to answer, the court can not properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand, where the object of the bill to subject land to sale is to ascertain the liens thereon and their priorities. Billingsley *v.* Manear, 47 W. Va. 785, 35 S. E. 847.

A mere order of reference, deciding nothing, may be made without an answer, where a demurrer to a bill has been overruled and the time given to answer. Foley *v.* Ruley, 43 W. Va. 513, 27 S. E. 268.

(dd) Failure to Answer on Day Specified.

If the defendant fails to appear and answer the bill on the day specified in the order, the plaintiff shall be entitled to a decree against him for the relief prayed for therein. W. Va. Code, 1899,

ch. 125, § 30; Va. Code, 1887, § 3273; Northwestern Bank *v.* Nelson, 1 Gratt. 108; Sutton *v.* Gatewood, 6 Munf. 398; Reynolds *v.* Bank, 6 Gratt. 174; Park *v.* Petroleum Co., 25 W. Va. 109; Pecks *v.* Chambers, 8 W. Va. 210; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Capehart *v.* Hale, 6 W. Va. 547; Dorsey *v.* Shepherd, 9 W. Va. 57; Nichols *v.* Nichols, 8 W. Va. 174.

The statutes regulating the leave to answer and rules of court, following a well-settled rule of chancery practice, also usually provide that if the defendant fails to answer within the time limit, the bill may be taken as confessed, and a decree rendered granting the relief prayed. But no decree can be properly rendered until this time has expired. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Nichols *v.* Nichols, 8 W. Va. 174; Pecks *v.* Chambers, 8 W. Va. 210. See also, Va. Code, 1887, § 3264; W. Va. Code, 1899, ch. 125, § 20.

Where a defendant in a chancery suit appears and demurs to the bill and his demurrer is overruled and a rule is given him to answer which he fails to do, and thereafter a decree is entered in the cause granting the relief prayed for in the bill, and such defendant obtains an appeal to the supreme court from the decree, without having moved in the court which rendered it, to have the errors complained of corrected, and assigns and complains of errors in the decree other than those resulting from the overruling of his demurrer; such a decree is a decree on a bill taken for confessed, and the supreme court will not entertain the appeal, but will dismiss it as having been improvidently awarded. Steenrod *v.* Wheeling, etc., R. Co., 25 W. Va. 133.

(ee) Refusal to Continue Where Answer Delayed.

Where a defendant, after the overruling of his demurrer, has failed for such length of time to plead, but had two continuances, and merely procures the filing of affidavits showing illness and necessary absence, without pleading, or, in any way, disclosing a defense, and without making a formal motion for a continuance, there is no error in failing to continue the case and rendering judgment. Bank *v.* Ralphsnyder, 54 W. Va. 231, 46 S. E. 206.

d. When Demurrer to Indictment Overruled.

Upon a demurrer to an indictment for unlawful gaming being overruled, the defendant can not have leave to plead not guilty without offering to withdraw his demurrer; the court may, in its discretion, give him leave to withdraw his demurrer, and to plead; but if he does not withdraw his demurrer and obtain leave to plead, judgment should be given for the fine and costs, not that the defendant shall answer over. Com. *v.* Foggy, 6 Leigh 638.

9. Error in Overruling.

Where Proper Parties Are Not before Court.—If the circuit court overrules a demurrer and grants the relief asked in the bill as to the subject matter in controversy without having a nominal party properly pleaded as to such subject matter, although other pleadings in the cause show that such nominal party is claiming the whole of such property, such nominal party may appeal from such decree and have the same reversed. Preston *v.* West, 55 W. Va. 391, 47 S. E. 152.

Demurrer to One of Several Counts.—Improperly overruling a demurrer to one count is not ground for setting aside a verdict of guilty on that account. Johnson *v.* Com., 102 Va. 927, 46 S. E. 789.

"If the first count was insufficient, as claimed—as to which we express no opinion—the failure to sustain the demurrer thereto resulted in no prejudice to the accused as the jury only found him guilty upon the second and third counts." Per Harrison, J., in Johnson *v.* Com., 102 Va. 927, 46 S. E. 789.

Several Counts—Demurrer to One Which Is Bad Overruled.—Where one

of three counts is bad and a demurrer to the declaration and each count thereof is overruled, and there is a verdict which may have been on that count, the verdict should be set aside. Richmond, etc., R. Co. *v.* Scott, 88 Va. 958, 14 S. E. 763. But in Hood *v.* Bloch, 29 W. Va. 244, 11 S. E. 910, the declaration contained several counts, and there was a demurrer to each count, which the court overruled, though some of the counts were good and some bad. Upon appeal the evidence was all certified, and it was held, that though it was error to overrule the demurrer to the bad counts, yet as the appellate court was satisfied that all the plaintiff's evidence was admissible under the good counts it would not reverse the judgment, as it did not appear that the error was to the defendant's prejudice.

If a plea is bad and the replication also bad, a demurrer to the latter should be sustained and the plea held for naught. But as an issue thus raised in the court below is an immaterial one, the error in overruling the demurrer to the replication could not be to the prejudice of the party filing the plea, and he can not be heard in this court to complain of it. Caperton *v.* Martin, 4 W. Va. 138.

If in such a suit the case is submitted by consent to the court in lieu of a jury, who renders a judgment for the plaintiff, and in a bill of exceptions taken by the defendant all the facts proven are certified by the court, and it appears, that they were all admissible under the common counts in the declaration and justify the judgment of the court, the supreme court will not reverse such a judgment, because the circuit court overruled improperly a demurrer to a defective special count, as the defendant could not possibly be prejudiced in such case by such error. Haigh *v.* United States Bldg., etc., Ass'n, 19 W. Va. 792.

Effect Where Error Prejudicial.—If a special replication has been permitted to be filed over the objection of the defendant, and his demurrer thereto overruled to his manifest injury, the error will be corrected in the supreme court by setting aside the judgment, and directing the trial court to award a new trial. Spence *v.* Robinson, 35 W. Va. 313, 13 S. E. 1004.

Correction of Error in Lower Court.—After a demurrer has been overruled and the defendant has pleaded, if the court is satisfied that the demurrer should have been sustained, it should allow the defendant to withdraw his plea, set aside its former order on the demurrer, and enter an order sustaining the demurrer. Russell *v.* Louisville, etc., R. Co., 93 Va. 322, 25 S. E. 99.

Exceptions.—It is unnecessary to except to the opinion of a trial court overruling a demurrer to a declaration. Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

10. Amendment.

Where a demurrer to a declaration has been overruled in the court below, there being a judgment for the plaintiff, and upon appeal the judgment is reversed and the demurrer sustained, the cause will be sent back with leave to the plaintiff to amend his declaration. Fitzhugh *v.* Fitzhugh, 11 Gratt. 210. See, in accord, Hale *v.* Crow, 9 Gratt. 263; Strange *v.* Floyd, 9 Gratt. 474; White *v.* Toncray, 5 Gratt. 179.

When a bill contains sufficient allegations for one character of relief sought, and insufficient for others, and the circuit court overrules a demurrer thereto, and grants relief to the full extent of the prayer of such bill, the supreme court will reverse the decrees entered, sustain the demurrer in part, and remand the cause, with leave to the plaintiff to amend. Billingsley *v.* Manear, 44 W. Va. 651, 30 S. E. 61, citing Morgan *v.* Morgan, 42 W. Va. 542, 26 S. E. 294.

D. FINALITY OF JUDGMENT.

See the titles FORMER ADJUDI-

CATION OR RES ADJUDICATA; JUDGMENTS AND DECREES.

1. In General.

By the common law as stated by Blackstone and Stephens, it seems that upon a general demurrer, the judgment was final. 3 Blackstone Com., p. 398; Stephens' Pl. § 97.

It is well settled, that a point once adjudicated by a court of competent jurisdiction, however erroneous that adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, when either party, or the privies of either party, allege anything inconsistent with it; and this too when the subsequent suit is upon the same or a different cause of action; nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits; provided the same subject matter in controversy, between two or more of the parties, plaintiffs or defendants, to the two suits respectively, has been in the former suit directly in issue and decided. The conclusiveness of the judgment or decree extends, beyond what may appear on its face, to every allegation which has been made on the one side and denied on the other, and was at issue and determined in the course of the proceedings. A decision upon a demurrer, which has clearly gone to the merits of the case, is an effectual bar to further litigation. All the authorities agree that if it appears by the record that the point in controversy was necessarily decided in the first suit, whether upon a demurrer or the facts in issue, it can not be again considered in any subsequent suit. Western Mining, etc., Co. *v.* Virginia Cannel Coal Co., 10 W. Va. 250; Coville *v.* Gilman, 13 W. Va. 314; Beckwith *v.* Thompson, 18 W. Va. 103; Corrothers *v.* Sargent, 20 W. Va. 356; Poole *v.* Dilworth, 26 W. Va. 593.

Of Matter Not in Controversy.—"Though a decision upon a demurrer be as in this case but a simple dismissal of the bill, it will be conclusive of every matter whether specifically stated in the bill or not, provided it is clear, that such matter was necessarily in controversy in the suit was decided by it. Yet, if as in this case it be not clear, that such matter was not necessarily in controversy in the suit, and if it be not clear, that it was decided in such suit such decision will not be conclusive of such matter." Poole *v.* Dilworth, 26 W. Va. 593.

2. Demurrer to Declaration.

When Leave Given to Amend.—If a demurrer to a declaration be sustained, leave is granted the plaintiff to amend the declaration upon terms. Baylor *v.* Baltimore, etc., Co., 9 W. Va. 270; Darracott *v.* Chesapeake, etc., Co., 83 Va. 288, 2 S. E. 511; White *v.* Railway Co., 26 W. Va. 800; Roanoke, etc., Co *v.* Karn, 80 Va. 589. See ante, "Amendment," X, B, 7; "Amendment," X, C, 10.

Several Counts in Declaration—Demurrer to One and Issue in Fact to Others.—If in a declaration there are several counts, to one of which the defendant demurs, and joins issue in fact upon the others, and the court sustains the demurrer, final judgment is not to be given for the defendant, as if there was only one count in the declaration, but the cause should be re-remanded for further proceedings on the other counts. Cooke *v.* Simms, 2 Call 39, 374.

3. Demurrer to Plea.

If there be but one plea, and the demurrer to that be sustained, the defendant if he has any other defense, may plead further; but if he has no other defense, judgment may be rendered, if it be such a case as that judgment by default might have been rendered on it; otherwise a writ of inqury must be executed. Clarke *v.* Day, 2 Leigh 177; Chesapeake, etc., Ry. Co. *v.* Rison, 99 Va. 18, 37 S. E. 320.

Plea in Abatement—Judgment of Respondeat Ouster.—In Virginia it is now the rule of practice, when a demurrer to a plea in abatement is sustained for the judgment to be respondeat ouster; or if sustained to any other plea, the defendant is by leave of court allowed to withdraw the plea, and enter a sufficient plea as a substitute, or if he has filed other pleas, as he may, under Va. Code, § 3264, he can fall back upon them. Cromer *v.* Cromer, 29 Gratt. 280; Reid *v.* Field, 83 Va. 26, 1 S. E. 395; Creel *v.* Brown, 1 Rob. 265; Strange *v.* Floyd, 9 Gratt. 474; Hamtramck *v.* Selden, 12 Gratt. 28; Clarke *v.* Day, 2 Leigh 177. See Curran *v.* Owens, 15 W. Va. 208; Smith *v.* County Court, 33 W. Va. 713, 11 S. E. 1.

4. To Replication.

In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed, charge the breach defectively, but fully avoid, by other replications, such other pleas of the defendant as go to the foundation of the action, to which replications demurrers are improperly filed, and the court enter judgment for the defendant, generally, upon all the pleadings, such judgment is erroneous; it should only be that the faulty replication is not sufficient in law, etc., and therefore that the plaintiff take nothing, etc. Lane *v.* Harrison, 6 Munf. 573.

If a plea be to the whole declaration, and the defendant's demurrer to plaintiff's replication to such plea be sustained, judgment will be given that plaintiff take nothing by his bill, and that defendant recover against him his costs. Thus, in an action of detinue, defendant pleaded that the cause of action did not accrue within five years next before action brought. Plaintiff's reply admitted averment of plea, but alleged subsequent acknowledgment by defendant of title in plaintiff made within five years. The defendant demurred to this replication, and the demurrer was held to have been properly sustained. Va. Code (1873), ch. 146, §§ 10, 20; Morris *v.* Lyon, 84 Va. 331, 4 S. E. 734. See also, Jarrett *v.* Nickell, 4 W. Va. 276.

In debt on a bond with collateral condition, if the plaintiff, by replication to the plea of conditions performed charge the breach defectively, but fully avoid, by other replications, such other pleas of the defendant as go to the foundation of the action; to which replications demurrers are improperly filed; and the court enter judgment for the defendant generally, upon all the pleadings, such judgment is erroneous; it should only be that the faulty replication is not sufficient in law, etc., and therefore that the plaintiff take nothing, etc. Lane *v.* Harrison, 6 Munf. 573.

E. APPEAL AND ERROR.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

No appeal lies from a decree overruling a demurrer, giving the defendant leave to answer, and continuing an injunction in force until the further order of the court, where there was no motion to dissolve, and the cause was heard solely upon the demurrer to the bill. Norfolk, etc., R. Co. *v.* Old Dominion Baggage Co., 97 Va. 89, 33 S. E. 385.

Where a demurrer to one count of a declaration has been sustained, and issue taken on other counts, and there have been a verdict and judgment for the plaintiff, a writ or error awarded to the defendant does not bring up the action of the trial court in sustaining the demurrer to that count, nor can that count be looked to by the appellate court in order to sustain the verdict and judgment complained of. Metropolitan Life Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383.

XI. Waiver or Abandonment.

See generally, the title WAIVER.

A. MANNER OF WAIVING.

By Acts or Agreements in General.—A party may by his acts and agreements waive a demurrer. Brodie *v.* Clator, 8 W. Va. 599; Roach *v.* Gardner, 9 Gratt. 89; Moore *v.* Douglass, 14 W. Va. 729. See also, Shepherd *v.* Brown, 30 W. Va. 13, 3 S. E. 189.

Consent to Overruling as Waiving.—See ante, "Overruling by Consent," X, C, 3.

Replying Instead of Demurring to Plea.—A plaintiff can not both demur and reply to a plea to the jurisdiction. When he replies after a demurrer to the plea is overruled, the demurrer can not be considered on appeal. Consequently it would seem to follow that in pleading and not demurring he would waive defects available on demurrer. Chesapeake, etc., R. Co. *v.* American Exchange Bank, 92 Va. 495, 23 S. E. 935.

"We do not think that the demurrer to the plea can be considered here. The plaintiff had the right to demur or reply to the plea, but he had no right to do both. The common law did not allow a party to demur and plead to the same matter. This rule has been changed by the statute so as to allow a defendant to 'plead as many several matters, whether of law or fact, as he shall think necessary.' Code 1887, § 3264. But as to subsequent stages of the pleading, there has been no change in the common law. The plaintiff can make one answer, either of law or of fact, but no more, to each plea. Lang *v.* Lewis, 1 Rand. 277; 4 Minor's Inst. 166-7 (3d Ed.). To escape this inconvenience in the replication and subsequent stages of the pleading, the practice is to demur, if the party desires to do so, and, if the demurrer be overruled, to obtain leave from the court (which is granted as a matter of course) to withdraw the demurrer, and then to answer in point of fact; but, if the demurrer is not withdrawn, no further answer can be made, and the court must give judgment in favor of the defendant on the issue raised by the plea. Maggort *v.* Hansbarger, 8 Leigh 532; 4 Minor's Inst. 1167." Per Buchanan, J., in Chesapeake, etc., R. Co. *v.* American Exchange Bank, 92 Va. 497, 23 S. E. 935.

B. AGREEMENT OF FACTS AFTER DEMURRER AS WAIVING.

If in an action at law the defendant demurs to the declaration, and afterwards agrees the facts, and that the court shall render a judgment upon the case agreed, which is done, he thereby waives his demurrer to the declaration. Roach *v.* Gardner, 9 Gratt. 89.

"It can scarcely be supposed, that if he had intended to reply upon his demurrer, he would have entered into an agreement resting the case upon the facts agreed, and the court can only regard such parties as having intended to put an end to the litigation between them by invoking the judgment of the court upon the facts, without regard to the previous pleading in the case." Per Lee, J., in Roach *v.* Gardner, 9 Gratt. 89. See also, Royall *v.* Eppes, 2 Munf. 479.

C. CHARACTER OF DEFECTS WAIVED.

Where the Facts Are Sufficient to Constitute a Cause of Action.—The rule is that a judgment will not be reversed for any defect, imperfection, or omission in the pleadings, unless in the court below there was a demurrer. Va. Code, 1873, ch. 77, § 3; W. Va. Code, 1899, ch. 134, § 3. See Holliday *v.* Myers, 11 W. Va. 276; Smith *v.* Knight, 14 W. Va. 749; Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180; McSmithee *v.* Feamster, 4 W. Va. 673; Campbell *v.* Hughes, 12 W. Va. 183; Douglass *v.* Central Land Co., 12 W. Va. 502; Feamster *v.* Withrow, 9 W. Va. 296.

Consequently the statute cures errors, which could have been the subject of demurrer, but which are waived by failure to interpose. Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589; Alvey *v.* Co-

hoon, 86 Va. 173, 9 S. E. 994. But a failure to state any cause of action at all, is not cured by the statute, when there is no demurrer. Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589.

Objection to Misjoinder of Counts.—Counts ex delicto can not be joined in the same declaration with counts ex contractu. Such misjoinder makes the declaration bad on demurrer. But unless a demurrer has been filed and overruled, such misjoinder will not be ground for motion in arrest of judgment or writ of error. The defect is waived by failure to demur, and is thereby cured by the statute. Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Defective Plea of Statute of Limitations.—Where plaintiff fails to demur to defective plea of the statute of limitations, the defect can not be taken advantage of after verdict. Va. Code (1873), ch. 177, § 3; Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095.

"So, in Lincoln *v.* Iron Co., 103 U. S. 415, it is said that it is the rule of the common law that where there is any defect or omission in a pleading, whether in substance or in form, which would have been fatal on demurrer, yet if the issue joined necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured."

Defects Not Waived.—When the constitution of the state requires an indictment to conclude in certain form and words, the indictment is not good unless it concludes in the exact language of the constitution, and a prisoner, by failing to demur, or moving to quash, or moving in arrest of judgment, on an indictment not in the exact language required by the constitution, can not be held to have waived his right to make objections to the indictment in the appellate court; the right being a constitutional, and not a personal right. Lemons *v.* State, 4 W. Va. 755.

D. FAILURE TO ASSIGN CAUSE—EFFECT ON ERROR.

No causes of demurrer not assigned in the statement of causes of demurrer in the trial court can be assigned in the appellate court. Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 49 S. E. 991.

But see Clayton *v.* Henley, 32 Gratt. 65, cited in Morgan *v.* Blatchley, 33 W. Va. 158, 10 S. E. 282, in support of the proposition that, although the defect for lack of parties be not suggested by demurrer, plea, or answer, yet, if it be apparent on the face of the bill, it will prevail at the hearing; and, even though not raised in any way in the lower court, it is competent to make the objection in the court of appeals.

Where a bill alleges that the complainant purchased from a father a tract of land which he had previously conveyed to certain of his children; that the complainant knew nothing of the existence of the deed; that he purchased in good faith, and that the purchase was made with the knowledge, acquiescence and consent of the children, this is sufficient to estop the children from setting up the conveyance tc them against such purchaser, and the fact that they were under age can not be set up for the first time in the appellate court—not having been stated among the grounds of demurrer specifically assigned in the trial court. Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661, 49 S. E. 984.

E. CONTESTING DEMURRER AS WAIVING NOTICE.

If a complainant in a bill of injunction that is at rules, appears in term by counsel and contests the demurrer, he thereby waives the right of notice, if any was necessary. Hyre *v.* Hoover, 3 W. Va. 11.

F. ELECTION TO WAIVE—EFFECT ON ERROR.

In a given case B. and C. entered into a written agreement which stipulated that C. agreed "to furnish the material and do all the work of plaster-

ing at B.'s house on Quincy street, at full book of plaster's prices, in payment of which B. agreed to furnish all material and do all of C.'s carpenter work at full book of carpenter's prices." B. filed a declaration in covenant; C. demurred to the declaration and each count thereof and plead covenants performed. The court overruled the demurrer. B. and C. then entered of record in the cause a written agreement, viz: "It is agreed that under the declaration, plea and accounts filed by the parties, respectively, in this case, either party may give in evidence any claim, demand, payment or set-off mentioned in his bill of particulars, whether arising under the special agreement declared on or otherwise; but if arising under the said special agreement, then such party is only to be allowed therefor such amounts as he may prove as the amount, price, or value thereof, without reference to said agreement; and the determination of any such claim, demand, payment, or set-off, in this proceeding, shall be as effectual a bar to any future proceedings therein as if made in an action or suit brought specially upon them." Held, that it was the province of the defendant to stand upon the demurrer, or waive it; and having elected to waive it an appellate court should not reverse the judgment. Brodie *v.* Clator, 8 W. Va. 599.

G. WHEN REGARDED AS ABANDONED.

In Vaiden *v.* Bell, 3 Rand. 448, a special demurrer and pleas were filed to the same declaration. Afterwards, the joinder in demurrer was withdrawn, and the declaration was amended in the point specified in the demurrer, and issues were joined on the same pleas. No further notice was taken of the demurrer, and a verdict was rendered on the issues. Held, that the demurrer to the first declaration should have been considered as abandoned.

XII. Joinder.

Form.—The form of a joinder in demurrer may be "the defendant (or plaintiff) says, that the declaration (or plea, etc.) is not (or is) sufficient in law. Va. Code, 1887, § 3271; W. Va. Code, 1899, ch. 125, § 23.

Issue Not Formed until Joinder.—A demurrer, though frequently called an "issue in law," may, with more propriety, be said to tender such issue; for the issue is not formed until there is a joinder in demurrer, which affirms the legal sufficiency of the allegation demurred to, which has been held to apply to demurrers in equity as well as at common law. Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223.

Sufficiency.—In a suit against two defendants, the process was served on one only; a plea was filed, appearing on its face, to be the joint plea of both; to which the plaintiff demurred; describing it as "the said plea of the said defendant;" the transcript of the record stated "that the defendants by counsel filed the following joinder, to wit, and the said defendant, for that he hath sufficient matter of law to bar the plaintiffs having their said actions against him, etc., prays judgment," etc. It was determined, that the word "defendant," in the demurrer did not restrict it to the plea of one defendant only; and that the joinder was by both defendants. Higginbotham *v.* Browns, 4 Munf. 516; Chinn *v.* Heale, 1 Munf. 63; Freelands *v.* Royall, 2 Hen. & M. 575.

Withdrawal of Joinder.—It is the usual course when the opinion of the court is in favor of the defendant on a demurrer to the whole declaration, to allow the plaintiff to withdraw his joinder in the demurrer, and amend his declaration, if the ground upon which the demurrer is sustained is of such a nature, as can be removed by an amendment. And there is no difference in this respect at common law or by statute between penal, and other actions.

Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

This court will not reverse a judgment because the court below refused to allow defendant to withdraw his joinder in issue and demur to the replication, where the latter is sufficient in law. Virginia Fire, etc., Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794.

Effect of Nonjoinder.—When there is a demurrer to a declaration and no formal joinder therein appears to have been entered of record, but the record shows that the parties appeared by their attorneys, and the matters of law arising upon the defendant's demurrer to the plaintiff's declaration, was argued by counsel, and considered by the court, and was overruled, although it may have been irregular for the court to act upon the demurrer without joinder therein being entered of record, still the judgment of the court below will not be reversed for this cause, if the declaration is good. Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

Not adding the joinder in demurrer is not available error in an appellate court after argument and the decision on the demurrer in the court below. Miller *v.* McLuer, Gilmer 338; Crump's Case, 98 Va. 834, 23 S. E. 760.

DEMURRER TO THE EVIDENCE.

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CROSS REFERENCES.

See the titles APPEAL AND ERROR, vol. 1, p. 418; EXCEPTIONS, BILL OF; VARIANCE; VERDICT.

As to the rule of decision in the appellate court, where the evidence and not the facts, is certified, see the titles APPEAL AND ERROR, vol. 1, pp. 576, 577; EXCEPTIONS, BILL OF. As to affirmance or reversal of judgment in appellate court, see the title APPEAL AND ERROR, vol. 1, pp. 620, 629.

I. At Common Law.

A. IN CIVIL CASES.

1. Definition and Office of a Demurrer to Evidence.

Definition.—A demurrer to the evidence declares that the demurrant will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue, and proposes to submit the case to the judgment of the court, upon the ground of the insufficiency of the evidence. 4 Min. Inst. (3d Ed.) 920.

Under the English practice a demurrer to evidence is a proceeding by which the judges whose province it is to determine questions of law, are called upon to declare what the law is upon the facts in evidence. And it is analogous to the demurrer upon the facts alleged in pleading. Miller *v.* Insurance Co., 8 W. Va. 515.

Office of Demurrer.—A demurrer to the evidence withdraws from the jury the proper triers of facts, the consideration of the evidence by which they are to be ascertained. Ware *v.* Stephenson, 10 Leigh 164; Hardaway *v.* Manson, 2 Munf. 230; Syme *v.* Butler, 1 Call 105; Miller *v.* Insurance Co., 8 W. Va. 515; Garrett *v.* Ramsey, 26 W. Va. 345; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546. In Green *v.* Judith, 5 Rand. 1, it is said that a demurrer to the evidence raises a question of law. The court is not the judge of the sufficiency of the evidence unless it is submitted to it by a demurrer to the evidence. Hollingsworths *v.* Dunbar, 5 Munf. 199. Upon a demurrer to the evidence, it is for the court, and not for the jury, to say whether an accident could or could not have been avoided by the use of ordinary care on the part of a defendant company. Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311.

A demurrer to evidence is the proper mode of taking from the jury the de-

termination of the weight of evidence; a motion to strike out is not equivalent. Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388.

Effect.—The effect of a demurrer to evidence certainly does not substitute the court for the jury to pass upon disputed facts, conflicting evidence, and the weight and credit of evidence, but to declare the inference of law upon the facts proved, in like manner as it does in a demurrer in law or to the declaration upon the facts stated. Miller *v.* Insurance Co., 8 W. Va. 515.

2. Proceedings Analogous to Demurrers to Evidence.

a. Bill of Exceptions.

See the title EXCEPTIONS, BILL OF.

A bill of exceptions can not be considered a demurrer to the evidence. They are wholly distinct and independent modes of proceeding. Wroe *v.* Washington, 1 Wash. 357; Creekmur *v.* Creekmur, 75 Va. 430; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

"It is recognized by decisions of this court, and generally accepted by the practitioners in the courts of the state as a correct distinction, that a demurrer to evidence and a bill of exceptions are wholly distinct and independent modes of proceeding. Judge John Marshall, representing the plaintiff in error, in Wroe *v.* Washington, 1 Wash. 357, distinguished them as follows: 'I would ask, if it be possible to liken a bill of exceptions to a demurrer to evidence; they are different in form, in their consequences, and in the conduct of the parties. In the former, the parties still proceed to a trial of the issue; in the latter, the jury are discharged immediately, or find a conditional verdict only. In the former, the question is brought before the court upon the motion of the objecting party only; in the latter, by the act of both parties, since the demurrer offered by the one is joined by the other. In the former, either party has the right to the benefit of his exceptions before a superior court; in the latter, the court, if the case be clear, may refuse to compel the other to join in the demurrer, and leave the whole question to the jury. The judgment upon reversal in the one case is for a new trial; in the other, it is final and conclusive.' In the opinion of the court in that case, by Pendleton, P., it was said: 'In the case of Keel & Herbert *v.* Roberts, 1 Wash. 203, this court decided against the doctrine of taking a bill of exception for a demurrer to evidence; but the counsel endeavored to distinguish that case from this, on account of the whole evidence being stated in this, whereas in that, there was a partial recital of the evidence, and says that the reason which governed the court in that case was founded upon that distinction. Whether this was the only reason assigned by the court, I can not ascertain, not having my notes with me, but the judges recollect that their distinction went farther, and that they considered the two modes as being so totally dissimilar, that the one could not be considered as answering the purposes of the other." Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

b. Motion for New Trial.

See the title NEW TRIALS.

In Creekmur *v.* Creekmur, 75 Va. 430, the court, citing Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812, says: "The decisions of this court have established a wide distinction between the effect of a demurrer to evidence and a motion for a new trial, founded upon a certificate of the evidence. In the latter case, the exceptor waives all his own testimony, which is merely oral, and must succeed if at all, by showing that the verdict of the jury is erroneous upon the testimony of the successful party. Upon a demurrer to the evidence, the demurrant is considered as admitting the truth of his ad-

ersary's evidence and all just infer-nces which might properly be drawn ıerefrom by a jury. He is also con-ıdered as waiving all his own evi-ence which conflicts with that of his ıdversary, and all inferences from such vidence which do not necessarily re-ılt therefrom." Other cases citing ichmond, etc., R. Co. *v.* Anderson, 31 ratt. 812, and affirming the general ıle laid down therein are Rudd *v.* ailroad Co., 80 Va. 546; Johnson *v.* hesapeake, etc., R. Co., 91 Va. 171, 1 S. E. 238; Fowler *v.* Baltimore, etc., .. Co., 18 W. Va. 579; Allen *v.* Bart-tt, 20 W. Va. 52. See also, Trout *v.* irginia, etc., R. Co., 23 Gratt. 619; hittington *v.* Christian, 2 Rand. 353; are *v.* Stephenson, 10 Leigh 155; Mil-r *v.* Insurance Co., 8 W. Va. 515; ebb *v.* Dye, 18 W. Va. 376; Hans-rough *v.* Thom, 3 Leigh 147; Horner Speed, 2 Pat. & H. 616.

Defendant moved the court below to t aside the verdict for plaintiff as ntrary to the evidence. The motion eing denied, on appeal, this court, un-er Virginia Code, 1887, § 3484, ap-lied to the consideration of the evi-ence the rule as upon a demurrer to idence, and allowed the new trial. outhwest Va. Imp. Co. *v.* Andrew, 86 a. 270, 9 S. E. 1015.

But in West Virginia a demurrer to idence, in so far as the demurree is oncerned, and a motion to set aside e verdict of a jury as contrary to the idence, rest on precisely the same inciples; and the same may be said the judgment of the circuit court, whom the facts are submitted in u of a jury. In either case the idence must plainly preponderate ainst the conclusion reached, or the me will not be disturbed. By sub-itting the issue to the circuit court, jury was waived; and the finding of e court on the facts takes the place a verdict, and must be regarded in is court as of equal weight. Hysell *v.* erling, etc., Mfg. Co., 46 W. Va. 158, S. E. 95.

When there has been a trial before a jury and a verdict, on a motion to set aside the verdict and grant a new trial, because the verdict is contrary to the evidence, if there be inconsistency, all the testimony, and all the inferences from it, which might be drawn by a jury, without error, that tends to sustain the verdict, must be accepted, and such of the testimony, as directly conflicts with the former, should be discarded. Kimmins *v.* Wilson, 8 W. Va. 584.

c. Motion to Exclude or Strike Out Evidence.

See generally, the title EVIDENCE.

In General.—In Virginia it was held in the case of Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388, that a demurrer to the evidence is the proper mode of taking from the jury the determination of the weight of the evidence; a motion to exclude or strike out is not equivalent. But in West Virginia, it is well settled by a long line of cases that a motion to exclude the evidence when such motion is properly allowed has the effect of a demurrer to the evidence.

"Under our practice, the only mode of taking away from the jury the determination of the weight to be given to evidence is by demurring to it. A motion to strike out is not equivalent to a demurrer to the evidence, as counsel for plaintiff in error contends, citing Fowlkes *v.* Southern R. Co., 96 Va. 742, 32 S. E. 464. The decision in that case only recognized and applied the universally admitted law that the court determines whether evidence is admissible or not, and, in the exercise of this function, admits or excludes it, on objection to it when offered, or on motion to strike it out, if it has been improperly admitted." Southern R. Co. *v.* Cooper, 98 Va. 299, 36 S. E. 388.

In Johnson *v.* Railroad Co., 25 W. Va. 570, it is said: "The rule is settled in this state, that a party who moves to exclude the evidence of the opposite side occupies the position of a demur-

rant to such evidence, at least as to the rule of construing it." See, in accord, Dresser *v.* Transportation Co., 8 W. Va. 553; Schwarzbach *v.* Protective Union, 25 W. Va. 622; Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 242; James *v.* Adams, 16 W. Va. 245; Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168.

A motion to exclude or strike out evidence is not in all cases the equivalent of a demurrer to evidence, and should not in practice, without modification, be permitted to supersede and replace such demurrer. Bon Aqua Imp. Co. *v.* Standard Fire Ins. Co., 34 W. Va. 764, 12 S. E. 771.

This would seem to have reference to the propriety of such motion in certain cases. The same result follows when the court tries a case in lieu of a jury. See Board, etc., *v.* Parsons, 24 W. Va. 551.

When Proper.—Where, on a jury trial, there is any evidence tending to sustain the plaintiff's demand, the court ought not to strike out that evidence. Powell *v.* Love, 36 W. Va. 96, 14 S. E. 406.

A motion by the defendant to exclude the plaintiff's evidence, upon the ground that it is not sufficient to warrant a verdict in his favor, will not be granted, if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case. If it tend to prove the plaintiff's case in any degree whatever, the case can not be withdrawn from the jury. The motion can never prevail or be sustained merely because the court may think the weight of evidence is against the plaintiff. Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12.

Variance.—On a motion to exclude evidence, verbal or written, because of a variance, the court should regard the party moving to exclude the evidence in the light of a demurrant, and the party offering the evidence in the light of a demurree, although there is in fact no formal demurrer. The court should consider, upon such motion, the plaintiff's evidence with all the favor and give it all the force and draw from it all the inferences it would be entitled to if there was a formal demurrer filed thereto by the party making the motion. And in such case, if, in the judgment of the court, according to the rules governing demurrers to evidence, the party offering the evidence would, on a demurrer thereto by the opposite party, be entitled to judgment thereon in his favor so far as relates to the establishment of the contract, then the court should not exclude the evidence from the jury. By this practice the business of the court may be greatly expedited, no principle violated and justice be satisfactorily administered. James *v.* Adams, 8 W. Va. 568.

In an action at law, where the defendant appears and pleads the general issue, and the plaintiff introduces all his evidence in chief to the jury, and then rests his case, and the defendant moves the court to exclude the evidence from the jury upon the ground that there is a material variation between the declaration and the proof, if, from the whole evidence, it clearly appears to the court that the plaintiff's evidence fails to support the issue on the part of the plaintiff, the court should exclude the evidence from the jury. In such case the court should regard the party moving to exclude the evidence in the light of a demurrant, and the party adducing the evidence in the light of a demurree, although there is in fact no demurrer. The court should consider, upon such motion, the plaintiff's evidence with all the favor, and give it all the force and draw therefrom all the inferences, it would be entitled to if there was a demurrer filed thereto by the party making the motion to exclude the evidence. And in such case, if in the judgment of the court, according to the rules governing demurrers to evidence, the party offering the evidence would, on a demurrer thereto by the opposite party,

be entitled to judgment thereon in his favor, then the court should not exclude the evidence from the jury. Dresser *v.* Transportation Co., 8 W. Va. 553.

Points of Dissimilarity.—A motion to exclude the evidence of the plaintiff from the jury differs in several respects from a demurrer to the evidence. In the first place, it must be made before the defendant has given in his testimony; and it has been held, by this court, in Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12, that, "after the defendant has given in his own evidence, a motion to strike out all the evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff, should not be granted;" while, in a demurrer to evidence, the whole evidence offered by each party is set forth, and, if it is not so done, the question is raised upon the joinder in the demurrer, and the action of the court may be then excepted to. Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737.

Points of Similarity.—On the other hand, a motion of the defendant to set aside the verdict and grant a new trial, or a motion to exclude evidence, will be considered as admitting the truth of all the evidence introduced by the plaintiff, who is treated as demurree, and all inferences therefrom, that can fairly be inferred by a jury, and as waiving all the evidence on the part of the defendant, who is treated as the demurrant, which contradicts that offered by the demurree, and all inferences from his own evidence which do not necessarily flow from it. Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 242; Southwest Virginia Imp. Co. *v.* Andrew, 86 Va. 270, 9 S. E. 1015.

At What Stage of Proceedings Allowed.—After the defendant has given in his own evidence or a material part, his motion to strike out all the evidence, or plaintiff's evidence, on the ground that it is not sufficient to sustain the issue on the plaintiff's part, should not be granted, but he should be left to his demurrer to the evidence. Woodell *v.* West Virginia Imp. Co., 38 W. Va. 23, 17 S. E. 386; Carrico *v.* West Virginia, etc., R. Co., 35 W. Va. 389, 14 S. E. 12; Overby *v.* Chesapeake, etc., R. Co., 37 W. Va. 524, 16 S. E. 813; Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901.

3. Form and Contents of Demurrer to Evidence.

a. Signature.

The failure of the plaintiff's counsel to sign the demurrer does not necessarily affect the demurrer. Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

b. Contents of Demurrer.

In General.—In a demurrer to the evidence all of the testimony on both sides ought to be inserted. Hyers *v.* Green, 2 Call 555; Hyers *v.* Wood, 2 Call 574; Childers *v.* Deane, 4 Rand. 406; Green *v.* Judith, 5 Rand. 1; Clopton *v.* Morris, 6 Leigh 278; Hansbrough *v.* Thom, 3 Leigh 147; Richmond, etc., R. Co. *v.* Moore, 78 Va. 93; Hoyle *v.* Young, 1 Wash. 150; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302; Muhleman *v.* Insurance Co., 6 W. Va. 508; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; Garrett *v.* Ramsey, 26 W. Va. 345; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546; Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685; Chapman *v.* Chapter, 46 W. Va. 769, 34 S. E. 768; Harrison *v.* Brock, 1 Munf. 35.

The modern practice requires the demurrant to tender with and as a part of his demurrer to evidence, a statement of all the evidence on both sides, in order to save the demurree the inconvenience of delay, and in taking a bill of exceptions to the refusal of the court to have made a part of the demurrer, omitted evidence which he

deems essential to a correct decision on the demurrer. This latter course he may pursue or refuse to join in the demurrer, and if he is compelled to join in the demurrer, this ruling of the court comes under review in the appellate court under an assignment of error to the judgment of the trial court upon the demurrer to the evidence. Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

In discussing the office of a demurrer to evidence, the learned author of Robinson's Practice, vol. 1 (old Ed.), page 351, says, that to avoid inconvenience, the modern practice is (especially in Virginia, where it has been sanctioned by repeated decisions of the court of appeals) to put all the evidence on both sides in the demurrer, and then to consider the demurrer as if the demandant had admitted all that could reasonably be inferred by a jury from the evidence given by the other party, and waived all the evidence on his part which contradicted that offered by the other party, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it. With these limitations, the party, whose evidence is demurred to, has all the benefits which the ancient practice was intended to give him, without subjecting the other party to its inconveniences; and no disputed fact is taken from the jury and referred to the court. Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

In West Virginia it has been long held, that the demurrer should set out the whole evidence on both sides for the consideration of the court. In most other states none but the evidence demurred to is set out or considered. So that the plaintiff can never safely demur to the defendant's evidence unless the defendant admits the plaintiff's case and pleads in bar or avoidance thereof. Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

On demurrer to evidence the rule is to certify and consider the whole evidence as though on a motion to set aside a verdict in favor of the demurree. Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

Limitation of Rule.—In a demurrer to evidence, it is not the practice, nor is it necessary, to state on the face of the record that the evidence set forth is all the evidence that was offered, but it is necessary that the whole evidence should be set out. "It is true that it has long been held that the whole evidence, both of the plaintiff and defendant must be set out; yet it has often been said that the forms of the law are the best evidences of the law, and when we look at 1 Rob. Forms, p. 121; 4 Minor Inst., pt. 1, p. 832; 1 Bart. Law Pr., p. 685; and Hutch. Treat. W. Va., p. 990,—we find that none of these forms contain the clause that the foregoing is all of the evidence offered. In the case of Childers *v.* Deane, 4 Rand. (Va.) 408, it was held, that a demurrer to evidence should contain the evidence on both sides. See also, Hoyle *v.* Young, 1 Wash. (Va.) 152; Green *v.* Judith, 5 Rand. (Va.) 1; Harrison *v.* Brock, 1 Munf. 35; and numerous other cases,—where it is held that the whole evidence must be set out; that is, not only that offered by the plaintiff, but that offered by the defendant." Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737.

Joinder in Demurrer.—The court should not compel a joinder in a demurrer to the evidence, unless all of the evidence is set out in such demurrer. Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737.

4. When Demurrer to Be Tendered.

At What Stage of Proceedings.—A demurrer to evidence may be allowed at any time before the jury retire, although the party demurring may have examined witnesses. "To permit a party to go fully into the trial, and after demurring to the evidence, take

his chance with the jury, and failing there, to try the court, would be highly improper, and repugnant to the spirit of the law, which prevents a plaintiff from suffering a nonsuit after the jury have retired. On the other hand, it would be equally improper to preclude him from a demurrer, because he had examined witnesses." Hoyle *v.* Young, 1 Wash. 150, 1 Am. Dec. 446.

Defendant may demur at the completion of the plaintiff's case. Union Steamship Co. *v.* Nottinghams, 17 Gratt. 115.

5. Parties to the Demurrer.

"According to the holdings of the courts of other states a demurrer to evidence in a case of this character where the affirmative of the issue is with the plaintiff, would be improper, it being held, that a party on whom rests the burden of the issue, can not successfully demur to the evidence, as his own evidence can not be considered on demurrer. 6 Ency. Plead. & Prac. 440; Goodman *v.* Ford, 23 Miss. 592; Stiles *v.* Inman, 53 Miss. 469; Fritz *v.* Clark, 80 Ind. 591; Stanley *v.* N. W. M. I. Co., 95 Ind. 254; Lyons *v.* Terre Haute R. Co., 101 Ind. 420; Pickel *v.* Isrigg, 6 Fed. Rep. 676. Such, however, has not been the practice in this state. The rule has been that either party may demur and that all the evidence must be certified and considered by the court, giving the demurree the full benefit of all just inferences and disregarding the demurrant's evidence wherein it conflicts with that of the demurree. It is true this court held in the case of Bennett *v.* Perkins, 47 W. Va. 425, second point in syllabus, 'that either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue.' This is a departure in some degree from the former holdings of this court and is a rule that applies where only the evidence of the demurree is considered." Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

The rule is that either party may demur to the evidence, with the following qualifications: If the case be clearly against the party offering the demurrer to the evidence, or the court should doubt what facts should reasonably be inferred from the evidence demurred to, or the object is to delay, then the party will not be allowed to demur. Whittington *v.* Christian, 2 Rand. 353; Eubank *v.* Smith, 77 Va. 206; Richmond, etc., R. R. Co. *v.* Moore, 78 Va. 93; Rohr *v.* Davis, 9 Leigh 30; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944; Dunbar *v.* Beale, 5 Munf. 24; Thweat *v.* Finch, 1 Wash. 217; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; Shaw *v.* County Court, 30 W. Va. 488, 4 S. E. 439; South Roanoke Land Co. *v.* Roberts, 7 Va. Law Reg. 247, 99 Va. 487, 39 S. E. 133.

Hyers *v.* Green, 2 Call 555, is cited in Clark *v.* Richmond, etc., R. Co., 78 Va. 713, for the proposition that either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join in the demurrer unless the case be plainly against the demurrant, and his object in demurring seems to be clearly nothing else but delay.

"Plaintiff or defendant may demur to the evidence, and the demurrant must set out the whole evidence; and the court, unless it be plainly against the demurrant, and appears to be resorted to only for delay, should compel the other party to join in the demurrer without requiring the demurrant to make on the record any admission of inferences of fact. But it is for the court to decide all inferences fairly deducible from the evidence demurred to." Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768, citing Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800.

The right of a plaintiff to demur to

the defendant's evidence in an action to enforce the collection of a stock subscription, is not taken away by the act of assembly (1897-98, p. 16), providing that in such cases the defendant shall be entitled to a jury where the amount involved exceeds $20. Demurrers to evidence have been, time out of mind, a part of the orderly and regular procedure in courts of common law, and there is nothing in the act which discloses any intention on the part of the legislature to alter or abridge them. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

And the fact of negligence constitutes no exception to the general rule. Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901.

The general rule is, that a party has a right to demur to the evidence; and an action for negligence is no exception to the rule. The exceptions to the general rule, are, when the case is clearly against him; or where the court doubts what facts should reasonably be inferred from the evidence demurred to. Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619.

6. Admissions, Inferences and Waiver.

a. In General.

On a demurrer to evidence, the demurrant must be considered as admitting the truth of his adversary's evidence, and all just inferences which can be drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences, it would seem, from his own evidence (though not in conflict with his adversary's) which do not necessarily result therefrom. Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; Stephens *v.* White, 2 Wash. 203; Lowry *v.* Mountjoy, 6 Call 55; Green *v.* Judith, 5 Rand. 1; Hansbrough *v.* Thom, 3 Leigh 147; Clopton *v.* Morris, 6 Leigh 278; Ware *v.* Stephenson, 10 Leigh 155; Tutt *v.* Slaughter, 5 Gratt. 364; Union Steamship Co. *v.* Nottinghams, 17 Gratt. 119; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Gillett *v.* American, etc., Co., 29 Gratt. 566; Long *v.* Ryan, 30 Gratt. 722; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; Horner *v.* Speed, 2 Pat. & H. 616; Orange, etc., R. Co. *v.* Miles, 76 Va. 773; Eubank *v.* Smith, 77 Va. 206; Richmond, etc., R. Co. *v.* Moore, 78 Va. 93; Clark *v.* Richmond, etc., R. Co., 78 Va. 709; Rudd *v.* Richmond, etc., R. Co., 80 Va. 546; Farley *v.* Richmond, etc., R. Co., 81 Va. 783; Jones *v.* Old Dominion Cotton Mills, 82 Va. 140; Virginia Mining, etc., Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689; Tucker *v.* Sandidge, 85 Va. 546, 8 S. E. 650; Adams *v.* Hays, 86 Va. 154, 9 S. E. 1019; Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, 9 S. E. 990; Norfolk, etc., R. Co. *v.* Thomas, 90 Va. 205, 17 S. E. 884; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896; Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424; Richmond, etc., Co. *v.* West Point, 94 Va. 668, 27 S. E. 460; McDonald *v.* Norfolk, etc., R. Co., 95 Va. 106, 27 S. E. 821; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302; Watts *v.* Southern Bell, etc., Co., 100 Va. 45, 40 S. E. 107; University of Va. *v.* Snyder, 100 Va. 567, 42 S. E. 337; Muhleman *v.* National Ins. Co., 6 W. Va. 508; Miller *v.* Insurance Co., 8 W. Va. 515; Stolle *v.* Aetna Fire, etc., Ins. Co., 10 W. Va. 546; Levy *v.* Peabody Ins. Co., 10 W. Va. 560; Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Allen *v.* Bartlett, 20 W. Va. 46; Garrett *v.* Ramsey, 26 W. Va. 345; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455; Hefflebower *v.* Detrick, 27 W. Va. 16; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Lowther *v.* Lowther, 30 W. Va. 103, 3 S. E. 42;

Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29; Bulkey *v.* Sims, 48 W. Va. 104, 35 S. E. 971.

In Allen *v.* Bartlett, 20 W. Va. 52, the court, citing Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619, said: "The rule of law in cases of demurrer to evidence is well settled in this state. In such cases the general rule may be stated as follows: The demurrant must be considered as allowing full credit to all the evidence of the demurree, and admitting all facts directly proved by, or that a jury might fairly infer, from the evidence; and as waiving all the parol evidence on his part which contradicts that offered by the demurree, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it." See also, Hefflebower *v.* Detrick, 27 W. Va. 21.

In the case of Clopton *v.* Morris, 6 Leigh 278, it was held, that on a demurrer to evidence the demurrant waives all his own evidence that at all conflicts with that of the other party, admits the truth of his adversary's evidence, admits all inferences of fact that may fairly be deduced from that evidence, and submits it to the court to deduce such fair inferences. See Muhleman *v.* National Ins. Co., 6 W. Va. 508; Ware *v.* Stephenson, 10 Leigh 165; Cramer *v.* Pomeroy, 47 W. Va. 56, 34 S. E. 762.

"In the 6 Ency. Plead. & Prac. 444, it is said under title of exception to the general rule that: 'In two states where the practice of inserting all the evidence on both sides into the demurrer obtains, the rule is not quite so broad. The defendant (demurrant) is considered to have waived all his evidence which is contradictory to that of the other party, all evidence the credit of which is impeached and all inferences from the evidence which do not necessarily flow from it.' The two states which are an exception to the rule that 'the demurrer is only applicable to evidence of the party holding the affirmative of the issue,' are Virginia and West Virginia. Green *v.* Judith, 5 Rand. 1; Muhleman *v.* National Ins. Co., 6 W. Va. 508; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; Talbott *v.* West Virginia, etc., Railway Co., 42 W. Va. 560, 26 S. E. 311; Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518." Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

b. Admissions.

(1) In General.

Credibility of Witnesses.—With us the evidence on both sides is inserted in the demurrer, and the court, by a retrospective process, when it comes to pass upon the demurrer, is to consider all the demurrant's evidence in conflict with that of the demurree, withdrawn, the credibility of his witnesses admitted, and all the facts admitted, which the demurree's evidence, thus considered, proves or conduces to prove or which may be reasonably inferred from the whole evidence, both direct and circumstantial; and in drawing inferences as to what the evidence, whether direct or circumstantial, and presumptive conduces to prove, if the evidence be susceptible of several constructions, differing in degrees of probability, it is incumbent upon the court to adopt those most favorable to the demurree, provided they be not forced, strained or manifestly repugnant to reason. Miller *v.* Insurance Co., 8 W. Va. 515; Horner *v.* Speed, 2 Pat. & H. 616.

(2) Admissions upon Record.

The former practice was to require the party demurring, to admit upon the record the existence of all the facts which the evidence offered by the other party conduced to prove, and these facts were to be ascertained by the court. Whatever may be the comparative merits of the old and the later rule, about which there has been among

the judges some difference of opinion, the rule, as stated above, is now well settled, and nowhere in our courts is it now controverted. Richmond, etc., R. Co. *v.* Moore, 78 Va. 93.

A demurrant to the evidence is not required to make a formal admission on the record of the inferences of fact which the court may think fairly deducible from the evidence demurred to. Whittington *v.* Christian, 2 Rand, 353; Hansbrough *v.* Thom, 3 Leigh 147; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608.

c. Inferences.

(1) In General.

By a demurrer to the evidence the demurrant allows full credit to the evidence of the demurree, and admits all the facts directly proved by, or that a jury might fairly infer from, the evidence. And in determining the facts inferrible, inferences most favorable to the demurree will be made, in cases in which there is a grave doubt which of two or more inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should incline to the inference favorable to the demurrant, to justify it in making that inference the ground of its judgment. Unless there be a decided preponderance of probability of reason against the inference that might be made in favor of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained and the party whose evidence is thus withdrawn from its proper forum is entitled to have it most beningnly interpreted by the substitute. He ought to have all the benefit that might have resulted from a decision of the case by the proper forum. If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict of a jury ascertaining these facts would not be set aside, merely because the court might have made inferences different from those made by the jury. The language of Judge Stanard in Ware *v.* Stephenson, 10 Leigh 155, as to the effect of a demurrer to evidence, is quoted with approval in many subsequent cases both in Virginia and West Virginia. Ware *v.* Stephenson, 10 Leigh 155, is cited in Trout *v.* Virginia, etc., R. Co., 23 Gratt. 638; Richmond, etc., R. Co. *v.* Moore, 78 Va. 97; Southwest Va. Imp. Co. *v.* Andrew, 86 Va. 279, 9 S. E. 1015; Clark *v.* Richmond, etc., R. Co., 78 Va. 712; Union Steamship Co. *v.* Nottinghams, 17 Gratt. 120; Miller *v.* Ins. Co., 8 W. Va. 533; Heard *v.* Railway Co., 26 W. Va. 458.

By demurring to the evidence, the demurrant admits, in favor of the demurree, all inferences of fact that may be fairly deduced from the evidence. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 561, 26 S. E. 311; Garrett *v.* Ramsey, 26 W. Va. 345; Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461.

Upon a demurrer to the evidence the court is required to make all inferences in favor of a verdict that the jury might have made. Simons *v.* Southern R. Co., 96 Va. 152, 31 S. E. 7; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Cochran *v.* Assurance Co., 93 Va. 553, 25 S. E. 597.

In determining the facts inferable, inferences most favorable to the demurree will be made, in cases in which there is grave doubt which of two or more inferences shall be deduced. Ware *v.* Stephenson, 10 Leigh 164; Miller *v.* Insurance Co., 8 W. Va. 515; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546; Garrett *v.* Ramsey, 26 W. Va. 345; Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168; Schwarzbach *v.* Ohio Valley, etc., Union, 25 W. Va. 642; Flannegan *v.* Chesapeake, etc., R. Co., 40 W. Va. 436, 21 S. E. 1028.

Inferences most favorable to the de-

murree are adopted unless they are strained, forced or contrary to reason. Horner *v.* Speed, 2 Pat. & H. 616; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 368; Bryan *v.* Peabody Ins. Co., 8 W. Va. 605; Lowther *v.* Lowther, 30 W. Va. 103, 3 S. E. 42; Clopton *v.* Morris, 6 Leigh 278; Stephens *v.* White, 2 Wash. 203.

The rule laid down in Heard v. Chesapeake, etc., R. Co., 26 W. Va. 455, for determining what facts shall be considered as established in cases of demurrer to evidence is, that when all of it is adduced by the demurree, the court shall regard the demurrant as necessarily admitting by his demurrer not ony the credit and truth of all the evidence but all inferences of fact that may fairly be deduced from it; and determining the facts inferable from the evidence, inferences most favorable to the demurree will be made in cases where there is grave doubt which of two or more inferences shall be drawn. Unless there is a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor. Huntington Nat. Bank *v.* Loar, 51 W. Va. 540, 41 S. E. 901.

On the trial of an action q. c. f. by this court in Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455 (Syl., pt. 1), the demurree is not entitled to the benefit of evidence offered in the case by him, nor to any inferences to be drawn therefrom, which evidence is incompetent and inadmissible, but which has been improperly admitted over the objection of demurrant. Huntington Nat. Bank *v.* Loar, 51 W. Va. 540, 41 S. E. 901.

(2) Illustrative Cases.

On the trial of an action q. c. f. brought by the heirs of R. A., the defendant demurs to the plaintiffs' evidence and by the evidence stated in the demurrer, it appears that R. A. died seized; there is no positive proof that the plaintiffs, his heirs, ever entered after his death, but there is proof that the defendant's possession did not commence until a year after R. A.'s death. Held, that, on this evidence in a demurrer to evidence, it may fairly be inferred, that R. A.'s heirs entered into possession immediately upon their ancestor's death and that, therefore, they are entitled to recover. Marsteller *v.* Coryell, 4 Leigh 325.

Withholding Evidence.—See the title PRESUMPTIONS AND BURDEN OF PROOF.

Where a party has in his possession or under his control, evidence, by the introduction of which at the trial he would be able to render certain, a fact material to his success, which is otherwise left in doubt, and he withholds such evidence, the court will, upon a demurrer to the evidence introduced by his adversary, presume that the fact was against him. Hefflebower *v.* Detrick, 27 W. Va. 16.

In an action for libel, if the communication is privileged, the presumption is that there was no malice in its publication, and the burden is upon the plaintiff to prove malice. Where the truth or falsity of a privileged communication is in no wise involved, but only the question of good faith in its publication, malice will not be presumed even on a demurrer to the evidence by the defendant. Brown *v.* Norfolk, etc., R. Co., 100 Va. 619, 42 S. E. 664.

Ejectment.—On a demurrer to the evidence by the defendant in an action of ejectment, where the defendant, for title, relies solely on a tax deed, if the evidence is such that the jury might infer that the tax for which the land was sold had been paid, judgment should be given against him. Brown *v.* Bradshaw, 100 Va. 124, 40 S. E. 617.

Collision in Admiralty.—In an action for injury by defendant's steamer to plaintiff's schooner, the only proof was of a collision on a dark night; and defendant demurred to plaintiff's evi-

dence without producing any himself. Held, though, when the collision happens in the daytime, it may reasonably be inferred that the steamer was in fault, yet when it happens on a dark night such an inference can not be made. The owners of the steamer being required under heavy penalties, to keep certain lights on board, and also a lookout, it is to be presumed that the law was complied with. Union Steamship Co. *v.* Nottinghams, 17 Gratt. 115.

In detinue for slaves the question being whether a transaction between plaintiff and defendant's testator, was a gift or a sale of slaves by the latter to the former, the defendant demurred to the plaintiff's evidence. Held, the evidence states facts, from which it may fairly be inferred that the transaction was a sale, though there was no express proof of any valuable consideration paid or stipulated. Hansborough *v.* Thom, 3 Leigh 147. See further as to what the court would be justified in inferring from the evidence. Tutt *v.* Slaughter, 5 Gratt. 364; Biggers *v.* Alderson, 1 Hen. & M. 54.

Upon a motion upon a forthcoming bond, there was a demurrer to the evidence by the defendant; it was held that the court was justified in presuming that upon the indorsement of the clerk upon the bond that the bond was returned by the sheriff as a forfeited bond, it being the duty of the sheriff to return such bond unless the amount has been paid. Land Co. *v.* Calhoun, 16 W. Va. 361.

Bills, Notes and Checks.—But the court on a demurrer to the evidence will not infer, in the absence of any evidence on the subject, that the postoffice of an endorser of a negotiable note, was at the place to which the protest states notice of the dishonor was sent. Rine *v.* Rice, 2 Pat. & H. 529.

In debt against the endorsers of a protested note discounted at a bank at C, the protest of the notary states that "he placed in the postoffice of this place four written notices, one directed to the payer, and one directed to H. & L. at B., Va., endorsers, informing them, etc." On demurrer to the evidence, held, the jury would have been warranted to infer from this evidence that the residence of the defendants was in B.; and upon a demurrer to the evidence, the court must make the same inference. Linkous *v.* Hale, 27 Gratt. 668.

A corporation brings suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio, and the general issue is pleaded. At the trial the defendant demurs to the plaintiff's evidence and the demurrer contains no direct proof of the legal incorporation of the plaintiff, nor can the fact be fairly inferred from the evidence included in the demurrer. Held, this defect is fatal to the plaintiff's case. Jackson *v.* Bank, 9 Leigh 240.

Master and Servant—Duty to Repair.—M. was on December 24th, 1879, conductor of freight train on R. & D. R. R., running from Greensboro to Richmond. A car was taken into train during the night at Burkville, the handle of the ladder whereof had been broken off long enough for the fracture to appear weatherworn. Next morning at Powhatan station, M., attempting to descend this ladder, face towards it, caught at, and would have caught the handle, had it been in its place, but fell and was killed. Conflict in evidence as to whether M. was drunk, and negligent or otherwise. In a suit by personal representative of M. for damages, defendant demurred to the evidence. It was held, that the defendant was guilty of negligence in permitting the car ladder to remain out of order, which negligence caused M.'s death, and renders defendant liable for damages, and under the rule governing demurrers to evidence, M. contributed in no way to the accident by his own misconduct. Richmond, etc., R. Co. *v.* Moore, 78 Va. 93.

Insurance.—The designation in the description of the building, viz; "oc-

cupied as a hardware store and dwelling," being no warranty, within itself, that it should continue to be so occupied; and the first floor of the building having been constantly used and occupied during the time the policy ran, and there being no proof that the risk was, in fact, increased by vacating the dwelling part; held, under the circumstances, that the court will not infer the fact, against the demurree, upon the demurrer to evidence. Bryan *v.* Peabody Ins. Co., 8 W. Va. 605.

The evidence of the plaintiff in this case, which is all that can be considered on the defendant's demurrer to the evidence, shows that the insurance company granted the plaintiff an extension of three months, after the time his right to sue would be barred by the terms of the policy, within which to institute an action; that the plaintiff accepted the benefit of the extension, and relied on it; and that the action was brought within the extended period. Though there was evidence upon which the jury might have inferred that the benefit of the extension was not accepted, yet, upon a demurrer to the evidence, or a motion to set aside the verdict of the jury, the court is bound to that interpretation of the facts, and that conclusion from the evidence, which the jury have sanctioned by their verdict. Cochran *v.* London Assurance Corporation, 93 Va. 553, 25 S. E. 597.

d. Evidence Waived.

Rule Stated.—In many of the states of the union, possibly in all except Virginia and West Virginia, the demurrant waives all his evidence. But the rule is otherwise in these jurisdictions, and, as is well understood, the demurrant is entitled to the benefit of all his unimpeached evidence not in conflict with his adversary's, and to all inferences that necessarily flow therefrom. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

In the late case of Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664, the court through Brannon, J., says: "Notwithstanding the holding in Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, and Talbott *v.* West Virginia Railroad Co., 42 W. Va. 560, 26 S. E. 311, that the demurrant does not waive his evidence conflicting with that of the demurree, I think the true rule is that he does do so, as held in the case of Garrett *v.* Ramsey, 26 W. Va. 345, and many prior cases, and Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, and Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8." Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, is also repudiated in Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546. Upon a demurrer to evidence, where the evidence is wholly that introduced by the plaintiff, the demurrant admits not only the truth of the facts proved, but also all that may be fairly inferred from these facts. Lee *v.* Virginia, etc., Bridge Co., 18 W. Va. 299.

It is true that it has been held in West Virginia that either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue. Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8; Hollandsworth *v.* Stone, 47 W. Va. 773, 35 S. E. 864.

But this ruling has been characterized as a departure in some degree from the former holding of the West Virginia court, and applies only where the evidence of the demurree is considered. Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

By demurring to evidence the demurrant is now, under § 9, ch. 131, of the West Virginia Code not held to waive any part of his competent evidence; but where it conflicts with that of the other party it will be regarded as overborne, unless it manifestly appears to be clearly and decidedly preponderant. He admits the credit of the evidence demurred to, and all in-

ferences of fact that may be fairly deducible from the evidence, but only such facts as are fairly deducible; and refers it to the court to deduce such fair inferences. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608; Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311.

In Lee *v.* Hill, 87 Va. 497, 12 S. E. 1052, the court said: "The evidence for the defendant shows clearly that it (the contract) was made in August 1886 for one year's service, to commence on the first day of October next ensuing; and, as this is not in conflict with the plaintiff's evidence it was not waived by the demurrer to evidence."

Plaintiff or defendant may demur to the evidence, and the demurrant must set out the whole evidence; and the court, unless it be plainly against the demurrant, and appears to be resorted to only for delay, should compel the other party to join in the demurrer without requiring the demurrant to make on the record any admission of inferences of fact; but it is for the court to deduce all inferences fairly deducible from the evidence demurred to. Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608.

Ejectment.—If the rule stated in Bennet *v.* Perkins, is to be adopted in West Virginia, the plaintiff having the affirmative of the issue in an ejectment case can not demur to the defendant's evidence without waiving all his own evidence, and thus virtually allow the case to be decided against him, for he must recover on the strength of his own title, and without evidence he has no title. Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

Conflicting Evidence.—On a demurrer to evidence in this state, the demurrant does not waive all of his evidence, but is entitled to the benefit of all his unimpeached evidence not in conflict with his adversary's, and to all inferences that necessarily flow therefrom. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

Where a plaintiff, in answer to a general question as to the duties of his intestate, specifies certain duties, but it is apparent that he did not undertake to give a comprehensive statement of all his duties, and the defendant does not deny the plaintiff's version of one contract, but affirms that there was a second contract, made at a later day, by which those duties were increased, and this latter evidence is not contradicted by the plaintiff, though given in his hearing, it can not be reasonably and fairly said that there is a conflict of evidence, even on a demurrer to evidence by the defendant. The testimony of the defendant is in the nature of a confession and avoidance, and the matter of avoidance is not controverted. Bowers *v.* Bristol Gas, etc., Co., 100 Va. 533, 42 S. E. 296.

Upon a demurrer to the evidence by the defendant in an action brought by two parties suing as partners, where the evidence as to whether they were partners or not is conflicting, the evidence of the defendant will be rejected, and the parties held to be partners in accordance with evidence of the plaintiffs. Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

7. Joinder in Demurrer.

a. Necessity for.

There should be a joinder in demurrer to raise an issue, but the judgment will not be reversed because the joinder is not signed by the parties. Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302. But if there is no joinder in the demurrer to the evidence, the court may give judgment after argument, there being no exception taken by the party not joining in the demurrer. Hudson *v.* Johnson, 1 Wash. 10.

b. Formal Admissions of Record.

It is the settled practice in Virginia, on demurrers to evidence, that the demurrant shall set out the whole evidence, and that the court may compel

the other party to join in the demurrer, without requiring the demurrant to make a formal admission on the record, of all the inferences of fact which the court may think fairly deducible from the evidence demurred to. Hansbrough *v.* Thom, 3 Leigh 147; Maple *v.* John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

c. When Compelled.

In General.—In a civil case either party has a right to demur to the evidence except where the evidence is clearly against him, or the court doubts what facts should be reasonably inferred from the evidence demurred to; and where a party has a right to demur it is the duty of the court to compel the other party to join in the demurrer. Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238; Eubank *v.* Smith, 77 Va. 206; Clark *v.* Richmond, etc., R. Co., 78 Va. 709; Green *v.* Judith, 5 Rand. 1; Hansbrough *v.* Thom, 3 Leigh 147; Whittington *v.* Christian, 2 Rand. 353; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Boyd *v.* Savings Bank, 15 Gratt. 501; Green *v.* Buckner, 6 Leigh 82; Rohr *v.* Davis, 9 Leigh 30; Stephens *v.* White, 2 Wash. 203; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Shaw *v.* County Court, 30 W. Va. 488, 4 S. E. 439; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

Unless the case be clearly against the party offering the demurrer, or unless the court should doubt what facts should be fairly inferred from the evidence demurred to, the court should compel the plaintiff to join in the demurrer. In the case at bar, there was no doubt as to the facts proved by the evidence, and those facts plainly showed that the case was clearly in favor of the demurrant; and therefore, the court did not err in compelling the plaintiff to join in the demurrer. Shaw *v.* County Court, 30 W. Va. 488, 4 S. E. 439.

Where the plaintiff's evidence is not doubtful and uncertain, but defective only, the defendant may demur. Knox *v.* Garland, 2 Call 241.

In Clark *v.* Richmond, etc., R. Co., 78 Va. 709, the court, citing Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619, said: "The plaintiff in error assigns as error in this case that he was compelled in the circuit court to join in the demurrer. Either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join in the demurrer, unless the case be plainly against the demurrant, and his object in demurring seems to be clearly nothing else but delay." See also, as to right of either party to demur and compel the adverse party to join in the demurrer unless the case be plainly against the demurrant, and his object be nothing else but delay, Deaton *v.* Taylor, 90 Va. 222, 17 S. E. 944; Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 173, 21 S. E. 238; Hyers *v.* Wood, 2 Call 574; Hansbrough *v.* Thom, 3 Leigh 147; Rohr *v.* Davis, 9 Leigh 30; Boyd *v.* Savings Bank, 15 Gratt. 503; Green *v.* Buckner, 6 Leigh 82; Eubank *v.* Smith, 77 Va. 206.

Negligence constitutes no exception to the rule that either party may demur to the evidence; it is the duty of the court to compel the other party to join in the demurrer to evidence. See Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 21 S. E. 238. Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619.

A Test.—See post, "Test in Ruling on Action of Trial Court," I, A, 11, a.

Where it would be the duty of the trial court to set aside a verdict in favor of the defendants, the defendants may properly be compelled to join in a demurrer to the evidence. Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Deaton *v.* Taylor, 90 Va. 219, 17 S. E. 944.

Where Evidence Is Documentary.—Where matter in writing is offered in evidence in maintenance of an issue joined between the parties, the opposite party may always demur to the evidence, and compel the party offering the evidence to join in the demurrer, and likewise where the evidence is parol and certain. And wherever a party may properly demur to the evidence, the other party must join in the demurrer. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Boyd *v.* City Savings Bank, 15 Gratt. 501.

If on the trial of a cause, the evidence is documentary, and presents a question of law which is not plainly against the defendant, he is entitled to demur to the evidence, and the court should compel the plaintiff to join in the demurrer. Boyd *v.* City Savings Bank, 15 Gratt. 501.

The rule laid down by Roan, J., in Hyers *v.* Wood, 2 Call 574, is as follows: "The court ought to award a joinder in demurrer where the evidence demurred to is in writing, or, being parol is explicit, and will not admit of variance." See, in accord, Norvell *v.* Camm, 2 Rand. 68; Green *v.* Buckner, 6 Leigh 82; Whittington *v.* Christian, 2 Rand. 353; Rohr *v.* Davis, 9 Leigh 30.

Notarial Certificate of Protest.—"The case under consideration is one about the facts of which, as introduced in evidence and inserted in the demurrer, there can be no doubt. It rests wholly upon the evidence introduced by the plaintiff as already set forth, and the whole, including the notarial certificate of protest, being 'matter in writing,' should, in my judgment, be regarded as documentary evidence, and that the notarial certificate should not be treated as the deposition of the notary, which, though in writing, would not be documentary evidence. But if the notarial protest is not to be regarded as documentary evidence, but only as the deposition of the notary, the plaintiff ought not to have been required to join in the demurrer, if, before he did so, he showed to the court that he had inadvertently omitted to introduce evidence whereby the demand of payment and the service of notice of protest could have been distinctly shown; and, if he had inadvertently joined in the demurrer, he should have been permitted to withdraw his joinder before judgment, upon showing that he had done so, and could supply such omitted evidence." Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

The reason why the party offering the evidence is obliged to join in the demurrer, when the evidence which he offers is in writing, is because there can not be any variance of a matter in writing. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Where Evidence Is Parol.—In Peabody Ins. Co. *v.* Wilson, 29 W. Va. 535, 2 S. E. 892, it is said: "Parol evidence is sometimes certain, and no more admitting of any variance than a matter in writing. The reason for obliging the party offering evidence in writing to join in demurrer applies to this sort of parol evidence, but it does not apply to parol evidence which is loose and indeterminate. But if the party who demurs will admit the existence of the fact the evidence of which is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact which the circumstances offered in evidence conduce to prove, there will be no more variance in this parol evidence than in a matter in writing, and the reasons for compelling the party who offers the evidence to join in the demurrer will then apply. It follows, as a necessary conclusion, that, if the demurrant will confess the matter of fact to be true, then he is admitted to his demurrer; and, wherever a party may probably demur to the evidence, the other party must join in demurrer. Baker's Case, 2 Croke 752; Wright *v.* Pindar, Aleyn, 18 Style 22; Boyd *v.*

City Sav. Bank, 15 Gratt. 501; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Green *v.* Buckner, 6 Leigh 82; Rohr *v.* Davis, 9 Leigh 30; Whittington *v.* Christian, 2 Rand. (Va.) 357; Hansbrough *v.* Thom, 3 Leigh 147; Stephens *v.* White, 2 Wash. (Va.) 203; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455."

d. When Court Will Refuse to Compel Joinder.

Where Evidence Is Improperly Stated.—In making up the demurrer, counsel for both parties are presumed to be present, and the court should not compel a joinder in the demurrer unless the evidence is properly stated. Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737.

Where an objection is made to a demurrer to evidence, that the testimony of a witness has not been correctly taken down, and the witness himself has left the court, so that he can not correct the supposed error; this will not be a sufficient excuse for not joining in the demurrer, unless the error complained of is stated, and it also appears that it would affect any of the questions to be decided by the court, on the demurrer. Norvell *v.* Camm, 2 Rand. 68.

Where Leave Is Asked to Introduce Further Evidence.—The court may refuse to compel the plaintiff to join in a demurrer to the evidence, when such plaintiff asks leave to introduce other relevant evidence though he had rested his case. Hunter *v.* Snyder, 11 W. Va. 198.

Burden of Proof on Demurree.—The defendant ought to be compelled to join in a demurrer to evidence, when the burden of proof is upon him, unless the case is clearly against the plaintiff, or the court doubts what facts should reasonably be inferred from the evidence. Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

Where Evidence Is against Demurrant.—If one of the parties offer a demurrer to the evidence, the court, if the evidence be clearly against him, may refuse to compel the other party to join in, or where the facts are doubted. Thweat *v.* Finch, 1 Wash. 217; Wroe *v.* Washington, 1 Wash. 357; Dunbar *v.* Beale, 5 Munf. 24; Brockenbrough *v.* Ward, 4 Rand. 352; Boyd *v.* Savings Bank, 15 Gratt. 501; Eubank *v.* Smith, 77 Va. 206; Hoyle *v.* Young, 1 Wash. 150; Merchants', etc., Bank *v.* Evans, 9 W. Va. 385; Moseley *v.* Jones, 5 Munf. 23; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608, 32 L. R. A. 800; Chapman *v.* Charter, 46 W. Va. 769, 34 S. E. 768.

Where the case is plainly against the demurrant, or where there is doubt as to the facts proved by, or the proper inferences deducible from the evidence, the court should always refuse to compel a joinder in the demurrer; for to do so would be to usurp the province of the jury. Eubank *v.* Smith, 77 Va. 206.

In a civil action either party may demur to the evidence, and it is the duty of the trial court to compel a joinder therein, unless the evidence is plainly against the demurrant, or it is doubtful what facts should be reasonably inferred from the evidence. Mere conflict in the evidence is no reason for refusing to compel a joinder. Under a former practice a demurrer to evidence operated as a delay of a decision for at least one term, and hence the courts refused to compel a joinder in a very plain case against the demurrant, but as the practice no longer exists, this is no longer a ground for refusal. University of Va. *v.* Snyder, 100 Va. 567, 42 S. E. 337.

Where Evidence Is Parol and Contradictory and Clear.—Where the evidence is parol and uncertain or contradictory, joinder will not be compelled. Hyers *v.* Wood, 2 Call 575; Hyers *v.* Green, 2 Call 556; Harrison *v.* Brock, 1 Munf. 22.

The court may refuse to compel the other party to join in demurrer, when

the evidence is clear. See Thweat *v.* Finch, 1 Wash. 220; Wroe *v.* Washington, 1 Wash. 362; Dunbar *v.* Beale, 5 Munf. 24. Or where the parol testimony is loose, indeterminate, and circumstantial. Hyers *v.* Wood, 2 Call 589; Green *v.* Buckner, 6 Leigh 83. In Merchants', etc., Bank *v.* Evans, 9 W. Va. 383, the court, citing Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619, said: "The court ought not to compel a joinder in demurrer, when the case is clearly against the party demurring (Hoyle *v.* Young, 1 Wash. 150), or when the court doubts what facts should reasonably be inferred from the evidence."

Although, upon a demurrer to evidence, the testimony adduced on both sides ought regularly to be stated, yet, if it be parol and contradictory, the party tendering the demurrer can not, after exhibiting his testimony, compel the other party to join in demurrer; for this, in effect, would be to enable the demurrant to confer credibility on his own witnesses, or at least to carry their credibility to be adjudged by an improper tribunal; the jury, and not the court, being exclusively judges of credibility. Harrison *v.* Brock, 1 Munf. 22.

Notwithstanding, therefore, the demurrant by his demurrer is considered as admitting the truth of all his adversary's evidence, and all just inferences which can properly be drawn therefrom by a jury, and as waiving all his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom; yet, if upon the evidence thus presented for the consideration of the court, it is still a matter of doubt or uncertainty as to what facts are established, or what inferences are fairly deducible from the evidence, it is the duty of the court to refuse to compel a joinder in the demurrer, and to submit the case to the jury. Eubank *v.* Smith, 77 Va. 205.

Under Statute of Insulting Words.—See the title LIBEL AND SLANDER.

In an action for insulting words under the Virginia statute, § 2897 of the Virginia Code of 1887, no demurrer shall preclude the jury from passing thereon, and it is therefore improper for the trial court to compel plaintiff to join in defendant's demurrer to the evidence. Rolland *v.* Batchelder, 84 Va. 664, 5 S. E. 695.

The provision of § 2897 of the Code that no demurrer shall preclude a jury from passing on words made actionable by that section, was inserted for the benefit of plaintiffs in actions brought under that section, and may be waived by them if they so elect. Brown *v.* Norfolk, etc., R. Co., 100 Va. 619, 42 S. E. 664.

e. Review in Appellate Court.

See post, "Appeal and Error," I, A, 11.

(1) Right to Review.

The action of the court in compelling a joinder in the demurrer, is subject to review. Eubank *v.* Smith, 77 Va. 206.

Whether or not a party has the right to demur to the evidence, or may be compelled to join in such demurrer, is a question addressed to the sound judicial discretion of the trial court, subject to review by the appellate court. University of Va. *v.* Snyder, 100 Va. 567, 42 S. E. 337.

(2) Reversible Error.

According to our practice either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join therein, unless the case be plainly against the demurrant, and his object seems to be nothing else but delay. But the power of the court to compel a joinder in the demurrer is one requiring the exercise of judicial discretion, and when exercised, is subject to be reviewed by this court. Trout *v.*

irginia, etc., R. Co., 23 Gratt. 619; ıbank *v.* Smith, 77 Va. 206; Deaton Taylor, 90 Va. 219, 17 S. E. 944.

If the court improperly refuses to mpel a joinder in demurrer to the idence, the judgment should be rsed. Rohr *v.* Davis, 9 Leigh 30. t an erroneous refusal to compel a nder in demurrer, is not ground for ersal, if the evidence set forth in demurrer shows a right in the intiff to recover. Boyd *v.* City Sav- s Bank, 15 Gratt. 501.

Exceptions and Objections.

ut one who objects to being com- led to join in a demurrer to evi- ce must make his objection in the er court, and can not make it for first time in the appellate court. llandsworth *v.* Stone, 47 W. Va. 773, S. E. 864; Merchants', etc., Bank *v.* ns, 9 W. Va. 373.

Entry of Final Judgment.

he court ought to enter final judg- t if the joinder has been properly e and the merits of the case ıght before the court. Fowler *v.* imore, etc., R. Co., 18 W. Va. 579; rrier *v.* Baltimore, etc., R. Co., 20 Va. 424; McGraw *v.* Baltimore, etc., o., 18 W. Va. 361.

Withdrawal of Demurrer.

ter the taking of the testimony in ase, the defendant demurred to the ence, and the plaintiffs joined ein, and immediately after such ler, the defendant asked leave to draw his demurrer, to which the tiffs objected; but the court over- l the objection, and allowed the ırrer to be withdrawn. It was that this court allows to the s below a wide latitude of discre- in all such matters of practice ıg during the trial of the case be- and, in general, will not review discretionary action, unless the has been exercised in a manner y arbitrary, or otherwise ob- ly improper. Burns *v.* Morrison, . Va. 423, 15 S. E. 62; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

9. Introduction of Further Evidence after Case Rested.

"Where the plaintiff gives evidence to the jury, and says he rests his case, and the defendant tenders a demurrer to the evidence then given to the jury, the court may, in the exercise of a sound discretion, permit the plaintiff to give additional relevant evidence to the jury, where it is satisfied that the failure to introduce it was owing to mere inadvertence of counsel, or other sufficient cause, and refused to compel the plaintiff to join in the demurrer to the evidence given to the jury before the additional evidence was amitted." Hunter *v.* Snyder, 11 W. Va. 213; Fairfax *v.* Lewis, 11 Leigh 233; Taliaferro *v.* Gatewood, 6 Munf. 321-323; Howel *v.* Com., 5 Gratt. 664; Livingston *v.* Com., 7 Gratt. 658; Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

The new act concerning demurrers to the evidence provides that after joinder in demurrer, no other evidence shall be admitted and a nonsuit shall not be allowed. Act approved March 14, 1906.

10. Hearing and Determination of Demurrer.

a. Consideration of Evidence by Court.

In General.—On a demurrer to the evidence the only question for the consideration of the court is, whether the evidence supports the issue or not, and the judgment is that it does or does not support it. Humphreys *v.* West, 3 Rand. 516; Briggs *v.* Hall, 4 Leigh 484; Riddle *v.* Core, 21 W. Va. 530.

In Humphrey *v.* West, 3 Rand., at page 516, this court said that "the only question for the consideration of the court on a demurrer to evidence is whether the evidence supports the issue, or not, and the judgment is that it does or does not support it. After the demurrer is joined, the jury may either be discharged, and, if the judgment be that the evidence does support

the issue, a writ of inquiry of damages is awarded, or the jury then impaneled may go on to assess conditional damages." Rhule *v.* Seaboard Air Line R. Co., 102 Va. 343, 46 S. E. 331.

Upon a demurrer by the defendant to the plaintiff's evidence, the court, to ascertain what facts the evidence establishes, must look to the whole of it. Upon such demurrer, in ascertaining the facts established by any one witness, everything stated by him, as well on his cross-examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question, may be supplied in answer to another. And where from one statement considered by itself an inference may be deduced, that inference may be strengthened or repelled by facts declosed in another. Ware *v.* Stephenson, 10 Leigh 155; Horner *v.* Speed, 2 Pat. & H. 616.

How Far Evidence of Demurrant Considered.—Upon a demurrer to the evidence, the demurrant's evidence is considered so far as not contradicted by the evidence of the demurree. Russell Creek Coal Co. *v.* Wells, 96 Va. 416, 31 S. E. 614.

Motion to Exclude Evidence.—This court has decided that a party moving to exclude the plaintiff's evidence from the jury is to be regarded as a demurrant, and the party adducing the evidence as a demurree, although there is in fact, no demurrer. Upon such motion the court should consider the plaintiff's evidence with all the favor, and give it all the force, and draw therefrom all the inferences, it would be entitled to if there was a demurrer filed thereto by the party making the motion to exclude the evidence, and in such case, if the party offering the evidence would on a demurrer thereto by the opposite party be entitled to a judgment thereon in his favor, then the court should not exclude the evidence from the jury. James *v.* Adams, 8 W. Va. 568; Johnson *v.* Baltimore, etc., R. Co., 25 W. Va. 570; Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 242.

Rule of Decision.—"The evidence upon a demurrer to the evidence should be interpreted most benignly in favor of the demurree; so that he may have all the benefit, which might have resulted from the decision of the case by a jury, the proper forum from which the decision has been withdrawn by the demurrant." Garrett *v.* Ramsey, 26 W. Va. 345 (Syl. 3), approved in Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546; Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461; Hysell *v.* Sterling, etc., Mfg. Co., 46 W. Va. 158, 33 S. E. 95.

A demurrer to evidence withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained, and the party whose evidence is thus withdrawn from its proper forum is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might have resulted from a decision of the case, by the proper forum. Miller *v.* Insurance Co., 8 W. Va. 515; Ware *v.* Stephenson, 10 Leigh 155.

Where reasonably fairminded men might differ about a question, such question must be decided against the demurrant, on a demurrer to the evidence. Bass *v.* Norfolk R., etc., Co., 100 Va. 1, 40 S. E. 100.

b. When Demurrer Sustained.

In General.—On demurrer to evidence, if the evidence though conflicting, plainly and decidedly preponderates in favor of the demurrant, on some decisive point, the demurrer should be sustained, and judgment should be given for the demurrant. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154. See Knox *v.* Garland, 2 Call 241.

Failure of Plaintiff to Carry Burden of Proof.—Where the burden of proof is on the plaintiff to make out a prima

facie case of negligence, if he fails to do this upon the whole evidence or demurrer to evidence by the defendant, judgment should be given for the defendant. Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311.

Rule in Negligence Cases.—If the defendant demurs to the plaintiff's evidence, and the evidence shows that the defendant was as a legal proposition guilty of the negligence which caused the plaintiff's injury, but further as a legal proposition proved that the plaintiff was guilty of contributory negligence, the court should sustain the defendant's demurrer. Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901. See also, Postlewaite *v.* Wise, 17 W. Va. 1; Childress *v.* Chesapeake, etc., R. Co., 94 Va. 186, 26 S. E. 424; Jackson *v.* Bank, 9 Leigh 240.

Brakeman was ordered by conductor to make a coupling to a car over the end whereof lumber projected. In obeying the order, brakeman, who knew the danger, was caught between the lumber and the next car; seeing which, conductor signaled engineer to "jar ahead quickly;" which was done, causing brakeman to fall; and the coupling having been made, the wheels passed over and killed him. Held, upon demurrer to the plaintiff's evidence, the plaintiff was entitled to recover, the death being caused by the negligence of the defendant's conductor in giving the signal without looking to see if the coupling had been made. Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582, citing Dun *v.* Seaboard, etc., R. Co., 78 Va. 645; Virginia Midland R. Co. *v.* White, 84 Va. 498, 5 S. E. 573.

Plaintiff, having knowledge of the negligent practice of a railroad company in making "flying switches" over a street crossing, came to the crossing on a starlit, but moonless, night, just as an engine was approaching, and after waiting for it to pass, stepped upon the sidetrack on which the cars following the engine were, and was struck and injured by a box car, so following, without a light or person on it, and without any signal having been given. V. and his father, who was with him, testify that, after the passage of the engine and before proceeding, they looked down the track for cars and saw none. As to the extent of the darkness and whether lights in a passenger coach at the rear of the box cars could, or ought to have been seen by them, the evidence is conflicting and uncertain. Held, that on demurrer to the evidence, judgment was properly rendered for the plaintiff. Vance *v.* Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461.

Agency.—The letters of the defendant's agent introduced by the plaintiff contain statements relevant to the issue, uncontradicted by any other evidence in the record, and are therefore to be taken as tending to prove the facts therein stated. Held, the demurrer to the evidence by the defendant was properly sustained. Oeters *v.* Knights of Honor, 98 Va. 201, 35 S. E. 356.

It appeared from a demurrer to the evidence in ejectment, that the right of the lessor of the plaintiff originated in a lease to J. S. his heirs and assigns for the lives of his sons A. S. and M. S. and his grandson A. S., Jr., renewable to the said J. S. his heirs and assigns, forever, and that J. S. dying intestate, his heir at law devised the land to the lessor of the plaintiff; the defendant claimed under a conveyance from the said A. S., Jr., and it was held that a judgment for the plaintiff would be affirmed, though it did not certainly appear from the demurrer whether or not the said A. S., M. S. and A. S., Jr., were yet living. Hyer *v.* Shobe, 2 Munf. 200.

Incorporation of Bank.—A bank brings a suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio; plea, the gen-

eral issue; at the trial, defendant demurs to plaintiff's evidence; the demurrer contains no direct proof of the legal incorporation of the bank, nor can the fact be fairly inferred from the evidence stated in the demurrer. Held, this defect of evidence is fatal to the plaintiff's case. Nor can the want, in the demurrer to evidence, of this necessary proof to entitle the bank to recover, be supplied by resort to a demurrer to the declaration, which was overruled, whereby the averment therein contained, of the legal incorporation of the bank, was admitted. Jackson *v.* Bank, 9 Leigh 240.

c. When Demurrer Overruled.

A Test.—On a demurrer to the evidence, if the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, the court should give judgment against the demurrant. Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Stolle *v.* Ætna Fire, etc., Ins. Co., 10 W. Va. 546; Garrett *v.* Ramsey, 26 W. Va. 345; Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168; Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546; Cramer *v.* Pomeroy, 47 W. Va. 56, 34 S. E. 762; Ware *v.* Stephenson, 10 Leigh 161; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Michael *v.* Roanoke Machine Works, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927.

The proper rule on demurrer to evidence in this state appears to be that the court should consider the evidence on both sides as though the demurrer was a motion to set aside the verdict of a jury in favor of the demurree, and if the court would not set aside such verdict on consideration of the whole evidence, it should overrule the demurrer and enter judgment for the demurree. Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908; Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

Where there is a demurrer to the evidence of the plaintiff, the defendant introducing no evidence, and the plaintiff's evidence is such that the court should not set aside a verdict found thereon if the case had been submitted to a jury, such demurrer should be overruled and judgment rendered for the demurree. Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971; Cochran *v.* London, etc., Corp., 93 Va. 553, 25 S. E. 597; Jones *v.* Old Dominion Cotton Mills, 82 Va. 140; Central Land Co. *v.* Calhoun, 16 W. Va. 361. It is error to allow a demurrer to the evidence when no issue has been found. Petty *v.* Frick Co., 86 Va. 501, 10 S. E. 886.

Evidence of Demurrant Preponderant.—On a demurrer to evidence, although the evidence in favor of the demurree may be weak, doubtful or questionable, the demurrer will be overruled, unless on some decisive point at issue, the evidence in favor of the demurrant plainly and decisively preponderates over the evidence as to the same point in favor of the demurree. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

On demurrer to evidence, if it be conflicting, judgment in favor of the demurree should be given, unless the evidence plainly and decidedly preponderates in favor of demurrant on some decisive point. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

Where, in the opinion of the court, there is sufficient doubt as to the facts established and the proper inferences to be drawn, to make it improper to withdraw the case from the consideration of the jury, the demurrer to the evidence should be overruled. Eubank *v.* Smith, 77 Va. 206.

Illustrative Cases.—If a life policy makes the statements of the application on which it is issued warranties, and such application states that the death of the father of the assured was caused by one disease, and the proof of loss made by the beneficiary and offered

in evidence by him states that death was caused by a different disease, on a demurrer to the evidence of the beneficiary, in an action against the insurance company, judgment should be given for the company. Metropolitan Life Ins. Co. *v.* Rutherford, 98 Va. 195, 35 S. E. 361.

Negligence.—If the defendant demur to the plaintiff's evidence, and the evidence fails to show that the defendant was as a legal proposition guilty of negligence, but shows a case in which the negligence of the defendant was properly a mixed question of law and fact, and the jury could not unreasonably infer from the evidence that the defendant was guilty of negligence, which caused the plaintiff's injury, but this evidence of the plaintiff is such that it would obviously require the jury if they should find there was any negligence in the case to find that it was mutual, the proof of the negligence of the defendant being exactly the same facts and circumstances which necessarily establish the contributory negligence of the plaintiff, if they establish the negligence of the defendant, upon such a case, the court should sustain the defendant's demurrer to the plaintiff's evidence; and in such case, if asked by the defendant, the court should exclude all the plaintiff's evidence from the jury. Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. 901.

If an action of debt on a judgment against an administrator suggesting a devastavit, the plaintiff produces the judgment and execution, and the defendant demurs to the evidence, the plaintiff is entitled to final judgment on the demurrer. Nuttall *v.* McDouall, 6 Call 53.

d. Verdict and Judgment.

See the titles JUDGMENTS AND DECREES; VERDICT.

Verdict Subject to Opinion of Court.—The practice in Virginia and West Virginia is not to discharge the jury from giving any verdict, but to allow them to find one subject to the decision of the court upon the demurrer to the evidence. 4 Min. Inst. (3d Ed.) 921; Taylor *v.* Chesapeake, etc., R. Co., 41 W. Va. 704, 24 S. E. 631; Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251; Low *v.* Settle, 22 W. Va. 387; Mathews *v.* Traders' Bank, 2 Va. Dec. 539.

Where a demurrer to the declaration is filed and also a demurrer to the evidence, and the court decides against the demurrer to the declaration, and the jury find a verdict for the plaintiff, subject to the decision of the court upon the demurrer to the evidence, and the court renders final judgment for the plaintiff, it was held that this shall be a final judgment on the demurrer to the evidence in favor of the plaintiff. Holman *v.* Gilliam, 6 Rand. 39.

A demurrer to the declaration is filed, and also a demurrer to the evidence, and the court decides against the demurrer to the declaration; whereupon the jury find a verdict for the plaintiff, subject to the opinion of the court upon the demurrer to the evidence. The court renders final judgment for the plaintiff. Held, this shall be considered as a judgment on the demurrer to the evidence, in favor of the plaintiff. Holman *v.* Gilliam, 6 Rand. 39.

Conditional and Unconditional Verdicts.—When the record of the proceedings in a cause (being an action of assumpsit), at a term at which there was a trial by jury, shows that after the jury was duly impaneled and sworn, the defendant filed a demurrer to the plaintiffs' evidence given in the cause, and that the defendant, joined in such demurrer, before verdict; and that the jury found a verdict for plaintiff, and assessed the damages, which verdict was unconditional upon its face, such verdict will be held to be conditional and subject to the opinion and judgment of the court upon the de-

murrer to the evidence. Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685.

When there is a demurrer to the evidence, an unconditional verdict on its face, by the jury, is not error, provided the demurrer to the evidence be afterward passed upon and determined by the court; but it is error in the court to render judgment upon the verdict of the jury in such case regardless of, and without determining, the demurrer to the evidence. Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685, citing Biggers *v.* Alderson, 1 Hen. & M. 54.

Where the verdict of the jury is conditional and subject to the opinion and judgment of the court upon a demurrer to the evidence, it (the verdict) continues conditional, until proper action of the court is taken upon the demurrer, and judgment is rendered, or it is set aside. Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685.

Where the record of the proceedings in the cause, as entered at different terms of the court, is contradictory apparently, as to whether a demurrer to the evidence had been filed by the defendant, and joinder therein by the plaintiff, before the jury rendered their verdict in the cause, which is unconditional upon its face; and it is clearly deducible from the whole record relating thereto, that the verdict of the jury was found with the understanding and belief of the court, the parties, their counsel and the jury, that the defendant had filed a demurrer to the evidence, and the plaintiff had joined therein; the verdict of the jury in such case, though unconditional on its face, will be held to be conditional, and as having been rendered subject to a demurrer to the evidence. Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685.

Directing Verdict.—See the title VERDICT.

The court may instruct the jury to find a verdict for a sum certain sued for, subject to the opinion of the court on a demurrer to the evidence. Mathews *v.* Traders' Bank, 2 Va. Dec. 539.

A trial of an action to recover damages for the negligent killing of the plaintiff's intestate, after the defendant's demurrer to the evidence had been joined in by the plaintiff, it was not improper for the trial court to instruct the jury that, if the plaintiff was entitled at all, she was entitled to the full amount which they might lawfully give, if there had been no demurrer to the evidence; and that they ought, in its opinion, to find the full amount claimed in the declaration, that amount not exceeding the amount the law allows to be recovered. Johnson *v.* Richmond, etc., R. Co., 84 Va. 713, 5 S. E. 707.

If a demurrer to the evidence would have been sustained, an instruction to the jury to find for the defendant, even after the jury has indicated an intention to find for the plaintiff, is not reversible error. West End Real Estate Co. *v.* Nash, 51 W. Va. 341, 41 S. E. 182.

Responsiveness of Verdict.—Where some of the defendants in ejectment demur to the evidence, and others go to trial on the issue made upon their plea of not guilty, and a conditional verdict is found as to all of the defendants, it should be set aside as to the defendants who have not demurred, as it is not responsive to the issue made by their plea. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

Rendition and Entry of Judgment.—A mere announcement by a judge in court of his opinion to sustain a demurrer to evidence, without an order or direction to the clerk to enter judgment accordingly, is not a sufficient rendition of judgment to warrant the entry of it as final judgment nunc pro tunc, when it further appears that absence of counsel was the reason for not ordering it to be entered at the time of the announcement. Vance *v.*

Ravenswood, etc., R. Co., 53 W. Va. 338, 44 S. E. 461.

Judgment in Favor of One Defendant and against Another.—In an action of debt, under the statute, against the drawer and endorser of a protested negotiable note, upon a demurrer by both defendants to the evidence offered by the plaintiff, in which the plaintiff joins, the court may give judgment against one defendant in favor of another. Raine *v.* Rice, 2 Pat. & H. 529.

e. Assessment of Damages.

The general practice is, when there is a demurrer to the evidence and joinder therein, for the jury at once to assess conditional damages; and for the court upon deciding the demurrer, if it finds the law for the plaintiff and that the evidence supports the issue, to enter up judgment for the amount found by the jury; but if otherwise the judgment is for the defendant. This court can not look into the demurrer to the evidence to see whether the damages assessed by the jury were excessive, in the absence of a motion made in and overruled by the trial court to set aside the verdict and grant a new trial. Riddle *v.* Core, 21 W. Va. 530.

After a demurrer to the evidence by the defendant the trial court instructing the jury that they were not to inquire whether or not the plaintiff was entitled to any damages, that the demurrer to the evidence withdrew that question from them; that they could only conditionally assess the damages sustained by the plaintiff, and in so doing they should consider the evidence only as bearing on the measure of damages. Held, this ruling is strictly in accord with the settled rule of practice. Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251.

After the demurrer to the evidence is joined, the jury may either be discharged, and (if the judgment be that the evidence does support the issue) a writ of enquiry of damages is awarded, or the jury then impaneled may assess conditional damages. Humphreys *v.* West, 3 Rand. 516.

Where the only defense set up to the plaintiff's cause of action is for damages by way of a special set-off under § 3299 of the Virginia Code, and the plaintiff demurs to the defendant's evidence, the verdict should be for the defendant, assessing his damages at a stated sum, subject to the opinion of the court upon the plaintiff's demurrer to the evidence; and if, upon the demurrer to the evidence, the law be with the plaintiff, then for the plaintiff, whatever sum the jury ascertain to be due. South Roanoke Land Co. *v.* Roberts, 7 Va. Law Reg. 247, 99 Va. 487, 39 S. E. 133.

f. New Trials.

See the title NEW TRIALS.

Power to Grant.—The power to set aside the proceedings for the purposes of justice, exists in cases of demurrer to the evidence which are under the control of the trial court. Taliaferro *v.* Gatewood, 6 Munf. 320.

When Allowed.—The whole proceeding upon a demurrer to the evidence is under the control of the judge before whom the trial is had; and if owing to a mistake or other causes, a material fact be omitted, without which the merits of the cause cannot be decided, the demurrer should be set aside and a new trial awarded, and this may be done on motion of either of the parties, or by the court itself before final judgment. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Taliaferro *v.* Gatewood, 6 Munf. 320.

In an action by the assignee against the assignor of a bond, the point in dispute being whether the assignee has used due diligence in suing the obligor; if the plaintiff produce a transcript of the proceedings in a suit which he brought against the obligor, showing the time when the declaration was filed, but not the date of the writ; and the defendant demur to the evidence; the

court not interfering nor requiring a copy of the writ to be produced; such demurrer should be set aside, and a venire de novo awarded. Taliaferro *v.* Gatewood, 6 Munf. 320.

If a demurrer to the evidence be so negligently framed that it does not contain the necessary facts on which a judgment on the merits can be safely founded, and the court from the facts appearing on the record judicially knows that the other evidence exists within the reach of the parties by which the omitted facts may be supplied, the demurrer should be set aside and a new trial awarded. Peabody Insurance Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

The trial court can set aside the demurrer to the evidence and allow additional pleas to be filed, even after judgment entered by the appellate court, and cause remanded for writ of enquiry of damages. Fairfax *v.* Lewis, 11 Leigh 233; Hunter *v.* Snyder, 11 W. Va. 198.

When Refused.—But if the demurrer to the evidence shows that the plaintiff ought not to recover, the court can not set it aside and award a new trial, but ought to enter judgment for the defendant. Knox *v.* Garland, 2 Call 241; Green *v.* Judith, 5 Rand. 1.

If a party finds out, after a demurrer to evidence, that he ought not to have demurred, but should have left his cause to a jury, the court can not award a venire de novo. By two judges. Green *v.* Judith, 5 Rand. 1; Knox *v.* Garland, 2 Call 241.

Appeal.—Where the plaintiff's evidence is not doubtful and uncertain but defective only, the defendant may demur, and if the court set the demurrer aside the defendant may appeal. Knox *v.* Garland, 2 Call 242.

Power of Appellate Court.—Upon a demurrer to evidence, where there is no objection to the verdict, this court has no power to grant a new trial. It must either affirm the judgment of the court below, or reverse it and give judgment for the opposite party. Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 34, 24 S. E. 698; Metropolitan Life Ins. Co. *v.* Rutherford, 2 Va. Dec. 707.

11. Appeal and Error.

a. Test in Ruling on Action of Trial Court.

Where there is a demurrer to evidence, and the question in the appellate court is, whether or not a fact ought to be taken as established by the evidence either directly or inferentially in favor of the demurree, the test is, whether the court would set aside the verdict, had the jury on the evidence found the fact. If the verdict so finding the fact would not be set aside, such fact ought to be considered as established by the evidence demurred to. Ware *v.* Stephenson, 10 Leigh 155, is cited for this proposition in Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Richmond, etc., R. Co. *v.* Anderson, 31 Gratt. 812; Michael *v.* Roanoke Machine Works, 90 Va. 498, 19 S. E. 261; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619; Miller *v.* Insurance Co., 8 W. Va. 534; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455; Richmond, etc., R. Co. *v.* Moore, 78 Va. 97; Cramer *v.* Pomeroy, 47 W. Va. 56, 34 S. E. 762; Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908.

When the question is whether a fact has been established by the evidence, either directly or inferentially, in favor of the demurrer, a fair test is furnished by the inquiry, would the court set aside the verdict, had the jury, on the evidence, found the fact? Cramer *v.* Pomeroy, 47 W. Va. 56, 34 S. E. 762, citing Ware *v.* Stephenson, 10 Leigh 155.

Where there is a demurrer to evidence, the question in the appellate court is not whether or not a fact ought to be taken as established by the evidence, but is, would the court set aside the verdict if the jury on the evidence

had so found the fact? And, if the verdict so finding the fact would not be set aside, such fact ought to be considered as established by the evidence demurred to. Fowler *v.* Baltimore, etc., R. Co., 18 W. Va. 579; Miller *v.* Insurance Co., 8 W. Va. 515; Muhleman *v.* National Ins. Co., 6 W. Va. 508; Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888; Nuzum *v.* Pittsburg, etc., R. Co., 30 W. Va. 228, 4 S. E. 242.

A verdict ought not to be set aside by this court, as contrary to the evidence, where the evidence is conflicting, unless it manifestly appears plainly against the clear and decided preponderance of evidence. Gilmer *v.* Sidenstricker, 42 W. Va. 52, 24 S. E. 566; Akers *v.* De Witt, 41 W. Va. 229, 23 S. E. 669; Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686. On a demurrer to evidence the same rule is established. Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311; Mapel *v.* John, 42 W. Va. 30, 24 S. E. 608." If the evidence is such that, if there were a verdict in favor of the demurree, the court ought not to set it aside, then, on the demurrer to the evidence, the court ought to give judgment against the demurrant." Gunn *v.* Ohio River R. Co., 42 W. Va. 681, 26 S. E. 546; Hysell *v.* Sterling, etc., Mfg. Co., 46 W. Va. 158, 33 S. E. 95.

Rule in Johnson v. Burns, 39 W. Va. 658, Controls.—"The first question that presents itself is as to what rule should govern in cases of demurrer to evidence, the new rule of Maple *v.* John, 42 W. Va. 30, 24 S. E. 608, supported by Talbott *v.* West Virginia, etc., R. Co., 42 W. Va. 560, 26 S. E. 311, and Teel *v.* Ohio River R. Co., 49 W. Va. 85, 38 S. E. 518, or the old rule as held in Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 8, sustained by Hogg's Pleadings and Forms, 537. Or can and should these rules be reconciled to mean virtually the same thing, except that the old rule is modified by the holdings of this court in the case of Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686. In the case of Shaver *v.* Edgell, 48 W. Va. 512, 37 S. E. 664, Judge Brannon says: 'I hesitate not to say that if this case had been wholly left to the jury, and it had found a verdict for the defendant, the court must have set it aside as unwarranted by the evidence, and this being so, the circuit court in this case was warranted in giving judgment for the plaintiff upon the demurrer. Gunn *v.* Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546.' In the latter case it is said 'If the evidence is such that, if there were a verdict in favor of the demurree, the court ought not to set it aside, then on demurrer to the evidence the court ought to give judgment against the demurrant.' Both these cases were decided since the case of Johnson *v.* Burns, cited. Hence, when they use the word verdict, they mean a verdict determined according to the rule laid down in the latter case, and not the rule existing prior to that time. The old rule regarding the review of a verdict of a jury was modified by the holding in the case of Johnson *v.* Burns, to suit the statutory requirement that the court should consider the whole of the evidence certified, and thereby incidentally modified the rule relating to the consideration of the evidence on demurrer, and this is the new rule established in the case of Maple *v.* John. To hold otherwise we must say in cases of demurrer to evidence, that when the word verdict is used, it is according to its ancient effect prior to the decision of Johnson *v.* Burns. This would make unnecessary confusion between the present rule relating to motions to set aside the verdict of juries, the motion to exclude the evidence, the motion to direct a verdict and a demurrer to the evidence, all which motions should be governed by the same principles of law, and this is that where the evidence plainly preponderates in favor of a litigant, he is entitled to judgment. If the evidence so plainly preponderates in favor of the demurrant a

verdict of a jury in favor of the demurree would be set aside then the court will sustain the demurrer, and give judgment for the demurrant, otherwise the judgment must be for the demurree. This verdict must be governed by the new standard established by the case of Johnson *v.* Burns, and not the old standard that was thereby modified. On the subject of the conflict of evidence the rule then would be that all the evidence of the demurrant in conflict with the evidence of the demurree should be rejected unless the conflicting evidence of the demurrant so plainly preponderates over the evidence of the demurree, that if there were a verdict in favor of the latter it would be set aside, and in such case the demurrer must be sustained. For if the evidence, although conflicting, plainly preponderates in favor of the demurrant, judgment should be entered accordingly." Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

b. Harmless Error.

When the circuit court has found for the plaintiff on a demurrer to evidence by the defendant, this court will not disturb such finding, unless it is against the plain and decided preponderance of the evidence, or is wholly without evidence to support it. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

A judgment in favor of demurree on conflicting evidence will not be disturbed unless upon a plain legal ground, sufficient to preclude any recovery on the part of the demurree. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

Judgments on the verdict of a jury, on demurrer to evidence in favor of the demurree, and the finding of a circuit court in lieu of a jury waived, are governed by the same principles, and are entitled to equal respect in this court, and they will not be reversed unless they are plainly contrary to the decided preponderance of the evidence. Hysell *v.* Sterling, etc., Mfg. Co., 46 W. Va. 158, 33 S. E. 95.

Where there is a demurrer to the evidence and the court below, which saw and heard such contradicting witnesses (who are the demurree's witnesses), give their evidence, renders judgment in favor of the demurree, generally, the appellate court will not disturb such judgment, by reversing it. Miller *v.* Insurance Co., 8 W. Va. 515.

Where the plaintiff demurs to the evidence of the defendant when the burden of proof is not the defendant, and such demurrer is erroneously entertained by the court, it is not reversible error if the facts be found for the defendant. Bennett *v.* Perkins, 47 W. Va. 425, 35 S. E. 8.

On a demurrer to evidence, the judgment is for the plaintiff; the appellate court will not reverse such judgment, merely because the court did not sustain a demurrer to a defective count in the declaration, if all the evidence on the demurrer to evidence would have been properly received on other good counts in the declaration. Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

A declaration, and each count thereof, was demurred to; the court overruled the demurrer when it should have sustained the demurrer to the first count, because of the informal and imperfect manner in which the cause of action was stated in it, and should have overruled the demurrer to the second count. The defendant demurred to the evidence; the facts proved did sustain the second count in the declaration, and would have sustained the first count, had it been drawn as it should have been. The circuit court gave judgment for the plaintiff. The appellate court should affirm this judgment. Stolle *v.* Ætna Fire, etc., Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593.

Joinder in Demurrer.—If the evidence set forth in the demurrer shows that the plaintiff was entitled to re-

cover, the refusal of the court to compel him to join in the demurrer, is not ground for reversing a judgment in his favor. Boyd *v.* Savings Bank, 15 Gratt. 501.

Admission of Illegal Evidence.—Where there is admitted illegal evidence against the objection of the party and there is a demurrer to the evidence and an alternative verdict, the appellate court after disregarding upon such demurrer the illegal evidence and treating the rest of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to maintain the judgment for the demurree, the admission of such illegal evidence will not be reversible error. Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39, 10 S. E. 29.

Credibility of Witnesses.—Generally, in cases where there is a real conflict in the testimony of witnesses as to a material fact directly involved in the issue, and the determination involves the credibility of the contradicting witnesses, the finding of the jury upon the fact will not be disturbed by the court; and such finding of the jury will not be disturbed by the appellate court where it has been approved by the court below. And in such case, where there is a demurrer to the evidence, and the court below, which saw and heard such contradicting witnesses (who are the demurree's witnesses) give their evidence, renders judgment in favor of the demurree, generally, the appellate court will not disturb such judgment, by reversing it. Miller *v.* Insurance Co., 8 W. Va. 515.

"The question as to the credibility of the one or the other of the demurree's witnesses in such case, or as to whether the evidence of the one or the other shall be believed or discredited, it seems to me, upon correct and well-established legal principles, is not for a court to determine upon a demurrer to evidence, and especially for an appellate court which does not see or hear any of the witnesses testify, to determine against the judgment of the court below, which saw and heard one or both of the witnesses give their evidence. Phillips on Evidence, Ed. 1849, vol. 2, p. 467." Miller *v.* Insurance Co., 8 W. Va. 515.

As to the credibility of the witnesses the jury is ordinarily the sole judge. Smith *v.* Norfolk, etc., R. Co., 48 W. Va. 69, 35 S. E. 834; Trump *v.* Tidewater Coal, etc., Co., 46 W. Va. 238, 32 S. E. 1035; Young *v.* West Virginia, etc., R. Co., 44 W. Va. 218, 28 S. E. 932; Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721; Akers *v.* DeWitt, 41 W. Va. 229, 23 S. E. 669. With the credibility of the witnesses, the court has nothing to do on a demurrer to evidence, as a general rule, for the demurrer admits the credibility of the demurree's witnesses as established. Barrett *v.* Raleigh Coal, etc., Co., 55 W. Va. 395, 47 S. E. 154.

c. Reversible Error.

When it has, by proper evidence, been shown, or by the record it appears to the court, that a demurrer to evidence should be set aside, and a motion for that purpose has been made and improperly overruled, and the court afterwards renders judgment on such demurrer in favor of the party making such motion, such error in overruling such motion is prejudicial to both parties, and the party against whom such judgment on the demurrer was rendered may, upon writ of error, have the same reversed, the demurrer set aside, and a new trial awarded. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

On a demurrer to the evidence by the defendant, the facts proven sustain the case of the plaintiff, but it is so defectively stated in the declaration that the court on the demurrer to the declaration ought to have sustained the demurrer. This court should set aside the judgment for the plaintiff,

and remand the cause, with directions that the plaintiff have leave to amend his declaration, if advised so to do. Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507.

Joinder in Demurrer.—It is reversible error to refuse to compel a joinder in demurrer to evidence, where the evidence is not plainly against the demurrant. Green *v.* Buckner, 6 Leigh 82; Rohr *v.* Davis, 9 Leigh 30; Trout *v.* Virginia, etc., R. Co., 23 Gratt. 619.

It is reversible error to compel a joinder in the demurrer, where there is sufficient doubt as to the facts established and the proper inferences to be drawn. For to do so, would be to usurp the province of the jury, which, in such cases, is a most fit tribunal to decide. Eubank *v.* Smith, 77 Va. 206.

d. Necessity of Motion for New Trial.

See the titles APPEAL AND ERROR, vol. 1, p. 573; NEW TRIALS.

In General.—In order to have a judgment on a demurrer to the evidence reviewed in the appellate court, it is not necessary that a motion for a new trial be made in the trial court. Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698; Fidelity, etc., Co. *v.* Chambers, 93 Va. 138, 24 S. E. 896.

It seems also to be the prevailing rule in West Virginia, that, to obtain a review by the appellate court, a motion in the lower court for a new trial is not necessary. Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394; Riddle *v.* Core, 21 W. Va. 530.

In Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698, many authorities were reviewed, and the conclusion was reached that it is not necessary for a motion for a new trial to be made in the trial court in order to have the judgment on demurrer to the evidence reviewed in the appellate court, but that it would not be proper to consider the quantum of damages as being too great or too small, unless objection to the verdict upon that ground was presented in the trial court. Rhule *v.* Seaboard Aid Line R. Co., 102 Va. 343, 46 S. E. 331.

But in Richmond, etc., R. Co. *v.* Scott, 1 Va. Dec. 871, it is held, that even though there has been a demurrer to evidence, a motion for a new trial in the lower court is necessary to obtain a review by the appellate court. This case, however, is overruled by Norfolk, etc., R. Co. *v.* Dunnaway, 93 Va. 29, 24 S. E. 698.

Limitations of General Rule.—Upon a demurrer to the evidence, no motion for a new trial is necessary in the trial court to enable this court to review its decision on the question whether the evidence supports the issue, or not. But if the amount of damages assessed by the jury is deemed excessive, a motion must be made in the trial court to set aside or abate the verdict. The objection can not be made in this court for the first time. Rhule *v.* Seaboard Aid Line R. Co., 102 Va. 343, 46 S. E. 331.

Where there has been a demurrer to the evidence, and the jury find an excessive verdict, or one too small, there must be a motion for a new trial in the lower court. The appellate court can not grant a new trial without such motion in the inferior court. Riddle *v.* Core, 21 W. Va. 530; Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394; Western Union Tel. Co. *v.* Virginia Paper Co., 87 Va. 418, 12 S. E. 755; Humphreys *v.* West, 3 Rand. 516; Green *v.* Judith, 5 Rand. 1; Briggs *v.* Hall, 4 Leigh 484. But see recent acts of Virginia, 1897-98, p. 784 (Pol. Suppl. § 3385a). The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to a higher court shall not be deemed a waiver of any objection made during the trial, if such objection be properly made a part of the record.

e. The Record—Necessity of Bill of Exceptions.

See the titles APPEAL AND ER-

ROR, vol. 1, p. 505; EXCEPTIONS, BILL OF.

A demurrer to the evidence is a part of the record of the case, and a bill of exceptions is not necessary to enable the appellate court to review such ruling. Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302; Mandeville *v.* Perry, 6 Call 78; White *v.* Toncray, 9 Leigh 347; Keel *v.* Herbert, 1 Wash. 203; Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394.

"We have been unable to find a case, decided by this court, or any other, in which it was held, that it is necessary to take a bill of exceptions to the ruling of the trial court upon a demurrer to evidence, in order to have it reviewed by the appellate court, or to bring up the evidence in the case as a part of the record, or that it is necessary to have the trial judge authenticate the evidence considered by him upon the demurrer to the evidence." Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

"A demurrer to evidence can not be made a part of the record by bill of exceptions. It is as much a part of the record proper as the demurrer to the pleadings or the verdict of the jury. 6 Ency. Pl. and Pr. 457, and authorities cited." Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

In Mandeville *v.* Perry, 6 Call 78, Tucker, J., declared that a demurrer to evidence was a part of the record in an action at law, and the statement there made by him, as to what constitutes the record in an action at law, is quoted with approval in White *v.* Toncray, 9 Leigh 351, and in Roanoke Land, etc., Co. *v.* Karn, 80 Va. 589; Chesapeake, etc., R. Co. *v.* Sparrow, 98 Va. 630, 37 S. E. 302.

Trial by Court in Lieu of Jury.—See the title EXCEPTIONS, BILL OF.

Where a case is tried by the court in lieu of a jury, the judgment may be reviewed by the appellate court if the facts appear in the record, though there was no bill of exceptions. Board of Education *v.* Parsons, 24 W. Va. 551.

Effect of Filing Bill of Exceptions.—A demurrer to the evidence is a part of the record and no bill of exception is necessary, but the filing of such bill will not prevent this court from reviewing the ruling of the trial court on the demurrer. Chesapeake, etc., R. Co. *v.* Pierce, 103 Va. 99, 48 S. E. 534.

The Transcript.—In making up the transcript for this court, papers or documents referred to in and made parts of a demurrer to evidence or bills of exceptions, should be plainly identified; and great care should be taken to have the transcript so copied and arranged as to show clearly what are legally parts of it, in order that this court can ascertain certainly and without doubt or conjecture the questions really presented for its determination. State *v.* Ripple, 27 W. Va. 211.

Sufficiency of Record Entry.—If a record entry shows that the defendant demurred in writing to the plaintiff's evidence, and that the plaintiff joined therein, it is a sufficient entry to make the written demurrer a part of the record. Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293.

"Does the record attest the demurrer to evidence? The record says that, 'after all the evidence has been introduced before the jury, the defendant demurred to the plaintiff's evidence in writing, in which demurrer the plaintiff joined.' Then we find a formal demurrer to evidence in writing and the evidence. How can we say there is no demurrer, under such circumstances? It would be exceedingly technical—indeed, erroneous—as the entry is in due form, and certainly sufficient." Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293.

"Hogg's Pleading and Forms makes

the order read: 'After hearing the plaintiff's evidence, the defendant demurred thereto, which demurrer was reduced to writing, and in which the plaintiff joined.' Robinson's Forms reads (on page 121): 'The defendant filed a demurrer to the evidence of the plaintiff, and the plaintiff filed (or entered) his joinder in the said demurrer.' He gives no further form to identify the demurrer." Seldomridge *v.* Chesapeake, etc., R. Co., 46 W. Va. 569, 33 S. E. 293.

f. Exceptions and Objections.

See the title APPEAL AND ERROR, vol. 1, p. 547.

Joinder in Demurrer.—One who objects to being compelled to join in a demurrer to evidence, must make his objection in the lower court, and can not make it for the first time in the appellate court. Hollandsworth *v.* Stone, 47 W. Va. 773, 35 S. E. 864.

If a party, who ought not to be compelled to join in a demurrer to evidence, does so voluntarily, he can make no objection thereto in the appellate court. Merchants', etc., Bank *v.* Evans, 9 W. Va. 373.

Demurrer as Waiver of Exceptions.—If there is an exception taken to the admission of evidence, and then there is a demurrer to all the evidence including that excepted to, the demurrer does not waive the exceptions. Dishazer *v.* Maitland, 12 Leigh 524. But see Biggers *v.* Alderson, 1 Hen. & M. 54.

g. Judgment in Appellate Court—Remand of Proceedings.

If, upon a demurrer to evidence, the trial court gives judgment on the verdict found subject to the decision of the trial court upon the demurrer, and the case is appealed and the judgment reversed, the appellate court will enter such judgment as it thinks proper upon the evidence. Norfolk, etc., R. Co. *v.* Harman, 83 Va. 553, 8 S. E. 251; Knox *v.* Garland, 2 Call 241; Heard *v.* Chesapeake, etc., R. Co., 26 W. Va. 455; Land Co. *v.* Calhoun, 16 W. Va. 361; Green *v.* Pittsburg, etc., R. Co., 11 W. Va. 685; Proudfoot *v.* Clevenger, 33 W. Va. 267, 10 S. E. 394; Berkeley *v.* Chesapeake, etc., R. Co., 43 W. Va. 11, 26 S. E. 349; Cochran *v.* London Assur. Corp., 93 Va. 553, 25 S. E. 597; Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971; Muhleman *v.* Insurance Co., 6 W. Va. 524; Ayers *v.* Richmond, etc., R. Co., 84 Va. 679, 5 S. E. 582.

But where there is a demurrer to the evidence by the defendant, and the facts sustain the case of the plaintiff, but it is so defectively stated in the declaration that the court in a demurrer to the declaration ought to have sustained the demurrer, the appellate court should set aside the judgment for the plaintiff, and remand the cause with directions that the plaintiff have leave to amend his declaration, if advised so to do. Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507. See also, Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

Joinder in Demurrer.—Where the trial court has erred in refusing to compel a joinder in a demurrer to the evidence, and all the evidence has been certified, and this court has everything before it to enable it to do complete justice, and can plainly see not only that joinder should have been compelled, but also what judgment should have been rendered thereon, the case will not be remanded to compel a joinder, but this court will enter such final judgment as it is manifest should have been entered by the trial court after compelling joinder. University of Va. *v.* Snyder, 100 Va. 567, 42 S. E. 337.

B. IN CRIMINAL PROSECUTIONS.

A demurrer to evidence is not a usual or proper practice in a criminal prosecution. "The court permitted the defendant to demur to the evidence and the jury find a conditional verdict, and discharged them. This was improper

under our practice, for if the accused has the right to demur to the evidence, the state would have the same right without the consent of the accused, and thus the constitutional right of trial by jury could be taken away. In the case of Doss *v.* Com., 1 Gratt. 557, it was held, that 'Neither the commonwealth nor the accused has a right to demur to the evidence in a criminal prosecution, except by consent of the other party.' The opinion shows that it was the intention of the court to hold that by consent of the parties in a misdemeanor case a jury might be waived, and the facts submitted to the court for determination as though on a demurrer to evidence. And it was certainly not the intention to hold that a person accused of crime could be permitted by a demurrer to evidence to waive his right to have the evidence establish his guilt beyond all reasonable doubt." State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350; State *v.* Hill, 52 W. Va. 301, 43 S. E. 160.

On a demurrer to evidence, all doubt must be resolved against the demurrant which renders a demurrer to evidence improper in a criminal case, for the accused is presumed to be innocent and entitled to the benefit of every reasonable doubt. The law is so settled in some states and in others it is in a state of discouraging doubt. State *v.* Alderton, 50 W. Va. 101, 40 S. E. 350, citing 6 Ency. Plead & Prac. 456.

Neither the commonwealth nor the accused has a right to demur to the evidence in a criminal prosecution, except by the consent of the other party. Doss *v.* Com., 1 Gratt. 557.

II. Under a Recent Statute in Virginia.

Be it enacted by the general assembly of Virginia, that in all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence, shall state in writing specifically the grounds of demurrer relied on and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing, nor shall any grounds of demurrer not thus specifically stated be considered. After joinder in demurrer no other evidence shall be admitted and a nonsuit shall not be allowed. Acts (Va.), March 14, 1906.

This new act concerning demurrers to the evidence, has been the subject of several learned articles in the Virginia Law Register, to which reference is here made. Va. Law Reg., April, 1906; July, 1906; August, 1906; September, 1906.

DENOMINATION.—"Webster defines the word **denomination** as follows: 'A class or collection of individuals called by the same name; a sect.' It is apparent that the third definition of the word 'church' given by this lexicographer will include those mentioned in the first and second definitions, by whatever names they may be called, as well as all religious **denominations** which acknowledge Christ as the Savior of mankind. By the Book of Church Order of the Presbyterian Church in the United States the word 'church' is defined: 'A number of professing Christians, with their offspring, associated together for divine worship and godly living agreeably to the Scriptures, and submitting to the lawful government of Christ's kingdom.'" Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 314. See also, the title RELIGIOUS SOCIETIES.

Dentist.

See the title PHYSICIANS AND SURGEONS.

DEODORIZE.—See Sweeney *v.* Baker, 13 W. Va. 193. And see generally, the title LIBEL AND SLANDER.

Departure in Pleading.

See the title PLEADING.

Dependent Covenants.

See the titles CONTRACTS, vol. 3, p. 432; COVENANTS, vol. 3, p. 747.

DEPOSIT.

CROSS REFERENCES.

See the titles BAILMENTS, vol. 2, p. 223; BANKS AND BANKING, vol. 2, p. 254; CARRIERS, vol. 2, p. 671; CONFUSION OF GOODS, vol. 3, p. 123; ESCROW; EXECUTORS AND ADMINISTRATORS; GAMING; GUARDIAN AND WARD; LOST PROPERTY; PAYMENT INTO COURT; PLEDGE AND COLLATERAL SECURITY; WAREHOUSES AND WAREHOUSEMEN.

Nature and Requisites.

A company agreed to allow another company to store iron upon its premises and agreed to aid the latter company in disposing of it. It was held, that this was a mere deposit for safekeeping, a mere depositum without reward, and was not a trust as would give equity jurisdiction. Thompson *v.* Whittaker Iron Co., 41 W. Va. 574, 23 S. E. 795, quoting 3 Minor's Inst. 271. See generally, the titles BAILMENTS, vol. 2, p. 223; TRUSTS AND TRUSTEES.

Duties and Liabilities of Depositaries.

Rights.—A depositary of property for a safekeeping can not apply such property in discharge of other demands due him from his cestui que trust. Woodson *v.* Payne, 1 Call 570.

Liabilities.—A mere depositary of a chattel, is not accountable for it if stolen unless the loss be the result of gross negligence on his part, since he holds the chattel only for the benefit and accommodation of the bailor. Tancil *v.* Seaton, 28 Gratt. 601; Carrington *v.* Ficklin, 32 Gratt. 670.

Depositary of Bank Note—Liability for Loss.—In an action of assumpsit it has been held, that the gratuitous bailee of a bank note will not be held liable for the loss thereof unless the plaintiff show that the note was a genuine one and of the value claimed. Tancil *v.* Seaton, 28 Gratt. 601, 26 Am. Rep. 380.

When Deposit Is Stolen.—If a person to whom a sum of money has been entrusted for safekeeping has the same stolen from him, he is not liable for the money to the person who entrusted him with it. Danville Bank *v.* Waddill, 31 Gratt. 469.

Question for Jury.—The question of negligence on the part of a mere depositary is a question of fact for the jury and not a matter of law. Carrington *v.* Ficklin, 32 Gratt. 670. See the title QUESTIONS OF LAW AND FACT.

Depositaries.

See the title DEPOSIT, ante, p. 548.

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CROSS REFERENCES.

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I. Definition.

In Bouvier's law dictionary deposition is defined: "The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provision of some statute law, to be used on the trial of some question of the fact in a court of justice. 3 Blatch. 456; 23 N. J. L. 49."

II. Depositions De Bene Esse.

"The term de bene esse is well understood in courts of equity; and, when applied to depositions, means such as can only be used provisionally. The legislature has used it in this sense in the law." Minnis *v.* Echols, 2 Hen. & M. 34.

III. Whose Depositions May Be Taken.

See post, "When Depositions May Be Taken," IV; "On Account of Interest," XI, C, 4, b.

IV. When Depositions May Be Taken.

"There are four cases, at law, in which the depositions of witnesses may be taken de bene esse, under our act of assembly: 1. When any witness is about to depart the country; 2. When a witness, by age, sickness, or otherwise, shall be unable to attend the court, upon affidavit, etc. 3. Upon affidavit that a witness resides beyond sea or in a foreign country; and, 4. When a claim or defense depends upon a single witness. Such deposition may be read in evidence at the trial, in case the witness should be unable to attend." Minnis *v.* Echols, 2 Hen. & M. 37.

As to when depositions may be taken, see post, "Leave to Take," VI.

V. Who May Take.

A. STATUTORY PROVISIONS.

In West Virginia.—"In any pending case the deposition of a witness whether a party to the suit or not, may, without any commission, be taken in or out of this state, by a justice or a notary public, or by a commissioner in chancery, or before any officer authorized to take depositions in the county or state where they may be taken, and if certified under his hand may be received without proof of the signature of such certificate." Section 33, ch. 130, W. Va. Code; Abbott *v.* L'Hommedieu, 10 W. Va. 677.

"And the 34th section of said chapter 130, provides, that, 'on affidavit that a witness resides out of this state, or is out of it in the service thereof, or of the United States, his depositions may be taken by or before any commissioner appointed by the governor of this state, or any justice, notary public or other officer authorized to take depositions in the state wherein the witness may be, or if the deposition is to be taken in a foreign country,' etc." Abbott *v.* L'Hommedieu, 10 W. Va. 677, 697.

In Virginia — When Taken in the State.—In any pending case the deposition of a witness whether a party to the suit or not, may be taken in this state by a justice, or notary, or by a commissioner in chancery, etc." Section 3359, Va. Code, 1904.

When Taken Out of the State.—"The deposition of a witness, whether a party to the suit or not, who resides out of this state, or is out of it in the service thereof, or of the United States, may be taken before any commissioner appointed by the governor of this state, or any justice, notary, or other officer authorized to take depositions in the state wherein the witness may be, or if the deposition is to be taken in a foreign country, before any person that the parties may agree upon in writing, or any American minister plenipotentiary, charge d' affairs, counsel general, vice consul, commercial agent appointed by the government of the United States, or any other represent-

ative of the United States in a foreign country or the mayor, or other magistrate of any city, town, or corporation in such country, or any notary therein." Section 3360, Va. Code, 1904.

B. COMMISSIONERS IN CHANCERY.

See generally, the title REFERENCE.

A master commissioner of a circuit court, to whom a cause is referred to take, state and settle an account of indebtedness, has authority not only to take and state the account referred to him, but also to take depositions. Hickman *v.* Painter, 11 W. Va. 386.

A commissioner appointed by a circuit court to take depositions had authority, under the acts of 1831, Supp. Rev. Code, p. 165, § 80, and 1834, Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common-law cause. McGuire *v.* Pierce, 9 Gratt. 167.

"The commissioner in chancery, is expressly authorized to take depositions in any pending case. Code, ch. 130, § 33. This authority goes back to the Code of 1819 (1 Rev. Code, 1819, §§ 39, 40, ch. 43, p. 203) and this power is not restricted to a case referred to him, or to depositions to be taken under his notice of taking the accounts." First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 556. See post, "Special Notice in Proceedings before Commissioner," VII, F.

C. GUARDIAN AD LITEM ACTING AS COMMISSIONER.

It is no valid objection to proceedings for the sale of an infant's land, that the depositions were taken before the same person as commissioners who was guardian ad litem of the infant. Durrett *v.* Davis, 24 Gratt. 302.

VI. Leave to Take.

A. NECESSITY FOR COMMISSION.

Virginia. — Prior to the statute allowing depositions, except in will cases, to be taken without a commission, Va. Code, 1887, § 3361, a deposition taken in another state was not admissible in evidence unless taken under a commission. Unis *v.* Charlton, 12 Gratt. 484.

Present Provisions.—See Virginia Code, 1904, § 3361.

Sufficiency of Proof of Commission. —It seems, that a deposition taken de bene esse, by two magistrates, and with due notice (it appearing that an order of court was made awarding a commission to take it, and that the clerk charged a fee for issuing the commission), may be read as evidence, on proof of inability of the witness to attend; notwithstanding there be no other proof that it was taken by virtue of a commission delivered to the magistrates (no commission being found among the papers); and it be returned to the clerk's office, open and unsealed, but without being shown to have been erased or altered. Givens *v.* Manns, 6 Munf. 191.

In West Virginia under the Code of 1860, a commission was necessary in order that the depositions of a witness, "who resides out of the state, or is out of it, etc.," might be taken. Abbott *v.* L'Hommedieu, 10 W. Va. 677.

The commission in such case was the authority of the officer to whom it was directed. Abbott *v.* L'Hommedieu, 10 W. Va. 677.

But by the 33 and 34 sections of the West Virginia Code of 1899 it is taken both in and out of the state without a commission. Abbott *v.* L'Hommedieu, 10 W. Va. 677; Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251.

B. NECESSITY FOR SPECIAL ORDER OF COURT.

Depositions taken after the argument of the cause (without special order), will be suppressed. Foster *v.* Sutten, 4 Hen. & M. 401; Dangerfield *v.* Claiborne, 4 Hen. & M. 397.

After a cause has been argued, a commission to take depositions can not be obtained but upon special order

of the court for that purpose. Anonymous, 4 Hen. & M. 409.

Taking Depositions after Interlocutory Decree.—The act of 1826 providing that "from the filing of the bill to the final hearing of the cause either party may, without order of the court, obtain commissions to take depositions therein" does not authorize depositions to be so taken after an interlocutory decree as to open matter which has already been fairly in issue and decided upon, but was intended to enable a party to take evidence after a cause was set for hearing, without special leave first obtained. Moore *v.* Hilton, 12 Leigh 1.

C. APPLICATION FOR.

1. Necessity.

In no case should a commission issue except by special order of the court, which may be given upon the application of the party seeking the commission. Dangerfield *v.* Claiborne, 4 Hen. & M. 398. See generally, the title ORDERS OF COURT.

2. Consent of Parties.

A deposition taken by consent of both parties, may be read as evidence on the hearing of the cause in which it was taken. Dangerfield *v.* Claiborne, 4 Hen. & M. 397.

3. Who May Apply.

A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff as a matter of course, saving all just exceptions. Plainville *v.* Brown, 4 Hen. & M. 482.

4. Notice of Intended Application.

The deposition of a nonresident witness which was taken under a commission, issued without notice of the intended application for it, can not be admitted in evidence, although the adverse party was present at the taking. Blincoe *v.* Berkeley, 1 Call 405.

5. Affidavit.

a. Necessity for.

After Cause Argued.—After the argument of a cause, a commission to take depositions can not be obtained but upon the affidavit of the party, for that purpose. Dangerfield *v.* Claiborne, 4 Hen. & M. 397; Anonymous, 4 Hen. & M. 409.

West Virginia Code, 1860.—An affidavit was necessary to authorize the clerk to issue the commission provided for by the West Virginia Code, 1860. Abbott *v.* L'Hommedieu, 10 W. Va. 677.

West Virginia Code, 1868.—"The 33d and 34th sections of the 130th chapter of the Code of 1868, by dispensing with a commission also dispenses with the necessity for the affidavit required by the 30th section of chapter 176 of the Code of 1860, except, perhaps, so far as such affidavit might be prima facie evidence that the witness resides out of this state, or is out of it, in the service of the state, etc., at the time his deposition was taken." Abbott *v.* L'Hommedieu, 10 W. Va. 677, 698.

Section 34 of chapter 130 of the West Virginia Code of 1891, provides that on affidavit that a witness resides out of the state, or is out of it in the service thereof or of the United States, his deposition may be taken; and in the case of Abbott *v.* L'Hommedieu, 10 W. Va. 677, such affidavit is held unnecessary if it appears by the deposition of the witness or by other evidence that such witness resides out of the state. Hoopes *v.* Devaughn, 43 W. Va. 447, 27 S. E. 251.

Intent and Purpose of § 34, Ch. 130, W. Va. Code, 1868.—The true purpose and intent of the thirty-fourth section of chapter one hundred and thirty, of the West Virginia Code of 1868, in providing for an affidavit, is complied with, if it appears by the deposition of the witness, whose deposition was taken, or other evidence, that the witness whose deposition was taken, resided out of the state, or was out of it in the service of the state, etc., at the time the deposition was taken. Abbott *v.* L'Hommedieu, 10 W. Va. 677.

b. Presumption of Affidavit.

Three successive actions were brought on a bond, the plaintiff having suffered a nonsuit in the first and second. Pending the second action which was referred to arbitrators, the deposition of a witness was taken by the defendant in December, 1829, to be read de bene esse, and it was relied on before the arbitrators without objection by the plaintiff. On the trial of the third action in 1864, the deposition was offered in evidence by the defendant, and was objected to by the plaintiff on the ground that there was no affidavit made before the clerk of the court in which the second action was pending, for the issuing of the commission to take the deposition. Held, that if an affidavit was necessary, it may well be presumed after the lapse of nearly eighteen years, and under all the circumstances of the case, that it had been taken and lost. Perkins *v.* Hawkins, 9 Gratt. 649. See generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

c. Filing Affidavit.

"Section 34 of chapter 130 of the W. Va. Code of 1868, does not designate or require that the affidavit therein named shall be filed in the clerk's office of the court in which the case is pending, or any other place, before the deposition of the witness is taken." Abbott *v.* L'Hommedieu, 10 W. Va. 677, 698.

6. Subscription of Commission by Clerk.

It is not necessary that a commission to take a deposition should be subscribed by the clerk, but a subscription by the clerk is the usual and proper mode of authenticating such a commission. Steptoe *v.* Read, 19 Gratt. 1.

VII. Notice of Taking.

A. NECESSITY FOR.

See post, "Who Entitled," VII, B.

A deposition taken without notice is not admissible in evidence. Unis *v.* Charlton, 12 Gratt. 484; Burwell *v.* Burwell, 78 Va. 574.

A deposition can not be read to affect the interests of any party to whom no notice of the taking it had been given. Stubbs *v.* Burwell, 2 Hen. & M. 536; Collins *v.* Lowry, 2 Wash. 74; Mandeville *v.* Perry, 6 Call 78; Unis *v.* Charlton, 12 Gratt. 484; Colvert *v.* Millstead, 5 Leigh 88.

The deposition of a witness resident in another state or country taken without notice to the adverse party is not admissible. Lewis *v.* Bacon, 3 Hen. & M. 101; Clay *v.* Williams, 2 Munf. 123; Thornton *v.* Corbin, 3 Call 388.

The statute requires notice to be given of the taking of every deposition. Trevelyan *v.* Lofft, 83 Va. 142, 1 S. E. 901; Abbott *v.* L'Hommedieu, 10 W. Va. 677.

B. WHO ENTITLED.

1. In General.

Whether a deposition be taken de bene esse or in the chief, notice should be given to the adverse party. Collins *v* Lowry, 2 Wash. 74; Bowyer *v.* Knapp, 15 W. Va. 277.

Notice shall be given to the adverse party of the taking of depositions. Abbott *v.* L'Hommedieu, 10 W. Va. 677; Unis *v.* Charlton, 12 Gratt. 484; Collins *v* Lowry, 2 Wash. 75; Mandeville *v.* Perry, 6 Call 78; Lewis *v.* Bacon, 3 Hen. & M. 89; Catlett *v.* Carter, 2 Munf. 24; Thornton *v.* Corbin, 3 Call 384; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

The plaintiffs were entitled to notice, after their appearance in the suit, of all the subsequent proceedings, and the decree founded on the depositions taken without notice to them, and when they were unrepresented, should have been reopened. Burwell *v.* Burwell, 78 Va. 574.

Although a deposition is regularly taken in the cause as to one party, there having been due notice to him, yet it can not be received as evidence to affect the interests of another party

to whom no notice has been given. Colvert *v.* Millstead, 5 Leigh 88; Stubbs *v.* Burwell, 2 Hen. & M. 536.

2. Husband.

Where a suit is brought to set aside a fraudulent conveyance made by a husband to his wife, depositions taken after notice given to the wife may be read as against her, and although read against her husband also, and she alone appeals from the decree reversed, because her husband had no notice of the taking of the depositions. Silverman *v.* Greaser, 27 W. Va. 550.

3. Guardian ad Litem.

Where the guardian ad litem had no notice, depositions taken in the cause can not be read against the infant parties. Walker *v.* Grayson, 86 Va. 337, 10 S. E. 51; Strayer *v.* Long, 83 Va. 715, 3 S. E. 372.

C. WHAT NOTICE MUST SPECIFY.

1. Time.

Notice of depositions should indicate to the adverse party the time when they will be taken. Bowyer *v.* Knapp, 15 W. Va. 277; Stubbs *v.* Burwell, 2 Hen. & M. 536; Collins *v.* Lowry, 2 Wash. 75; Mandeville *v.* Perry, 6 Call 78; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; McGinnis *v.* Washington, etc., Ass'n, 12 Gratt. 602; Kincheloe *v.* Kincheloe, 11 Leigh 393; Unis *v.* Charlton, 12 Gratt. 484; Colvert *v.* Millstead, 5 Leigh 88; Abbott *v.* L'Hommedieu, 10 W. Va. 677.

2. Place.

The notice of taking deposition that is to be given to the adverse party should specify the place at which they will be taken. Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557; Collins *v.* Lowry, 2 Wash. 75; Stubbs *v.* Burwell, 2 Hen. & M. 536; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901; Hunter *v.* Fulcher, 5 Rand. 126, 16 Am. Dec. 738; Bowyer *v.* Knapp, 15 W. Va. 277.

3. Suit in Which Depositions Are to Be Taken.

Notice of taking depositions should state in what suit they are to be taken. Bowyer *v.* Knapp, 15 W. Va. 277.

D. CERTAINTY AND REASONABLENESS.

1. In General—Upon What Dependent.

What is reasonable notice is a question dependent upon the peculiar circumstances of each case, the principal of which are the distance, traveling conveniences, condition of the roads, and other such matters as affect the ability of the party to attend, personally or by counsel, and to return in time for trial. Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

Therefore, where a notice was left with the wife of the party at his dwelling house, when it was known by the adverse party that he was absent on a journey to another state, and where it appeared also, that the notice might previously have been given to the party himself, and that the taking of the deposition might have been postponed, as it respected the trial of the cause, till his return; it was held, that the notice was insufficient, and the deposition taken under it was suppressed. Coleman *v.* Moody, 4 Hen. & M. 1.

2. As to Time.

a Certainty.

The time of taking depositions should be indicated with reasonable certainty. Bowyer *v.* Knapp, 15 W. Va. 277; Abbott *v.* L'Hommedieu, 10 W. Va. 677, 697; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

b. Reasonableness.

In the case of Fant *v.* Miller, 17 Gratt. 187, it was held, "that a party has a right to be personally present when depositions are taken by his adversary, and that a notice which does not afford him an opportunity of being so, is insufficient." Wise *v.* Postlewait, 3 W. Va. 459.

In the case of Unis *v.* Charlton, 12 Gratt. 484, it was held, where the defendants could not have attended at the place where the deposition was taken, and then have reached the court

by the commencement of the term at which the case was expected to be tried, the deposition was properly excluded. Wise *v.* Postlewait, 3 W. Va. 459.

A notice given at 8 p. m. to take a deposition between 8 and 9 a. m. of the next day, in the city where both parties and their counsel reside, would generally be reasonable notice. And such notice, given directly the plaintiff learned that the witness would leave for a distant state on the next evening by 3 o'clock and would not return again, is sufficient, though the court was in session in the city at the time, and though the defendant and his counsel had been occupied on a case in the court on the day of the notice and would be so occupied on the day after, so that they could not attend the taking of the deposition. McGinnis *v.* Washington Hall Ass'n, 12 Gratt. 602.

A notice was given by a plaintiff to the defendant, for taking the depositions of several witnesses at a specified place in Missouri on six successive days, between certain hours of each day. Held, that considering the distance of the place appointed for taking the depositions, and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice was sufficiently definite. Kincheloe *v.* Kincheloe, 11 Leigh 401.

The notice was served on counsel in the city of Richmond at 3:45 p. m. on May 24th, to take the deposition at Hampton, Va., on May 26th, between the hours of 9 a. m. and 6 p. m. It was not practicable within the time intervening between the service of the notice and the date appointed for taking the deposition for counsel to communicate by letter with the plaintiff and receive a reply, and then attend at the place of taking the deposition. The service of the notice was not within a reasonable time, and was clearly insufficient. Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

"On the seventh of June, 1881, notice was given that the depositions in question would be taken in London on the fourth of July following, and was served by posting a copy of the notice at the front door of the appellant's residence in this city (he and all the members of his family being then absent from home), and also by serving a copy upon his counsel, the same day. It also appears that on the next day a copy was mailed to the appellant in England, which, it would seem, he received in due course of mail, and he acknowledged receipt thereof in a letter addressed to the appellees' counsel in this city. In view of the evidence in respect to communication and the conveniences of travel between this country and England, the notice in point of same was sufficient." Trevelyan *v.* Lofft, 83 Va. 141, 146, 1 S. E. 901.

3. As to Place.

a. Certainty.

A notice to take depositions is insufficient if it omits to specify with reasonable certainty the place where the depositions are to be taken. Hunter *v.* Fulcher, 5 Rand. 126, 16 Am. Dec. 738; Abbott *v.* L'Hommedieu, 10 W. Va. 677; Trevelyan *v.* Lofft, 83 Va. 141, 1 S. E. 901.

A notice to take depositions is not bad because it specifies the county in which the depositions are to be taken, or in which the suit is pending, but does not specify the state. Brannon, J., dissenting. Davis *v.* Settle, 43 W. Va. 17, 26 S. E. 557.

b. Reasonableness.

Notice of Taking at Different Places on Same Day.—If a party gives notice of the taking of several depositions at different places on the same day, so that the opposing party can not be present to cross-examine all the witnesses, he may select which examination he will attend, and the other depositions will be suppressed. Fant *v.* Miller, 17 Gratt. 187.

Where the defendant was notified by the plaintiff's attorneys that they would take depositions in Georgia on the same day that depositions were taken by them in New York, this fact does not vitiate either deposition, where the defendant was interested in only one of the causes and the objection was not made until the case was called. Wytheville Insurance, etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

4. As to Suit Pending.

The notice of taking a deposition should indicate with reasonable certainty in what suit it is to be taken. Bowyer *v.* Knapp, 15 W. Va. 277.

Hence a notice which recites that the suit is pending in one county when in fact it is pending in another, is insufficient. Bowyer *v.* Knapp, 15 W. Va. 277.

5. As to Name of Defendant.

A deposition was taken to be read in a case in which Franklin Bartley was defendant, and that was the name given in the summons and to which he appeared; but the name in which the action was carried on was William F. Bartley. The person was obviously the same, and Franklin was part of the defendant's name. Held, that the deposition could not be objected to on this ground. Bartley *v.* McKinney, 28 Gratt. 750. See the titles NAMES; VARIANCE.

E. SERVICE AND RETURN.

See the title SERVICE OF PROCESS.

1. Manner and Sufficiency of Service.

a. In General.

"A notice to a party living within the state is good, if given to him, or delivered in writing to any free white person above the age of sixteen years, who shall be a member of the family of such person, and shall be informed of the support of such notice, or left at some public place, at the dwelling house or other known place of residence of such person. 1 Rev. Code, § 113, Ent. 42." Chapman *v.* Chapman, 4 Hen. & M. 426.

Where a notice to take depositions was left with the wife of the party at his dwelling house, when it was known by the adverse party that he was absent on a journey to another state, and where it appeared also that the notice might previously have been given to the party himself, and that the taking of the deposition might have been postponed till his return, it was held that the notice was insufficient, and the deposition taken under it was suppressed. Coleman *v.* Moody, 4 Hen. & M. 1.

Service on Overseer.—A notice to take depositions, given to the overseer of the party, who resided part of his time in the state and part out, is not sufficient. Chapman *v.* Chapman, 4 Hen. & M. 426.

Service on Attorney.—Notice of taking depositions is not sufficient if given to the attorney at law, in the absence of the principal from the commonwealth, but ought to be given to the agent or attorney in fact, or, if there be none, by publication in the manner prescribed by law. Cahill *v.* Pintony, 4 Munf. 371.

Notice to take depositions may be served on the counsel for nonresident party. Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

b. Upon Party Living without the State.

The service of notice of the taking of depositions to a party not living within the state or not having an agent or attorney within the same, to whom it can be given, shall be good if published in the Virginia Gazette, or in any other public newspaper printed within this commonwealth for four weeks successively, provided it complies with the ordinary requirements of notice, viz., time, place, name of witness, names of parties to suit, and of suit in which witness is to be examined. Chapman *v.* Chapman, 4 Hen. & M. 426; Cahill *v.* Pintony, 4 Munf. 371.

c. Service of Publication.

The publication of notice to take depositions, under the West Virginia statute requiring the notice to be published once a week for four successive weeks, is completed on the fourth issue of the newspaper containing it; and if a reasonable time elapses between the date of said fourth issue and the taking of the depositions, the notice is sufficient. Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 378.

"The statute provides that any such notice may be served by publication once a week for four successive weeks. Section 2, ch. 121, W. Va. Code, 1868. In Marling *v.* Robrecht, 13 W. Va. 440, this court held that the publication of the notice provided for in § 4, ch. 129, Code, for four successive weeks is completed on the fourth issue of the newspaper containing it, though the four weeks have not actually elapsed between the dates of the first and last publication. The statute under which that decision was made, and the one now in question, contain the same requirement as to the time of publication. The fourth publication of the notice here was nine days before the deposition was taken. It seems to me, therefore, under this authority and the circumstances above stated, that the circuit court clearly erred in suppressing said deposition." Miller *v.* Neff, 33 W. Va. 197, 10 S. E. 379.

2. Conclusiveness of Return.

The return of a sheriff upon a notice to take depositions is only prima facie evidence of its truth. Bowyer *v.* Knapp, 15 W. Va. 277.

The rule that the return on judicial process can not be contradicted by the parties or their privies as to such facts stated in it as the law requires to be stated, does not apply to notices for depositions; in such cases the return is only prima facie evidence of such facts. McClung *v.* McWhorter, 47 W. Va. 150, 34 S. E. 740.

As to the general rules regarding conclusiveness of returns, see the title SERVICE OF PROCESS, and references there given.

F. SPECIAL NOTICE IN PROCEEDINGS BEFORE COMMISSIONER.

See generally, the title REFERENCE.

"Sanders, in his suit in Equity (page 627, § 536), says: 'Under the general notice given by the master commissioner when the order or decree is placed in his hands, the master or commissioner may take the depositions of witnesses without giving special notice to the parties of their being taken.' See also, the case of McCandlish *v.* Edloe, 3 Gratt. 330, where it is held (third point of syllabus) that 'in taking an account the commissioner may take the depositions of witnesses, to enable him to act upon the subject, under his general notice, and a special notice is not necessary.' See also, 2 Bart. Ch. Pr., p. 641." Miller *v.* Cox, 38 W. Va. 747, 18 S. E. 963.

In taking an account the commissioner may take the depositions of witnesses to enable him to act upon the subject, under his general notice, and a special notice is not necessary. Miller *v.* Cox, 38 W. Va. 747, 18 S. E. 960.

Where a commissioner to whom a cause has been referred by an interlocutory decree, in his regular proceedings to adjust, settle and report the matters so referred, takes the depositions of witnesses to enable him to act upon the subject, his general notice of such proceedings is sufficient, without a special notice from him or the adverse party that such depositions will be taken. Geiser Mfg. Co. *v.* Chewning, 52 W. Va. 523, 44 S. E. 193. And see ante, "Commissioners in Chancery," V, B.

VIII. The Taking—Executing Commissioner.

A. COMMISSIONER REQUIRED TO BE PRESENT.

A commission directed to five per-

sons ("any three of whom to act"), can not be executed by one only; and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present. Marshall *v.* Frisbie, 1 Munf. 247.

B. TIME OF TAKING.

1. Time Allowed by Statute.

In all cases where a general commission issues for taking depositions, upon an answer and replication, in any suit in the high court of chancery, the cause must remain at rules six months from the time of filing the replication, before it is set down for hearing; unless this be dispensed with by consent of parties, entered on the record. Dalby *v.* Price, 2 Wash. 191.

"The statute regulating the practice of this court, says (1 Rev. Code 67, § 46), 'whenever a general commission shall issue for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties, for taking their depositions, and either party, at the expiration of the said six months, may set the same for hearing.'" Dangerfield *v.* Claiborne, 4 Hen. & M. 398.

Subsequent Act of 1822.—In a suit in chancery, when an answer is filed at rules in due time, four months from the time of the replication to the answer are allowed the parties for taking their depositions, by the act of February 17, 1823, in sess. acts of 1822-3, p. 39, ch. 37, § 1; Suppl. to Rev. Code, p. 129. And until the expiration of the said four months, neither party has the right (without the consent of the other) to set the cause for hearing. Poling *v.* Johnson, 2 Rob. 255.

2. When Notice Served on Counsel of Nonresident.

The statute which authorizes the service upon the counsel of a party who is a nonresident of the state of a notice to take a deposition, prescribes that "the time between the service of and taking the deposition shall be sufficient for conveying by ordinary course of mail a letter from the place of service to the place of residence of the party, and a reply from that place back to the place of service, and then for the counsel to attend at the place of taking the deposition." Section 3363, Va. Code, 1904. Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

3. Reasonableness.

A deposition taken at so late a day that the other party can not attend at the time and place of taking it, and then get to the court where the cause, in which it is to be taken, is to be tried by the commencement of the term, is not admissible in evidence. Unis *v.* Charlton, 12 Gratt. 484.

When the trial of a cause is progressing, a party to it can not be required to take deposition to be used in the cause, during a temporary adjournment of the court, at a point so distant from the courthouse that he can not attend the taking of the deposition, and then get to the courthouse by the time the case is to be proceeded with. Wise *v.* Postlewait, 3 W. Va. 452.

4. After Submission for Hearing in Vacation.

Where, pending a petition for the rehearing of an interlocutory decree, the defendants' motion for a continuance to enable them to procure testimony is denied, and by agreement the cause is ordered to be submitted for hearing and decision in vacation, not later than a day named, the defendants may take depositions until the day for hearing is fixed by further agreement; especially, when the petitioners have apparently so construed the order by appearing and cross-examining defendants' witnesses, it being provided by Va. Code, 1873, ch. 172, § 36, that depositions in a chancery cause may be taken and returned at any time before the final hearing. Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

5. After Order of Reference.

Where a cause has been referred to a commissioner, and ample opportunity has been afforded to both parties to introduce their witnesses, and the commissioner has made his report, and the cause is ready for hearing, a deposition afterwards taken as to a controverted matter in the report ought, generally, to be disregarded by the court. Buster *v.* Holland, 27 W. Va. 510.

"If we say that after a report has been made a party may go on and take depositions, and have them read, we introduce confusion in practice, install a bad practice, and put a premium upon negligence and delay." Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746.

6. During Progress of Trial.

a. In General.

A party can not be required, during the progress of a trial, to take a deposition at a point so distant from the courthouse that he can not attend the taking of the deposition and return to the courthouse by the time the case is proceeded with. Wise *v.* Postlewait, 3 W. Va. 452.

b. After Interlocutory Decree.

There is no rule of law which precludes a party from taking new evidence after an interlocutory decree, even before a rehearing is obtained. Summers *v.* Darne, 31 Gratt. 791.

The act of 1826 providing that "from the finding of the bill to the final hearing of the cause either party may, without order of the court, obtain commission to take deposition therein" does not authorize depositions to be so taken after an interlocutory decree as to matter which has already been fairly in issue and decided upon. Moore *v.* Hilton, 12 Leigh 1.

"In Richardson *v.* Duble, 33 Gratt. 730, it was held, that when there has been an interlocutory decree in a chancery cause, a deposition taken thereafter can not be read as to any matter thereby adjudicated, unless it be as the foundation for a motion or petition to rehear the cause. But as to any matter not adjudicated, if the deposition be taken and returned upon final hearing, it may be read; but the right to have it read is not an absolute right." Buster *v.* Holland, 27 W. Va. 510.

"Virginia Code, 1873, ch. 172, § 36, says: 'In a suit in equity, a deposition may be read if returned before the hearing of the cause, or though after an interlocutory decree, if it be as to matter not thereby adjudged, and be returned before a final decree.' It is true the statute gives no absolute right, and only provides that the depositions in such case may be read. See Summers *v.* Darne, 31 Gratt. 791; Richardson *v.* Duble, 33 Gratt. 730." Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

"It is, therefore, a question of sound judicial discretion to be exercised by the court in view of all the attendant circumstances." Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

7. After Verdict.

The depositions of witnesses, taken after the verdict to which there is no sufficient objection, and before the decree, can not be read upon the final hearing of the cause. Nease *v.* Capehart, 15 W. Va. 299.

8. Before Final Hearing.

As to any matter not theretofore adjudicated, if a deposition be taken and returned before the final hearing of a cause, it may be read; but the right to have it read is not an absolute right. Buster *v.* Holland, 27 W. Va. 510; Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

"I can see no reason why the circuit court could not read them on the hearing, as they were returned before the final decree. See Code, ch. 130, § 35." First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554.

9. During Term.

Depositions taken during the term are admissible where the counsel of both parties were present and ex-

amined and cross-examined the witnesses, no objection being made until the hearing. Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737.

Whether a deposition taken after a cause is decided, but during the same term, can be brought in before the end of the term, and made part of the record is questionable. Bullock *v.* Goodall, 3 Call 44.

C. PRESENCE OF PARTIES.

1. Right to Be Present in General.

In the case of Fant *v.* Miller, etc., 17 Gratt. 187, it was held, that a party has a right to be personally present when depositions are taken by his adversary. Wise *v.* Postlewait, 3 W. Va. 452.

2. Presence of Guardian Ad Litem.

Where the guardian ad litem had notice of the taking of depositions in an action to cancel a deed in which an infant is interested, the depositions are not rendered inadmissible by the failure of such guardian to be present when taken. The provision of Va. Code, 1887, §§ 2435, 2619, that depositions shall be inadmissible in a suit against an infant or insane party, unless taken in the presence of the guardian ad litem or on interrogatories agreed on by him, relates only to suits for the sale of land of persons under disability and does not extend to cases generally in which infants are parties. Moore *v.* Triplett, 2 Va. Dec. 238.

The provision contained in ch. 83, W. Va. Code, 1868, § 4, "no deposition shall be read in the suit against any infant or insane party, except by leave of the court, unless it be taken in the presence of the guardian ad litem, or upon interrogatories agreed upon by him," has no application to a suit for dissolution of a corporation in which an infant is a stockholder and defendant as such defendant in such a suit for its dissolution is not an infant or an insane party, and as this fourth section is confined in its operation to suits instituted under the provisions of ch. 83, W. Va. Code, 1868—that is, to suits whose object is the leasing or sale of the lands of persons under disabilities, or of lands held for cestuis que trust. Hurst *v.* Coe, 30 W. Va. 158, 3 S. E. 564.

D. EXAMINATION OF WITNESS.

1. In General.

a. Right of Witness to Use Notes.

A witness ought not to write his deposition or his answers beforehand; nor ought they to be written for him beforehand by counsel or any other person; but he ought to answer the questions orally or from memory, as they are propounded to him. Fant *v.* Miller, etc., 17 Gratt. 187.

"A witness may be permitted to use such short notes as he brings with him to refresh his memory, but not the substance of his deposition; nor may he transcribe such notes verbatim. Thus the law is laid down in 2 Dan. Ch. Pr. 1062. A witness ought not to write his deposition or his answers beforehand, nor ought they to be written for him beforehand by counsel or any other person, but he ought to answer the questions orally and from memory as they are propounded to him. Parties or their counsel may, orally or by writing, previous to his examination, direct his attention to the facts in regard to which he is intended to be examined, and he may refresh his memory in regard to such facts by examining books and papers, and make memoranda from them and otherwise, especially of dates and amounts, and use such memoranda, for the purpose only of refreshing his memory, at the time of giving his evidence." Fant *v.* Miller, etc., 17 Gratt. 187. See the title WITNESSES.

b. Parties' Right to Direct Witness's Attention to Facts.

Parties or their counsel may orally or by writing, previous to the examination of a witness, direct his attention to the facts in regard to which he is intended to be examined; and he may refresh his memory in regard to

such facts, by examining books or papers, and make memoranda from them or otherwise, especially of dates and amounts, and use such memoranda for the purpose of refreshing his memory, at the time of giving his evidence. Fant *v.* Miller, 17 Gratt. 187. See the title WITNESSES.

2. Opening Depositions to Allow Cross-Examination.

The magistrate or commissioner who has taken a deposition should, within the hours appointed by the notice, open it again at the instance of any party who was not present when it was taken and wishes to cross-examine the witness. Jeter *v.* Taliaferro, etc., Co., 4 Munf. 80.

E. BY WHOM WRITTEN AND MANNER OF WRITING.

Deposition taken in shorthand by the officer, and afterwards written out in longhand by the officer, but not read to or by the witnesses after being written in longhand, if objected to, can not be read, though the officer certifies that they were fully and truly written out by him in longhand in the words spoken by the witnesses. Shephard *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

"In Moller *v.* U. S., 6 C. C. A. 459, 57 Fed. 490, 13 U. S. App. 472, it was held, by the circuit appellate court that depositions taken down in questions and answers by a stenographer, and not reduced to writing in the presence of the witness, nor read over to or by him are not properly taken, and not admissible against the objection of either party." Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

"In re Cary (D. C.), 9 Fed. 754, it was held, that depositions taken by a stenographer before a register, and afterwards reduced to longhand, will be suppressed, if not read to and signed by the witness, according to general order 10, after they are written out. That order says 'that the depositions shall be taken down in writing by or under the direction of the witness, and signed by him in the presence of the register.' But this I understand to be only general practice." Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 880.

"In Zehner *v.* Navigation Co., 41 Atl. 464, 187 Pa. St. 487, it was held, that 'a deposition taken by a stenographer in shorthand, after being written out in longhand, must be scrutinized, assented to, and signed by the witness.' The opinion says: 'It ought to be obvious to any one that depositions taken by a stenographer in shorthand must be fully written out in longhand, read by or to the witness, and assented to and signed by him.' These requirements, or their full equivalents, are essential, and can not be dispensed with." Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 880.

"Our statute (Code, p. 1062) applies only to stenographers appointed by courts. No statute authorizes a stenographer to take a deposition in shorthand, and then merely longhand and certify it, as is the case in some states under statute." Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 880.

Written by Coroner.—See post, "To Subsequently Impeach Deponent," XI, L, 4.

F. SIGNATURE OF WITNESS.

A deposition not signed by the witness is admissible in evidence if certified by the officer who took it. Barnett *v.* Watson, 1 Wash. 372.

Though regular to have a witness to sign a deposition, yet its omission will not suppress the deposition. Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

G. ADJOURNMENT.

See generally, the title ADJOURNMENT, vol. 1, p. 179.

When Necessary.—A magistrate taking a deposition upon a day appointed can not resume the taking of such deposition at any future day, without an adjournment to such day. Hunter

v. Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

Authority to Adjourn. — Quære, whether commissioners appointed to take depositions can, "by their own mere authority, adjourn the taking thereof to any other convenient time and place, in the event that the business can not readily be finished on the day, and at the place to which the notice applies;" no intended adjournment, from day to day until the business be finished, being expressed in such notice. Marshall *v.* Frisbie, 1 Munf. 247.

Sufficiency of Adjournment.—An adjournment in taking depositions must specify the date to which the adjournment is made. Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47.

"The adjournment of the taking of the depositions from the 23d of February, 1875, to the 24th day of February, 1875, I think, is good and sufficient. The depositions seem to have been taken on the 24th of February, pursuant to the adjournment on the 23d. Hunter *v.* Fulcher, 5 Rand. 124, 128, 129." Richardson *v.* Donehoo, 16 W. Va. 710.

IX. The Return.

A. NECESSITY FOR CERTIFICATE OF OFFICER.

When depositions are taken under a decree for account, the usual certificate is unnecessary. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

B. SUFFICIENCY.

1. By Whom Certified.

A commission directed to five persons ("any three of whom to act"), can not be executed by one only; and a return, by one, that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present. Marshall *v.* Frisble, 1 Munf. 247.

2. Certainty as to Parties.

A deposition was taken at the time and place specified in the notice, to be read, etc., but in the certificate of the officer who took it the plaintiff was styled William Robertson, administrator, etc., when the suit was Wallace Robertson, etc. Held, that the mistake in the name of the plaintiff (who had sued in his representative character) could not have misled the defendants, and was not sufficient to exclude the deposition. Hunter *v.* Robinson, 5 W. Va. 272. See the title VARIANCE.

3. Names of Witnesses.

Though regular in depositions to state in the caption or closing certificate the names of the witnesses, yet its omission will not suppress the depositions, if it is certified in effect, in caption or certificate, that the depositions were duly taken, sworn to, etc., so as to identify them. Shepherd *v.* Snodgrass, 47 W. Va. 79, 34 S. E. 879.

4. Description of Proceedings.

The caption of a deposition, describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. Cales *v.* Miller, 8 Gratt. 6.

5. Time of Taking.

If the time appointed for taking a deposition "be between the hours of twelve and one;" quære, whether it can be read upon the certificate stating, merely, that it is taken "after 12 o'clock?" See Blincoe *v.* Berkeley, 1 Call 405; Marshall *v.* Frisble, 1 Munf. 247; Chaney *v.* Saunders, 3 Munf. 51.

C. AUTHENTICATION.

Adding Letters J. P. to Name.—A deposition is duly authenticated where it purports in the caption to have been taken in the state and county designated in the commission and notice, and is certified by a person who adds to his name the letters J. P. Hobbs *v.* Shumates, 11 Gratt. 516.

"The case falls within the principle decided in Pollard's heirs *v.* Lively, 2 Gratt. 216, which held, that a certificate

such as is found in this case, headed with the state and county, and signed by the party taking the deposition with his name and the letters J. P. is sufficient evidence of the fact that the deposition was taken by a justice of the peace." Hobbs *v.* Shumates, 11 Gratt. 521.

Thus it is seen, that adding the initials J. P. after the name of the person who certifies the deposition, will be presumed to be intended for and to mean "justice of the peace." Pollard *v.* Lively, 2 Gratt. 216; Hobbs *v.* Shumate, 11 Gratt. 516.

"The seal of a notary out of the state does not, alone, verify and authenticate his act, except as regards bill of exchange, under § 7, ch. 51, Code, and deeds, under § 3, ch. 73. His signature, alone, is enough as to depositions under ch. 130, § 33, Code. Proff. Not. § 166; 16 Am. & Eng. Ency. Law 757." Bohn *v.* Zeigler, 44 W. Va. 402, 29 S. E. 983. See the title SEALS AND SEALED INSTRUMENTS.

Whose Seal May Be Used.—"Any person or persons, taking such deposition may certify the deposition with his official seal annexed; and if he has none, the genuineness of his signature shall be authenticated by some officer of the same state or country, under his official seal, unless the deposition is taken by justice out of this state, but in the United States, in which case his certificate shall be received without any seal annexed, or any other authentication of his signature." Abbott *v.* L'Hommedieu, 10 W. Va. 677, 697.

D. CONCLUSIVENESS.

The caption of the deposition, which must be regarded as the act of the magistrates, certifies that it was taken in pursuance of the notice; and their certificate of this fact is conclusive. Lynch *v.* Thomas, 3 Leigh 691.

E. FILING AND ENDORSEMENT BY CLERK.

1. Time of Filing.

A deposition taken before the decree was pronounced in the court of chancery, but not filed until after an appeal was taken from the decree, was received by the court of appeals. Auditor *v.* Pauly, 5 Call 331.

2. Duty of Clerk to Endorse.

It is proper, though not indispensable, for the clerk, when depositions are filed in his office, to endorse upon them the time when they were filed, and to verify such entry and endorsement with his official signature. Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

The entry or endorsement may be treated by the appellate court as an authorized official act. Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

3. Sufficiency of Endorsement.

The plaintiff objected to the reading of the deposition because it appeared from the clerk's indorsement, in these words, "Returned open, 22d August, 1815," that the said deposition was returned to his office open and unsealed. The objection was averred, the court saying: "For aught appearing by the clerk's indorsement, it may have been returned open by the magistrate themselves." Givens *v.* Manns, 6 Munf. 191.

X. Who May Use.

It is competent for one party, on the trial of a cause, to read in his own behalf a deposition regularly taken and filed by the other party; and although a deposition in such case may be certified jointly with the deposition of other witnesses, it may be detached and read separately. Echols *v.* Staunton, 3 W. Va. 574.

But the compulsory deposition of one's adversary in the nature of a discovery can not be used by such adversary, if the party taking it neglects to put it in evidence. M'Farland *v.* Hunter, 8 Leigh 489; Vaughn *v.* Garland, 11 Leigh 251.

XI. Admission in Evidence.

A. IN GENERAL.

Depositions ought not to be admitted in a suit at law, unless it appears

by the record in what suit and by what authority they were taken. Butts *v.* Blunt, 1 Rand. 255.

Proof of Inability of Witness to Attend.—Depositions ought not to be admitted in a suit at law, unless it appears that the witness could not attend at the trial. Butts *v.* Blunt, 1 Rand. 255; Pleasants *v.* Clements, 2 Leigh 474; Powell *v.* Manson, 22 Gratt. 189; Burwell *v.* Corbin, 1 Rand. 131; Douglass *v.* McChesney, 2 Rand. 109; Grigsby *v.* Weaver, 5 Leigh 197; Minnis *v.* Echols, 2 Hen. & M. 31; Lawrence *v.* Swann, 5 Munf. 332.

Proof of the inability of a witness to attend the trial is necessary, when his deposition, taken de bene esse, is offered to be read. Collins *v.* Lowry, 2 Wash. 75.

But where it was taken in chief, no proof upon the subject was necessary. Collins *v.* Lowry, 2 Wash. 75.

Exceptions to Rule Requiring Inability of Witness to Be Shown.—"The clause of the act of 1792 respecting the depositions of aged, infirm, or absent witnesses, has a provision that such depositions, shall be read on the trial, 'in case the witness should be unable to attend.' The clause relating to those of a single witness, in a cause, or to a material question thereof, omits this provision. It is not easy to assign a reason why this provision was not expressly extended to that case also; unless it be that the deposition of the witness, in that case, is to be taken merely for the purpose of perpetuating his testimony, and that, nevertheless, he must be 'produced at the trial.'" Minnis *v.* Echols, 2 Hen. & M. 31.

B. MUST BE TAKEN WITH REFERENCE TO ISSUE MADE UP.

"Depositions can not be read unless taken in reference to an issue made up at the time they are taken. Morrow *v.* Hatfield, 6 Humph. 108. See Jones *v.* Williams, 1 Wash. (Va.) 230; Story Eq. Pl., §§ 28, 257." Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

Depositions proving a matter not in the pleadings when taken can not be read to support an answer afterwards filed setting up such matter, if objected to. Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402; Goldsmith *v.* Goldsmith, 46 W. Va. 426, 33 S. E. 266.

C. GROUNDS OF ADMISSIBILITY.

1. Death of Witness.

The deposition of witness may be admitted if he is shown to be dead. Powell *v.* Manson, 22 Gratt. 189, citing Burwell *v.* Corbin, 1 Rand. 131; Douglass *v.* McChesney, 2 Rand. 109, and Grigsby *v.* Weaver, 5 Leigh 197; Minnis *v.* Echols, 2 Hen. & M. 31; Lawrence *v.* Swann, 5 Munf. 332; Pleasant *v.* Clements, 2 Leigh 474.

In the trial of an action of debt, when there is a plea of payment, it is error to suppress the deposition of a witness who has died, and whose testimony tends to prove the settlement, before suit brought, of the note sued on, by a partial payment, and a new note given for the residue. Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

"This deposition went to the very merits of the case, and was vital and essential; and (a further reason that it should have been permitted to be read) that the witness was dead, and it could not be retaken." Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

Presumption of Death of Witness.—Depositions in a chancery suit, taken in 1794, of persons then from 40 to 80 years of age, and read at the hearing without exceptions, are admissible 50 years later as evidence of pedigree, the presumption being that the witnesses are dead. Colvert *v.* Millstead, 5 Leigh 88. See the title PRESUMPTIONS AND BURDEN OF PROOF.

2. Physical Disability or Absence.

a. Physical Disability.

(1) In General.

The deposition of a witness may be admitted where it is shown that he is physically unable to attend. Powell *v.* Manson, 22 Gratt. 177, citing Burwell

v. Corbin, 1 Rand. 131; Douglass *v.* McChesney, 2 Rand. 109, and Grigsby *v.* Weaver, 5 Leigh 197; Pleasants *v.* Clements, 2 Leigh 474; Lawrence *v.* Swann, 5 Munf. 332; Minnis *v.* Echols, 2 Hen. & M. 31; Lynch *v.* Thomas, 3 Leigh 682; Pollard *v.* Lively, 2 Gratt. 216.

The deposition of a witness may be read at the trial, where it appears from the evidence that he is physically unable to attend court. Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Depositions may be admitted in an action at law where it appears by the record that the witness could not attend at the trial. Butts *v.* Blunt, 1 Rand. 255; Collins *v.* Lowry, 2 Wash. 75.

(2) Effect of Failure to Serve Subpœna.

Where a party taking the deposition of an aged and infirm witness to be read de bene esse fails to serve a subpœna on him to attend the trial, the deposition should nevertheless be read, upon satisfactory proof that the witness is unable to attend the trial by reason of ill health. Lynch *v.* Thomas, 3 Leigh 682.

(3) Question of Law.

The court must judge upon the proofs of the fact of the inability of the witness to attend. The court is not confined to any particular kind of proof. Lynch *v.* Thomas, 3 Leigh 682.

b. Absence of Witness.

If it is shown that the witness could not be procured, his deposition may be read. Minnis *v.* Echols, 2 Hen. & M. 31; Pleasants *v.* Clements, 2 Leigh 474.

A party desiring to introduce a deposition on account of the absence of a witness must show that he has used due diligence to find the witness, or that he is not within the jurisdiction of the court or reach of its process. Tompkins *v.* Wiley, 6 Rand. 242.

Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appears that the witnesses are out of the power of the court. Lawrence *v.* Swann, 5 Munf. 332.

Depositions taken in a cause in chancery may be read upon the trial of an issue out of chancery if the witness be abroad. Powell *v.* Manson, 22 Gratt. 177, citing Burwell *v.* Corbin, 1 Rand. 131; Douglas *v.* McChesney, 2 Rand. 109, and Grigsby *v.* Weaver, 5 Leigh 197.

c. Evidence.

(1) Burden of Proof.

"The court will require some satisfactory proof on the subject; and the question is, on whom ought the onus probandi to lie? On the party who is to derive a benefit from the evidence and who knows, or ought to know, that he can not avail himself of the deposition, unless he satisfies the court of the inability of the witness to attend, or on the adverse party, who may be injured by the testimony; on whom it would be highly unreasonable to lay the burden of proving the ability of his adversary's witness to attend in person; one, perhaps, that he may never have known, or heard of, till the taking of the deposition?" Minnis *v.* Echols, 2 Hen. & M. 31.

The burden of proving grounds for the admission of depositions is upon the party desiring to introduce them. Tompkins *v.* Wiley, 6 Rand. 242.

(2) Admissibility.

"In conformity to the decisions of this court in the cases of Pollard's Heirs *v.* Lively, 2 Gratt. 216, and Nuckols *v.* Jones, 8 Gratt. 267, that where the deposition of an absent witness is offered to be read in evidence upon the trial of an action at law, the evidence of the witness himself touching his failure or inability to attend the court, and the cause thereof, may properly be heard and considered." Tayloe *v.* Smith, 10 Gratt. 557. See also, post, "Sufficiency," XI, C, 2, c, (3).

(3) Sufficiency.

Testimony of Deponent.—The affi-

davit of a witness, taken eight days before a cause is called for trial, that from age and infirmity he is unable to attend court is sufficient to authorize his deposition to be read in evidence. Tayloe *v.* Smith, 10 Gratt. 557. See also, Nuckols *v.* Jones, 8 Gratt. 267.

It appearing from the affidavit of the said A, taken about eight days before the trial, that he was then in the ninetieth year of his age, extremely enfeebled from the effects of age and continued disease, that he was unable to take any other than the most moderate exercise without serious risk, and that he could not as he believed, attend the session of the court to give his testimony in person without probable danger of his life, nor had he any reason to hope that he would be in a better condition at any future time, the court is of opinion that the absence of the witness was sufficiently accounted for, and that the objection to the reading of his deposition upon the ground that the witness appeared to be still in life and residing in the same county in which the trial was had, should not have prevailed. Tayloe *v.* Smith, 10 Gratt. 557.

A witness giving his deposition de bene esse states in it that he is unable from his age and ill health to attend at court. This is sufficient to authorize his deposition to be read upon the trial of the cause in which it was taken. Pollard *v.* Lively, 2 Gratt. 216.

Mere Return of Subpœna Executed. —The mere return of a subpœna duly executed is not sufficient proof of inability of the witness to attend. See also, Collins *v.* Lowry, 2 Wash. 75; Butts *v.* Blunt, 1 Rand. 255; Tompkins *v.* Wiley, 6 Rand. 242; Pollard *v.* Lively, 2 Gratt. 216; Nuckols *v.* Jones, 8 Gratt. 267; Tayloe *v.* Smith, 10 Gratt. 557; Lynch *v.* Thomas, 3 Leigh 682.

"It has been argued, however, that the return of a subpœna, executed by a sworn officer, is sufficient evidence of the inability of a witness to attend; but the argument seems rather specious than solid." Minnis *v.* Echols, 2 Hen. & M. 31.

Hearsay Evidence. — In Collins *v.* Lowry, 2 Wash. 75, it was decided (and very properly) that hearsay evidence that the deponent has left the country, and has not returned, is not sufficient to authorize the reading his deposition; in Minnis *v.* Echols, 2 Hen. & M. 31, that the service of a subpœna will not do, but it must be proved, that the witness is dead, or if living, unable to attend; and in Butts *v.* Blunt, 1 Rand. 255, that depositions ought not to be read in a suit at law, unless it appear that the witness could not attend at the trial. We see, then, both by the statute and the decisions upon it, that to authorize the reading of the deposition, nothing more is necessary than that the witness should be unable to attend; nor is any higher or more cogent proof required to establish this than any other fact. Lynch *v.* Thomas, 3 Leigh 682. See the title EVIDENCE.

3. Death of Party to Action.

Although the death of a party to a suit has rendered the deposition of his adversary inadmissible, his own deposition may nevertheless be read in evidence. Keran *v.* Trice, 75 Va. 690.

A deposition which was read on the hearing in the circuit court can not be suppressed on appeal because, since the decision in the circuit court, an adverse party has died. Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

"We are asked to suppress or ignore the deposition of Hinkson because of the death of Ervin since this appeal was taken. No authority is cited to support the motion but Zane *v.* Fink, 18 W. Va. 747-752. We have no other authority, and do not think this supports the motion. We are of opinion the deposition can not be excluded in this court, because we must hear the case on the record as it was when the case was heard in the court below." Hinkson *v.* Ervin, 40 W. Va. 111, 20 S. E. 849.

6. Incompetency of Witness.

a. Time of Incompetency.

See ante, WITNESSES.

(1) Virginia Rule.

[illegible]

(2) West Virginia Rule.

[illegible] incompetent [illegible] her chil- [illegible] her [illegible] and [illegible] creditors [illegible] incompetency.' [illegible] un- [illegible] but the [illegible] inter- [illegible] heard on the [illegible]." Skaggs v. [illegible] S. E. 110.

b. Deposition of Person under Whom Party Claims.

The deposition of a person, under whom the party in whose favor it is [illegible] is not admissible as evidence, unless it appears from the deeds [illegible] recourse can be had against the [illegible] in case of eviction. Wood-

ward *v.* Woodson, 6 Munf. 227. See Va. Code, 1887, §§ 3345-49, abolishing incompetency on account of interest, with certain qualifications.

(3) Husband and Wife.

Where husband and wife are both parties, and interested in the result of a suit, neither is a competent witness. Burton *v.* Mill, 78 Va. 468.

Sections 22 and 23, chapter 130, of the Code of 1868, do not alter the common-law rule of evidence, that husband and wife are not competent witnesses for or against each other except in an action or suit between themselves. Watkins *v.* Wortman, 19 W. Va. 78.

"It is settled that at common law it is not competent testimony, Brown being the husband of his codefendant Emily Brown. This question has been directly before this court in Hill *v.* Proctor, 10 W. Va. 59. The court citing the common-law rule, as laid down in 1 Greenl. Ev., § 334, etc., held that 'the 22d and 23d sections of chapter 130 of the Code of 1868, make no material change in the common law, as to husband and wife giving evidence for or against each other in a case in which they are parties, except in an action or suit between husband and wife.'" Rose *v.* Brown, 11 W. Va. 122, 133.

Suit by Widow's Administrator against Husband's Executor.—A testator bequeaths the one-third of his personal estate to his widow and the residue to three of his children, and what is claimed by the legatees to be a portion of the general estate consists of a specified sum of money and certain bonds, which the executor claims were transferred to him by the testator in his lifetime and are therefore no part of the estate. After the death of the widow a suit is brought by her administrator against the executor and legatees of said testator to compel the executor to settle his accounts, to charge him with said money and the proceeds of said bonds and for distribution of said estate. In this suit the deposition of the widow, taken de bene esse, is read and portions of it relate to personal transactions and communications had in respect to said money and bonds between the executor and the testator. The deposition of the executor is also taken on his own behalf. Held, the deposition of the widow was itself incompetent evidence, and could not therefore lay the foundation for making the executor a competent witness to testify in his own behalf as to personal transactions or communications had with the deceased, nor could it make his wife a competent witness as to such transactions and communications. The testimony of both the executor and the wife as to such matters was therefore incompetent. Kimmel *v.* Shroyer, 28 W. Va. 505.

c. Effect of Removal of Incompetency.

The deposition of a party to a suit is taken before the passage of the act of February 7th, 1868; exceptions were taken to the deposition on account of the incompetency of the witness, by reason of interest in the result of the suit at the time the deposition was taken, but as that objection has been removed by the act aforesaid, and as the deposition when read on the hearing could have no more weight than if taken since the passage of the act, making the witness competent, no good reason exists why the deposition should be retaken, and it may be read on the hearing of the cause after the passage of the act. Parker *v.* Clarkson, 4 W. Va. 407.

D. SUFFICIENCY OF DEPOSITION.

The deposition of the collector in general terms, that the sale was made in exact pursuance of the act of congress, without specifying what was done, is not proper evidence of the fact. Evidence of the various proceedings required by law before the sale was made should be adduced, to enable the court to determine upon the facts so proved,

4. Incompetency of Witness.

a. Time of Incompetency.

See the title WITNESSES.

(1) Virginia Rule.

An objection to the admissibility of a deposition on the ground of the incompetency of the witness will not avail where the witness was competent at the time the deposition was taken. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

(2) West Virginia Rule.

Within the meaning of the West Virginia statute, a party testifies in his own behalf at the time when his deposition is used in a chancery cause and not at the time when it was actually taken. Hence, if the witness is incompetent at the time of the trial, his deposition can not be used, although he was competent when it was taken. Seabright *v.* Seabright, 28 W. Va. 412; Zane *v.* Fink, 18 W. Va. 693.

Though a witness was incompetent to testify when his deposition was taken, yet, if he was afterwards rendered competent by virtue of a statute, and at the time such deposition is read at the hearing of the cause he is competent, such deposition will be read and considered just as if it had been taken when it was read, and when the witness was competent to testify. Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927.

b. On Account of Interest.

See the title WITNESSES.

(1) In General.

A commission can not issue at the instance of the defendant to examine the plaintiff as a witness in the cause. Ross *v.* Carter, 4 Hen. & M. 488.

The court in the above case said: "The plaintiff has either an interest in the subject to the suit, or he has not; if he has, he should not give evidence." Ross *v.* Carter, 4 Hen. & M. 488.

Construction of § 23, Ch. 130, W. Va. Code.—It is assigned as error that "the court erred in overruling the exceptions to the depositions of L. J. Burdett and Susan Burdett, taken May 1, 1897. "The exception indorsed is as follows: 'The within deposition of L. J. Burdett is excepted to for the reason of incompetency of witness in so far as the evidence relates to the claim set up by the petition of Susan Burdett, the wife of L. J. Burdett. Smith *v.* Turley, 32 W. Va. 14, 9 S. E. 46.' In the first place there is no exception to the deposition of Susan Burdett, and if there were, the exception does not come within the purview of that decision and § 23, ch. 130, of the Code, as all the parties were still living at the time of the taking of the depositions. In the Turley case, referred to, Judge Brannon, in giving the reason of the incompetence of Mrs. Turley to testify, says: 'True, that statute (§ 23, ch. 130, Code) does not expressly exclude such party from giving evidence against creditors of the deceased; but creditors claiming under heirs, as to lands, in a sense, stand in their shoes. If Mrs. Turley establishes the trust, she overthrows the title of the heirs, and also the belief of the creditors as a consequence. Giving evidence against the heirs, she gives evidence against the creditors, as to the heirs she is incompetent under the letter of the statute, and as to the creditors incompetent under its spirit. Otherwise her children, willing to let her sustain her claim, might make no exception, and thus defeat creditors, if said creditors could not except for incompetency.' Here the creditors are not claiming under the heirs of a decedent, but the vendors and all other parties in interest are living and may be heard on the witness stand in the cause." Skaggs *v.* Mann, 46 W. Va. 209, 33 S. E. 110.

(2) Deposition of Person under Whom Party Claims.

The deposition of a person, under whom the party in whose favor it is offered claims, is not admissible as evidence, unless it appears from the deeds that no recourse can be had against the witness in case of eviction. Wood-

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whether the authority to sell was properly exercised in the particular case. Jesse *v.* Preston, 5 Gratt. 120.

Upon the trial of an issue directed in the said suit, a deposition of one M., who was then dead, was offered, whereby it was sought to show that L., one of the defendants, in the presence of W., another of the defendants, had, in an interview at Richmond, made to M. certain admissions material to the issue. These two defendants were strangers to the witness, and on cross examination describing them he said: "They were not black negroes. I think the brother-in-law had the lightest skin of the two. I think they were not bright mulattoes but dark mulattoes." It was proved by other witnesses that the brother-in-law spoken of (W.) was a white man, and that L. was so bright that he could hardly be distinguished from a white man. It was further proved that about the time at which the witness said he had the interview with the two men they were both in Richmond inquiring for him. Upon an objection to the reading of the deposition on the ground that the witness did not sufficiently identify the persons whose admissions were sought to be proved by him, it was held, that the evidence was prima facie sufficient to authorize the deposition to go to the jury. George *v.* Pilcher, 28 Gratt. 299.

E. WEIGHT OF DEPOSITION.

Where the answer of the defendant in chancery contains a direct and positive denial of the allegations in the complainant's bill it can not be outweighed by the deposition of one witness only, unsupported by corroborating circumstances. Beatty *v.* Smith, 2 Hen. & M. 395.

F. ADMISSION OF PART OF DEPOSITION.

Duty of Court to Select Part to Be Disregarded.—"It is not to be supposed or expected, that the court could be so well apprized of the contents of the depositions, as to be able to select, without the aid of counsel, those parts which the jury ought to disregard. The depositions being regularly taken, and read without objection, could not be withheld from the jury, partially; the court could not direct any erasure, as has been supposed." Buster *v.* Wallace, 4 Hen. & M. 88.

G. DETACHED DEPOSITION.

And although a deposition in such case may be certified jointly with the deposition of other witnesses, it may be detached and read separately. Echols *v.* Staunton, 3 W. Va. 574.

H. COPY OF ORIGINAL DEPOSITION.

Without proof of loss, or inability to produce the original power of attorney, no copy thereof can be admissible as evidence, unless it be such a copy as is provided by § 20, ch. 130, W. Va. Code, 1868. Dickinson *v.* Clarke, 5 W. Va. 280.

I. DEPOSITION TAKEN IN PURSUANCE OF REPEALED STATUTE.

The deposition of a party, to be read in a pending cause at law, was commenced before the passage of the act of March 2d, 1865-66, p. 86, requiring that parties should testify ore tenus, but was not completed until the law went into effect. Held, that the deposition was inadmissible if objected to. Crawford *v.* Halsted, 20 Gratt. 211.

The act of March 2, 1866, held under the circumstances not to be in conflict with § 16, art. 4, of the Alexandria constitution. Crawford *v.* Halsted, 20 Gratt. 211.

J. AMENDED PLEADINGS FILED.

Depositions proving matters not in an original bill when taken can not be read to support substantive matters in an amended bill afterwards filed, and a decree based on such amended bill, supported by only such depositions previously taken, is erroneous. Edgell *v.* Smith, 50 W. Va. 349, 40 S. E. 402. See ante, "Must Be Taken with Reference to Issue Made Up," XI, B.

K. WITHDRAWAL OF REPLICATION.

A deposition which was taken after a replication had been entered in the cause can not be read after the replication has been withdrawn. Clarke *v.* Tinsley, 4 Rand. 250.

L. PURPOSES FOR WHICH ADMITTED.

1. Attacking Genuineness of Receipts.

The court erred in admitting the depositions of plaintiffs attacking the genuineness of receipts, the affidavit required by § 40, ch. 126, W. Va. Code, which provides: "When a declaration or other pleading alleges that any person made, endorsed, assigned or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact he denied by an affidavit with the plea which puts it in issue, not having been filed." Maxwell *v.* Burbridge, 44 W. Va. 248, 28 S. E. 702.

2. Overthrowing Commissioner's Report—Depositions Taken after Report Returned.

Depositions taken after the return of the report of a commissioner can not be used to overthrow the report. They can be only to support a motion to recommit the report. Ward *v.* Ward, 40 W. Va. 611, 21 S. E. 746.

3. Deposition Subsequently Used as Admission.

The depositions of a witness in one suit may be read as evidence against him, as an admission, in another suit, where the subject matter is the same. Hatcher *v.* Crews, 78 Va. 460, citing 2 Whart, Ev., § 1120; Tabb *v.* Cabell, 17 Gratt. 160; Brown *v.* Molineaux, 21 Gratt. 539. See the title DECLARATIONS AND ADMISSIONS, ante p. 325.

4. To Subsequently Impeach Deponent.

Depositions Taken by Coroner.—On a trial for murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by him before the inquest, taken down at the time by the coroner and read to the witness, and signed by him. Wormeley *v.* Com., 10 Gratt. 658. See the title WITNESSES.

"A deposition officially taken in a judicial proceeding, especially a deposition taken with such exceeding care and accuracy as the one offered; which after being written was read over to the witness, corrected at his request and then signed by him, would seem to furnish a much more authentic history of what had been stated by the witness, than any that could be derived from the memory of witnesses, however veracious and retentive. It could not be read nor was it, as proof of the existence of any fact deposed to by the witness, but as proof of what the witness stated to be the fact in reference to a certain particular, for which purpose it was the best and safest testimony that could have been resorted to." Wormeley *v.* Com., 10 Gratt. 658.

5. To Prove Proceedings in Foreign Country.

"In the case of Young *v.* Gregorie (3 Call 446), in which the district court reversed the judgment of the county court, because the latter admitted letters and depositions to go in evidence to the jury to prove that an attachment had been levied on the plaintiff's property in a foreign country; and because the attachment in the proceedings mentioned, or an authenticated copy thereof, was the best evidence, and ought to have been produced; three of the judges of this court concurred in the opinion that the evidence was admissible, as it related to proceedings in a foreign country, which oftentimes can be proved in no other way than by depositions, and testimony dehors the proceedings; of which it is not always in the power of the party to procure copies." Hadfield *v.* Jameson, 2 Munf. 53.

M. AGAINST WHOM ADMISSIBLE.

New Parties.—It after answer filed

and depositions taken, the plaintiff makes new parties and files a new bill, the depositions previously taken can not be read against the new defendant. Jones *v.* Williams, 1 Wash. 230.

Lite Pendente Purchaser.—Depositions may be read against a lite pendente purchaser, though they were taken when he was not a party to the suit. Court of appeals rejected said depositions; because he was not a party to the suit; but say, that had he been a pendente lite purchaser, they might perhaps have been read. Williams *v.* Jacob, Wythe 145. See also, Jones *v.* Williams, 1 Wash. 230.

Husband and Wife.—Where a suit is brought to set aside a fraudulent conveyance made by a husband to his wife, depositions taken after notice given to the wife may be read as against her, and although read against her husband also, and she alone appeals from the decree reversed, because her husband had no notice of the taking of the depositions. Silverman *v.* Greaser, 27 W. Va. 550.

N. IRREGULARITIES IN TAKING —CONSENT OF PARTIES.

It is not improper to read depositions which appear to be irregularly in the cause, as against infant defendants, if it is done with the consent of the guardian ad litem. Hardman *v.* Orr, 5 W. Va. 71.

Notice—Time of Taking.—While notice to take depositions may be served on the counsel for a nonresident party, the time prescribed by § 3363 of the Virginia Code between the date of service, and taking deposition must elapse or the deposition can not be read, if objected to. Payne *v.* Zell, 98 Va. 294, 36 S. E. 379.

XII. Retaking Deposition.

A. RIGHT TO RETAKE AND GROUNDS FOR RETAKING.

"There is greater strictness in England than in this state in permitting the deposition of a witness to be retaken, arising from the difference in the practice of the two countries in regard to the mode of taking depositions. It may, however, be said here as well as in England, that 'the court is always desirous that the examination of witnesses should be completed as much as possible, uno actu, and that whenever it can be accomplished, no opportunity should be offered after a witness has once signed his deposition, and turned his back upon the examiner, of tampering with him, and inducing him to retract or contradict or explain away what he has stated in his first examination upon the record. But notwithstanding this unwillingness to allow a second examination of the same witness, there are cases in which, it justice requires that a second examination of the same witnesses should take place, an order will be made to permit it'" Fant *v.* Miller, 17 Gratt. 187.

A deposition once taken can not be retaken without the leave of the court, which will always be granted whenever justice seems to require it. Carter *v.* Edmonds, 80 Va. 58. McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765, citing Fant *v.* Miller, 17 Gratt. 187; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137.

Proving Facts Subsequently Rendered Necessary to Defense.—"The object of the defendants in obtaining leave to re-examine the witness was, not to afford him an opportunity 'to retract, or contradict, or explain away' what he had stated in his first examination, but to prove facts rendered necessary to their defense by the action of the plaintiff since the first deposition was taken, and which could not be any other witness. According to the strictest construction of the rules of equity practice, there is none which forbids the re-examination of the witness under such circumstances and for such a purpose." Fant *v.* Miller, 17 Gratt. 187.

Want of Notice.—The court held in the case of Vance *v.* Snyder, 6 W. Va. 26, that "it is not error in a court of

equity to give a party leave to retake depositions which the court upon an exception determines can not be read, for want of sufficient notice, at the term at which it is so determined." Hoopes *v.* DeVaughn, 43 W. Va. 447, 27 S. E. 251.

B. NECESSITY FOR ORDER.

1. General Rule.

As a general rule depositions can not be retaken without an order of court. Fox *v.* Jones, 1 W. Va. 216; Booth *v.* McJilton, 82 Va. 827, 1 S. E. 137.

The courts possess much latitude in permitting the retaking of a witness' depositions. Carter *v.* Edmonds, 80 Va. 58; Hoopes *v.* Devaughn, 43 W. Va. 477, 27 S. E. 251.

"Barton in his Chancery Practice (§ 297), says: 'The general rule is that without the leave of the court, and for good cause, a deposition once taken in a case can not be retaken, the object being to compel a full disclosure on the side before the other side proves his case, and to prevent the temptation to perjury, that would be offered by giving opportunity to change the evidence to suit the emergencies of the case. But the courts possess much latitude in permitting a second examination; and, where the circumstances of the case and justice require it, an order for the second examination of the same witness will be made, which, unless it was palpably improper to grant, an appellate court will not for this cause reverse the decree. Citing Fant *v.* Miller, 17 Gratt. 188. In accord with these views, it has been held not to be error to allow depositions to be taken which the court, upon exception, determines can not be read for want of sufficient notice, the order to retake being made at the term at which the matter was determined." Hoopes *v.* DeVaughn, 43 W. Va. 447, 27 S. E. 251.

Where there is an exception filed to the reading of a deposition of a witness, retaken without leave of the court first obtained, and for that cause, if the court, on considering the question, and the circumstances, is of opinion from the character of the deposition excepted to, and the circumstances of the case appearing, that it would have given leave to retake the deposition, if it had been asked so to do, prior to the retaking of the deposition, it should overrule the exception. Feamster *v.* Withrow, 9 W. Va. 296, 297; Carter *v.* Edmonds, 80 Va. 58; Hoopes *v.* Devaughn, 43 W. Va. 477, 27 S. E. 251; Leonard *v.* St. John, 101 Va. 752, 45 S. E. 474.

"Appellee contends that the deposition ought to have been rejected because it had been retaken without leave of the court. There was no exception to the deposition to the effect that it was retaken without leave of the court, or that the deposition of this witness had ever been taken in the case, so far as the record shows. If there had been such exception or objection to its being read, it would have been a matter of sound discretion with the court whether to allow it to be read or not. Carter *v.* Edmonds, 80 Va. 58; McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765." Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. 612.

Since the enactment of § 3364, Va. Code, 1887; same section, Va. Code, 1904, the deposition of a witness may be retaken without the consent of the court first obtained, and may be read on the trial if the court, in the exercise of a sound discretion, would have directed such re-examination. Prior to that enactment such was not the law, and the previous consent of the court was necessary. Since that enactment the court may direct a deposition to be retaken, where justice seems to require it, or may permit it to be taken without consent under the conditions above mentioned, and in either case this court will not reverse the action of the trial court unless it is palpably erroneous. Leonard *v.* St. John, 101 Va. 752, 45 S. E. 474.

2. Where Original Deposition Excepted to.

Where a deposition has been taken in a cause and excepted to, it may be retaken by the party desiring to use it, before the cause is heard, without an order from court for that purpose. Fox *v.* Jones, 1 W. Va. 216, 91 Am. Dec. 383; McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765.

The fact that the depositions as first taken were then excepted to, constitutes an exception to the rule and fully authorized the second taking. A party who has taken a deposition which is excepted to for any formal objection, is not compelled to wait the action of the court on such objection; by which (if the exception were sustained) he might not only be delayed, but even deprived entirely of the testimony of the witness should he die pending the question. He may, therefore, well assume, if he chooses, that the objection was properly taken, and proceed at once to remove it by taking the deposition de novo. Fox *v.* Jones, 1 W. Va. 205, 91 Am. Dec. 383.

3. When Original Deposition Not Excepted To.

When a deposition not excepted to has been retaken without leave of the court, it may or may not be read, at the discretion of the court. McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765. See ante, "General Rule," XII, B, 1.

4. Commissioner Directing Account.

Independently of the statute, Va. Code, 1887, § 3362, a commissioner, acting under an order of court directing an account, may, in a proper case, without leave of court, reopen depositions that have been closed and re-examine the witnesses. Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748.

C. SUPERVISORS OF APPELLATE COURT.

Unless it was palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this reason, reverse the decree; as the circuit court ought to possess much latitude of discretion in the decision of such questions. Fant *v.* Miller, 17 Gratt. 187; Brooks *v.* Wilcox, 11 Gratt. 411; Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749; Tate *v.* Bank, 96 Va. 765, 32 S. E. 476.

XIII. Action or Proceedings in Which Used.

A. PROCEEDINGS IN SAME ACTION.

Under Va. Code, 1873, ch. 172, § 36, a deposition in a chancery cause, taken after an interlocutory decree, can not be read as to any matter adjudicated by such decree. Richardson *v.* Duble, 33 Gratt. 730.

A deposition, admissible in the original suit, may be read upon the hearing of a cross bill, under an order so directing. Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67.

A deposition taken after an appeal from an interlocutory decree may be read upon the hearing of the appeal. Alexander *v.* Morris, 3 Call 89.

B. OTHER ACTIONS BETWEEN SAME PARTIES.

1. In General.

Where two suits are brought by a trustee and cestui que trust at the same time against the same parties and to recover the same trust property, they are not so connected that testimony taken in one may be read in the other. Sheppards *v.* Turpin, 3 Gratt. 373.

If two actions be pending between the same parties, and in the same court, quære, whether a deposition, taken by virtue of a notice in which the particular action is not distinctly specified, can be read as evidence in either action. Chaney *v.* Saunders, 3 Munf. 51.

Collateral Suits at Law and in Equity.—Depositions taken are admissible in collateral suits at law, and in equity. Austin *v.* Winston, 1 Hen. & M. 33, 3 Am. Dec. 583.

Subsequent Suit at Law.—"Depositions regularly taken upon a bill and answer in chancery, may be used as evidence in a trial at law between the same parties, provided it be proved that the witnesses are dead, or by reason of sickness are unable to attend, or that they can not be found, or are absent from the country, or are otherwise not amendable to the process of the court, Com. Dig. title Testoigne. C. 4, Deposition, 1 Atk. 445, yet they can be used only under the circumstances just mentioned." Pleasants *v.* Clements, 2 Leigh 474.

A deposition taken in a chancery suit can not be read in a subsequent action at law between the same parties where the issues are not the same. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

2. Identity of Parties and Issue.

Depositions taken in a suit with the factor may be read in a suit with the principal for the same cause. Ritchie *v.* Lyne, 1 Call 489.

"Complete mutuality or identity of parties is not necessary, 'it being sufficient if the point or matters in issue were the same in both cases, and the party against whem the evidence is offered, or those under whom he claims, had full power of cross-examination.' 3 Greenleaf on Evidence (15th Ed.), § 341. The reason of this is plain. The proof must respond to the allegation and plea, and, if a witness in his deposition testifies with respect to a matter not in issue, his testimony would be immaterial, and might with safety and propriety be passed by without challenge or cross-examination, and in such a case to permit it to be read in another suit upon a different state of the pleading would operate a surprise and an injustice." Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

"The rule is that depositions taken in one suit can not be used in another suit unless the parties are the same or are in privity and the subject involved in the suit is also the same. 6 Ency. Pl. & Pr. 579. It excludes the depositions in the former suit for neither the parties nor the subject matter are wholly the same. Another principle having the like effect asserted in Brown *v.* Johnson, 13 Gratt. 644, is that: 'A man who can not be prejudiced by a deposition or proceeding in a suit, shall never receive any advantage from it.' In Brown *v.* Jackson, an action against one obligor on a joint bond, an attempt was made by the defendant to use a deposition taken in another action by the plaintiff on the same bond against another obligor, and the court held, that under no circumstances, could it be competent evidence. See also, Payne *v.* Coles, 1 Munf. 373, and Chapmans *v.* Chapman, 1 Munf. 398. The plaintiff could not have used these depositions against the defendants except by agreement, or in a limited sense for purposes of contradiction." Miller *v.* Gillespie, 54 W. Va. 450, 46 S. E. 451.

A deposition taken in a chancery suit can not be used, after the death of the deponent, in a subsequent action at law concerning the same transaction, where the issues are not the same. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

In the absence of an agreement to the contrary, depositions taken in one suit can not be used in another, unless the parties are the same, or are in privity, and the subject matter of the suits is also the same. Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451.

C. ACTIONS BETWEEN DIFFERENT PARTIES.

Where two actions are pending by the same plaintiff against different obligors on the same bond, a deposition taken by the defendant in one of the actions can, under no circumstances, be competent evidence for the defendant in the other. Brown *v.* Johnson, 13 Gratt. 644.

Depositions relating to pedigree, taken in a former suit to which the plaintiff but not the defendant was a

party, are competent evidence touching the descent of slaves, the deponents themselves being dead. Colvert *v* Millstead, 5 Leigh 88.

Depositions taken in a cause relative to the same subject, but not between the same parties, can not be read in evidence in a subsequent suit. Rowe *v.* Smith, 1 Call 487.

A deposition taken by the defendant in a suit brought by one creditor to set aside a fraudulent conveyance, can not be used by the defendant in another suit brought by another creditor to impeach the same conveyance, unless by agreement. Miller *v.* Gillispie, 54 W. Va. 450, 46 S. E. 451.

XIV. Giving Depositions to the Jury.

Virginia Rule.—A deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased. Hansbrough *v.* Stinnett, 25 Gratt. 495.

West Virginia.—A contrary rule obtains in West Virginia. In Welch *v.* Ins. Co., 23 W. Va. 288, the court says: "It often happens * * * that the evidence on one side is oral testimony introduced before the jury, the witnesses being examined in person before the jury. The mass of the testimony on the other side is in the form of depositions read to the jury. If the case is an important one and the trial lasts for many days, if the depositions are permitted to be taken to the jury room, and the minds of the jurors refreshed by the reading of the depositions, while the oral testimony of the other side has in a measure faded from the memory of the jury, it is obvious, that an undue advantage is given to the side, which is sustained by depositions. The Virginia decision [Hansbrough *v.* Stinnett, 25 Gratt. 495] would seem to have been rendered upon but little consideration, and no reason is given for their departure from the English practice. We hold this English practice as obligatory upon us until changed by statute law."

Depositions read in a trial at law by a jury can not be carried out by the jury, to be considered when deliberating on the case, except by leave of court. W. Va. Code, ch. 131, § 12. Graham *v.* Citizens' Nat Bank, 45 W. Va. 701, 32 S. E. 245.

In criminal cases it is improper to permit the jury to take depositions in behalf of the accused to its room, on retiring; but the court should, on its request, have any portion of such depositions reread to it. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; State *v.* Cain, 20 W. Va. 679.

"Code, ch. 131, § 12, has no application to depositions taken in criminal cases, but they are governed by ch. 159, § 1; and therefore the court committed no error in not allowing the jury to take the depositions to the jury room, but the court should have seen that the jury were fully informed as to their contents, so as to enable them to arrive at a just conclusion." State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

XV. Exceptions and Objections.

A. RIGHT TO OBJECT—WHO MAY.

Where both parties to a suit obtain special commissions to take depositions, subject to all just exceptions, and only one party acts under his commission, the other party is not precluded from objecting to the competency of the witness by having himself obtained a special commission. Beverley *v.* Brooke, 2 Leigh 425.

For Lack of Notice to Husband.—In a suit brought to set aside as fraudulent a conveyance made by a husband to his wife, the wife can not object to depositions, taken after notice to her, on the ground that notice was not also given to her husband. Silverman *v.* Greaser, 27 W. Va. 550.

In such a case counsel for the wife at her request has no right to appear

for her husband to object to the depositions for him, on the ground that he had no notice of the taking of such depositions. Silverman *v.* Greaser, 27 W. Va. 550.

B. TIME TO OBJECT.

1. To Party Taking.

A commission was regularly awarded by the court; the parties attended in pursuance, and as no objection was taken to the deposition at the time, it shall either be intended that the party taking them was then a magistrate, or that the parties agreed that the deposition might be taken before him. Thornton *v.* Corbin, 3 Call 388, distinguished in Blincoe *v.* Berkley, 1 Call 405.

2. To Competency of Witness.

a. Examination in Chief as Waiver.

It is no waiver of objection to the competency of a witness that the exception was not made until after four questions has been pronounced to him on his examination in chief. Warwick *v.* Warwick, 31 Gratt. 70.

Failure to object to the competency of a witness until after the examination in chief is not necessarily a waiver of objection. Hill *v.* Postley, 90 Va. 200, 17 S. E. 946.

b. Cross-Examination as Waiver.

Where a party to a cause is examined in his own behalf and cross-examined at length by the other party without objection to his competency, the objection is thereby waived and can not afterwards be made. Neilson *v.* Bowman, 29 Gratt. 732; Hord *v.* Colbert, 28 Gratt. 49; Smith *v.* Profitt, 82 Va. 832, 1 S. E. 67. But where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by the cross-examination. Neilson *v.* Bowman, 29 Gratt. 732.

If, after an exception has been taken to the competency of a witness, the exceptor cross-examines him as to matters not brought out on the examination in chief, against the objection of the party calling him, the exceptor thereby waives his exception to the competency of the witness and makes him his own witness. Miller *v.* Miller, 92 Va. 510, 23 S. E. 891.

Objection to the competency of a witness, known to be incompetent, should be made before he is examined in chief. It can not be made after cross-examination. Pillow *v.* Southwest, etc., Imp. Co., 92 Va. 144, 23 S. E. 32; Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

A deposition can not be objected to at the trial on the ground of interest when it appears that the party wishing to reject it, or his counsel, was present at the taking and cross-examined the deponent. Detwiler *v.* Green, 1 W. Va. 109.

3. To Interrogatories.

Objection to questions on the ground that they are leading should be made at the examination, if the adverse party is present, and if not, then within a reasonable time after the deposition is returned to court. M'Candlish *v.* Edloe, 3 Gratt. 330.

Suppressing Statements after Cross-Examination. — Where the plaintiff's deposition has been taken and the defendants have cross-examined him, they can not have the questions and answers on cross-examination struck out, though they may refer to the acts and declarations of a deceased person, under whom the defendants claim. Field *v.* Brown, 24 Gratt. 74.

Where, on a trial at law, a deposition is introduced, taken regularly under a commission, and an objection is made to some of the questions as leading questions, the court can not suppress the improper questions and answers, after the jury is sworn; but the objection should be made to the court before the jury is sworn, and the improper questions and answers suppressed. Jones *v.* Lucas, 1 Rand. 268.

4. For Irregularities.

a. Issuance of Commission.

Exceptions to depositions taken under a commission issued after a cause is set for hearing may be made at any time before the cause is gone into. Foster *v.* Sutton, 4 Hen. & M. 401.

b. Want of Affidavit.

No objection having been made for want of an affidavit for the issuance of a commission to take a deposition until after the deposition had been read as evidence before the arbitrators, and after the death of the witness, the objection was properly overruled. Perkins *v.* Hawkins, 9 Gratt. 649.

c. Want of Notice.

A deposition taken without authority or notice is not admissible as evidence; and the objection to it may be taken when it is offered to be read to the jury. Unis *v.* Charlton, 12 Gratt. 484.

An exception to a deposition for want of notice, or other irregularity, must be brought to the notice of the court before the hearing of the cause, that it may be passed upon, or it will be considered as waived, and will not be noticed in the appellate court. Statham *v.* Ferguson, 25 Gratt. 28.

The latter, however, was in no way interested in, or connected with, the other suit; and besides, no objection was raised until the calling of the present case for trial, which was several months after the depositions had been taken. The motion was without merit, and was rightly overruled. Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

Objecting at Another Trial of Cause.—If depositions are read on a trial without objection or if objection is made, without an exception taken to their admission, upon another trial of the cause, they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them in time to enable the party offering them to take them again and the witnesses are alive at the time of such notice. Peshine *v.* Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

5. To Evidence for Admission of Deposition.

The affidavit of a witness taken before a justice of the peace, that from his age and infirmities he was unable to attend the court without endangering his life, not having been objected to in the court below for want of notice, that objection can not be made in the appellate court. Tayloe *v.* Smith, 10 Gratt. 557.

6. Retaking without Order.

"One assignment of error is that the court allowed the plaintiff to read a deposition of a witness whose deposition had already been taken, the objection being that no leave of court was given to retake the deposition; but this objection ought to have been made the ground of an exception before the trial, and not first made when offered at the trial. This would work a surprise. Dickinson *v.* Clarke, 5 W. Va. 280; Jones *v.* Lucas, 1 Rand. (Va.), 268; Foster *v.* Sutton, 4 Hen. & M. 401; Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611; Peshine *v.* Shepperson, 17 Gratt. 472; Bart. Ch. Prac. 758; Bart. Law Prac. 439; Doane *v.* Glenn, 21 Wall. 35." Electric, etc., Co. *v.* Consolidated, etc., R. Co., 42 W. Va. 583, 26 S. E. 188.

7. Introduction of Copy.

Without proof of loss, or inability to produce the original power of attorney, no copy thereof can be admissible as evidence, unless it be such a copy as is provided by W. Va. Code, 1868, ch. 130, § 20. Nor is the objection to the introduction of such copy waived by failure to object before trial. Dickinson *v.* Clarke, 5 W. Va. 280.

C. SUFFICIENCY AND SCOPE.

1. In General.

The grounds of exception to depositions must be given in the exception. A mere general exception is not suffi-

cient, except for incompetency. Long *v.* Perine, 41 W. Va. 314, 23 S. E. 611; Richardson *v.* Donehoo, 16 W. Va. 685; Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

2. To Exceptionable Testimony.

If depositions offered as evidence contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disregard them. Buster *v.* Wallace, 4 Hen. & M. 82; Harriman *v.* Brown, 8 Leigh 697; Friend *v.* Wilkinson, 9 Gratt. 31; Trogdon's Case, 31 Gratt. 862; Norfolk, etc., R. Co. *v.* Ampey, 93 Va. 108, 25 S. E. 226; Parsons *v.* Harper, 16 Gratt. 64; Washington, etc., R. Co. *v.* Lacey, 94 Va. 460, 26 S. E. 834.

"It is the duty of the exceptor to point out the exceptionable passages, contained in the deposition or depositions. It is the duty of the exceptor to lay his finger upon the passages which in his opinion come within the scope of his objections, so that the mind of the court may be brought to bear upon them. In the case of Harriman *v.* Brown, 8 Leigh 697, it was held, as follows: 'A deposition is objected to, so far as it states the mere belief of the deponent as to the matters spoken of by him, the sayings or doings of others not parties to the suit, and the understanding, reputation or tradition of the neighborhood; and also, so far as the answers are given to leading questions.' Held, it is not sufficient to make the objection in these general terms but it is incumbent on the parties objecting to point out the exceptionable passages, and move the court to expunge or disregard them." Richardson *v.* Donehoo, 16 W. Va. 685.

A deposition was objected to so far as it stated the mere belief of the deponent as to the matters spoken of by him, the sayings or doings of others not parties to the suit, and the understanding, reputation or tradition of the neighborhood; and also so far as the answers were given to leading questions. Held, that it was not sufficient to make the objection in these leading terms, but that it was incumbent on the party objecting to point out the exceptionable passages and move the court to expunge or disregard them. Harriman *v.* Brown, 8 Leigh 697; Dillard *v.* Collins, 25 Gratt. 343.

A party objected to the admission of so much of certain depositions as gave evidence of hearsay. The exception, however, did not specify the particular parts objected to, and the court allowed the depositions to go to the jury under instructions that they should consider those parts which gave evidence of hearsay only for the purpose of corroborating the testimony of other witnesses whose testimony had been assailed. Held, that the exception to the deposition was valid, notwithstanding its generality, as the portions excepted to were brought to the notice of the court. Charlton *v.* Unis, 4 Gratt. 58.

Effect of Failure to Specifically Point Out Objection.—A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he specifically pointed out. Warren *v.* Warren, 93 Va. 73, 24 S. E. 913.

3. For Irregularities.

If, on the trial of a cause in the court below, a party objects to the introduction of a deposition as evidence, for any irregularity in taking it, his exception to the opinion of the court overruling the objection must state the grounds of the objection. Barker *v.* Barker, 2 Gratt. 344.

D. OBJECTIONS ON APPEAL.

1. General Rule.

Where a party excepts to a deposition, if he wishes to rely on the exception he must bring it to the attention of the court, and unless the record

shows that this has been done the exception on appeal will be treated as waived. Taylor *v.* McDonald, 100 Va. 487, 41 S. E. 946; Baxter *v.* Moore, 5 Leigh 219; Simmons *v.* Simmons, 33 Gratt. 451; Rose *v.* Brown, 11 W. Va. 122; Hill *v.* Proctor, 10 W. Va. 59; McVeigh *v.* Chamberlain, 94 Va. 73, 26 S. E. 395; Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 595; Fant *v.* Miller, 17 Gratt. 187; Vanscoy *v.* Stinchcomb, 29 W. Va. 263, 11 S. E. 927; Middleton *v.* White, 5 W. Va. 572; Fisher *v.* Dickenson, 84 Va. 318, 4 S. E. 737; Dickinson *v.* Clarke, 5 W. Va. 280; Linsey *v.* McGannon, 9 W. Va. 154; Statham *v.* Ferguson, 25 Gratt. 28.

It is too late to object to a deposition for the first time in the appellate court, where it was read without objection in the court below. Burkholder *v.* Ludlam, 30 Gratt. 255, 32 Am. Rep. 668; Dickenson *v.* Davis, 2 Leigh 401.

"There are pended to the record several depositions, designed to sustain these allegations in the answer of Camden; but the recitals in the decree of January 24, 1874, of what the cause was heard upon, shows that it was not heard on these depositions. Why it was not heard on these depositions also does not appear, but, in the absence of any objection to their exclusion being made in the circuit court, this court can not regard their exclusion as any error. And not having been read in the court below, they can not be read or considered in this court." Shumate *v.* Dunbar, 6 Munf. 430; Camden *v.* Haymond, 9 W. Va. 680.

2. For Irregularities.

Exceptions to depositions which are curable by retaking should be made before the commencing of the trial. Electric, etc., Co. *v.* Consolidated, etc., R. Co., 42 W. Va. 583, 26 S. E. 188.

It is too late to urge as an objection that certain depositions were taken after the master's report was filed, when it appears by the record that the cause was finally heard below on the report of the master, and also on such depositions, without objection. Hunter *v.* Robinson, 5 W. Va. 272.

A deposition having been taken after the cause was set for hearing in the superior court of chancery, and no objection appearing to have been made in that court, the court of appeals will presume that good cause was shown for admitting it. Stubbs *v.* Burwell, 2 Hen. & M. 536.

Want of Notice.—Exceptions to depositions for want of notice and other irregularities must be called up and decided in the court below, otherwise it can not be assigned for error that they were read. Fant *v.* Miller, 17 Gratt. 187. See the title APPEAL AND ERROR, vol. 1, p. 563.

Where no objection was made in the lower court to the reading of depositions in an action for divorce, on the ground of insufficient notice, no such objection can be raised for the first time on appeal. Brown *v.* Brown, 2 Va. Dec. 308.

Presumption as to Notice.—The certificate of a commissioner who took a deposition did not state that it was taken pursuant to notice, and, though the deposition was excepted to for lack of a commission and for failure of the certificate to state the names of the parties, no exception was taken to it in the lower court for want of notice. Held, that, although there was no notice or evidence of notice in the record, the objection for want of notice could not be taken in the appellate court. Steptoe *v.* Read, 19 Gratt. 1; Hill *v.* Bowyer, 18 Gratt. 364; Coffman *v.* Sangston, 21 Gratt. 263.

3. To Leading Interrogatories.

Though an exception is taken and entered at the time, that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony; and if he fails to do this, the exception will not be regarded in

the appellate court. Summers *v.* Darne, 31 Gratt. 791.

4. To Competency of Witness.

Where an exception to a deposition is to the competency of a party to the cause, whether the exception was passed upon at the hearing or not it may be passed upon by the appellate court. Taylor *v.* McDonald, 100 Va. 487, 41 S. E. 946.

"An exception to a deposition whether endorsed on it or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (except upon the ground of incompetency, in which no exception is necessary), not having been brought to the notice of the court below, or passed upon by that court, ought to be considered as having been waived, and can not be noticed by the appellate court; and a general judgment or decree of the court below against the party making the exception, can not be considered as involving a decision upon the exception." Hill *v.* Proctor, 10 W. Va. 59; Fant *v.* Miller, 17 Gratt. 187.

Where deposition in a chancery suit is taken subject to all just exceptions, the court should examine and decide the question of competency, although no exception is made to the deposition; and if on appeal the appellate court finds the deposition incompetent it will disregard it. Bevereley *v.* Brooke, 2 Leigh 425.

Where no objection was made to the reading of a deposition in the court below, the witness being competent, it is too late to raise an objection in the appellate court. Linsey *v.* McGannon, 9 W. Va. 154.

Objections to a deposition, that might be waived, if not made at the time of its being taken, or, at least, for not being taken and noted before the trial of the case, are such as relate to the regularity of the taking of it, and not such as refer to its competency. Dickinson *v.* Clarke, 5 W. Va. 280.

Where the objection to a deposition relates to the competency of the witness the objection may be made on the hearing or in the appellate court, although no exception was made to the deposition. Rose *v.* Brown, 11 W. Va. 122; Martin *v.* Smith, 25 W. Va. 579, 587; Kimmel *v.* Shroyer, 28 W. Va. 55; Hill *v.* Proctor, 10 W. Va. 59; Middleton *v.* White, 5 W. Va. 572; Vanscoy *v.* Stinchomb, 29 W. Va. 263, 11 S. E. 927.

No objection or exception having been taken to the reading of a deposition of a witness in the court below, he being a competent witness, it is too late to raise the objection in the appellate court. Linsey *v.* McGannon, 9 W. Va. 154.

An objection to a deposition for incompetency endorsed thereon, is not waived by a failure to insist thereon in the court below. Middleton *v.* White, 5 W. Va. 572.

Conflicting Theory.—In Simmons *v.* Simmons, 33 Gratt. 460, the court said: "Notwithstanding some expressions in decided cases, which seem to concede that objections to the testimony of a witness on the grounds of his incompetency may be properly made in this court although not made, or considered, or passed upon in the court below, we are of opinion, that such objections, unless first made in the court below, can not be relied on here, for the reason that if allowed, parties might be taken by surprise. If made in the court of original jurisdiction: First. The incompetency might in some cases be removed by release or otherwise. Second. If not removed and the witness be excluded, the loss of his testimony might perhaps be supplied by other evidence.

Where no objection was made to the use of a deposition in the court below, objections to the competency of the witness can not be raised for the first time in the appellate court. Baxter *v.* Moore, 5 Leigh 219.

And in McVeigh *v.* Chamberlain, 94 Va. 78, 26 S. E. 395, the court said: "Under the decisions of this court, an exception taken to a deposition on the ground of the incompetency of the witness or for other cause, if not brought to the attention of the court below at the hearing, will be taken by the appellate court to have been waived. Fant *v.* Miller, 17 Gratt. 227-228; Simmons *v.* Simmons, 33 Gratt. 460-61; and Martin *v.* South Salem Land Co., ante, p. 28."

5. For Want of Proper Authentication.

In order to have the advantage in the appellate court of objections to depositions being read in a cause, for want of proper authentication, or proper certification by the officer taking the same, the objections to the reading of the depositions, must be made in the court below and the defective authentication or certificate with the objection copied into and part of the record as provided in § 6, ch. 135, W. Va. Code. Cheuvront *v.* Cheuvront, 54 W. Va. 171, 46 S. E. 233.

E. WAIVER OF OBJECTIONS.

1. What Constitutes.

a. Objection to Competency.

See ante, "To Competency of Witness," XV, B, 2; "To Competency of Witness," XV, D, 4.

b. Objection to Irregularities.

Want of Notice.—Where notice is given to take depositions at two distant places on the same day, the other party may attend at one of the places and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he can not except to the depositions taken at either place. Latham *v.* Latham, 30 Gratt. 307. See ante, "Want of Notice," XV, B, 4, c; "For Irregularities," XV, C, 3; "For Irregularities," XV, D, 2.

When the depositions of a nonresident are taken without notice of the intended application, the appearance of the adverse party at the taking of the deposition is no waiver of the objection. Blincoe *v.* Berkeley, 1 Call 405.

Insufficiency of Notice.—A deposition, taken at a time and place not mentioned in the notice, may be read as evidence, an agent of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time and place appointed, and consented to a postponement to such other time and place. And if, in other respects, the commission be regularly executed and returned, the court will presume from circumstances, that the person who gave the consent was the authorized agent of the party. Marshall *v.* Frisbie, 1 Munf. 247.

Irregularity in Cause against Infant.—See ante, "Irregularities in Taking—Consent of Parties," XI, N.

c. Objection to Exceptionable Testimony.

See ante, "To Exceptionable Testimony," XV, C, 2; "To Interrogatories," XV, B, 3; "To Leading Interrogatories," XV, D, 3.

d. Refusal of Counsel to State Objection.

Where counsel refused to state whether or not they objected to the filing of a paper as a deposition, they thereby waived the right to object to its being read during trial on the ground that it was not signed. Meyers *v* Falk, 99 Va. 385, 38 S. E. 178.

e. Admitting Party Defendant—Conditional Admission.

After the defendant in a chancery suit had answered and depositions had been taken, another person was admitted as a party defendant upon condition that the cause should not thereby be delayed. Held, that the condition upon which the new defendant was admitted was a waiver of objections on his part as to irregularities in depositions which had been taken. Jones *v.* Janes, 6 Leigh 167.

2. Effect of Waiver.

Application of Waiver to Subsequent Action.—The waiver of an objection to a deposition in a chancery suit because taken before the answer is filed, will not apply to a subsequent action at law not then contemplated by the parties. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

XVI. Appeals.

A. IN GENERAL.

When a court excludes as evidence portions of a deposition, which has been read to the jury, it should designate clearly the parts of the deposition excluded, and if it fails to do so, and it is a matter of conjecture as to what portions of such deposition, the court intended to exclude, the appellate court will decide the case, as though no part of such deposition had been excluded. Bindley *v.* Martin, 28 W. Va. 773.

When evidence is introduced in a cause to which there are objections and exceptions taken and a decree rendered without the court passing upon such objections and exceptions and there is sufficient legal evidence in the cause together with the facts and circumstances of the case to justify the decree, the same will not be reversed because the court may have considered at the hearing the evidence so objected and excepted to; or because it failed to prepare such objections and exceptions. Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363.

A deposition is excluded by the circuit court upon exceptions. Whether the deposition was properly excluded or not is immaterial if the reading of it would not have altered the result. Watkins *v.* Wortman, 19 W. Va. 78.

When the circuit court sustains exceptions to depositions, and erroneously excludes material and important evidence before passing on the case, and then finds contrary to what its decision might have been, had such evidence not been excluded, this court will reverse the case for such erroneous ruling alone, and remand it for further proceedings. Farmers' Bank *v.* Gould, 42 W. Va. 132, 24 S. E. 547.

B. RECOGNITION OF DEPOSITIONS ON APPEAL MUST BE PART OF RECORD.

The fact that depositions were used must be set out on record in order that they may be recognized on appeal. Ayres *v.* Robins, 30 Gratt. 105.

"Depositions of the plaintiff and others taken on his behalf are copied into the transcript of the record, with a memorandum of the clerk that they had been filed in the cause of March 23, 1881, but said depositions are not referred to or recognized in any order or decree of the court, nor is there anything in any order or decree to show that they were made a part of the record, or that they were read on the hearing of the cause; therefore according to the repeated decisions of this court said depositions are no part of the record and can not be considered by the appellate court. Camden *v.* Haymond, 9 W. Va. 680; Hill *v.* Proctor, 10 W. Va. 59; Hilleary *v.* Thompson, 11 W. Va. 113; Park *v.* Petroleum Co., 25 W. Va. 108; Handy *v.* Scott, 26 W. Va. 710; Nelson *v.* Cornwell, 11 Gratt. 724; 4 Min. Inst. 1198. The rule is qualified to some extent in Day *v.* Hale, 22 Gratt. 146, and Turnbull *v.* Clifton Coal Co., 19 W. Va. 299. According to these cases, when depositions are taken and filed in the cause, and the decree is supported by and obviously based upon them; the omission to refer to them in the orders, or decrees of the court will be considered a clerical mistake; and the cause will be treated as having been heard upon them as well as upon the other papers in the cause. Warren *v.* Syme, 7 W. Va. 474; (Renick *v.* Ludington, 20 W. Va. 533.)" Bloss *v.* Hull, 27 W. Va. 503.

Failure to Recite Depositions in Decree.—"In the case of Day *v.* Hale, and Hale *v.* Hare, 22 Gratt. 146, the first

section of the syllabus is: 'When depositions are taken and filed in a cause, both parties having been present when they were taken, and the decree is obviously based upon them, the omission to refer to them in the decree will be considered a clerical mistake, and the cause will be considered as having been heard upon them as well as upon the other papers.' In these cases Judge Anderson delivered the opinion of the court and at pages 159 and 160 he says: 'The next assignment of error we shall notice is, that the decree not stating that the cause was heard upon depositions, they should be excluded from consideration; and the answers being responsive to the bill and denying its material allegations, it should have been dismissed. The record shows, that depositions were taken by both parties, and that both parties were present at the taking of the depositions, and cross-examined each other's witnesses; and it appearing from the entry of the clerk, that the depositions were filed in the cause before the hearing, and the decree being evidently founded upon the evidence, it is fair to presume, that it was a clerical omission in drawing the decree, and that the cause was heard upon the depositions." Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

"In the case of Camden *v.* Haymond, 9 W. Va. 680 and 690, this court held according to the last section of the syllabus as prepared by the court, that 'if a decree recites, that the cause came on to be heard on bill, answer and general replication thereto, and an appeal is taken from such decree, and depositions had been taken to sustain the answer and copied in the record, these depositions will not be read or considered in the appellate court.' Judge Green, in delivering the opinion of the court in this case, at page 690, says: 'There are appended to the record several depositions, designed to sustain these allegations in the answer of Camden; but the recitals in the decree of January 24, 1874, of what the cause was heard upon, shows that it was not heard on these depositions. Why it was not heard on these depositions also does not appear, but in the absence of any objection to their exclusion being made in the circuit court, this court can not regard their exclusion as any error. And not having been read in the court below, they can not be read or considered in this court. Shumate *v.* Dunbar, 6 Munf. 431." Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

"In the case of Shumate *v.* Dunbar, 6 Munf. 431, the syllabus as prepared by the reporter is: '1. If it be stated in the transcript of a decree in chancery, that the cause came on to be heard on the bill, answer and exhibits, such hearing must be understood to have been in exclusion of the depositions contained in the record, no proof appearing of notice of the time and place of taking these depositions.'" Turnbull *v.* Clifton Coal Co., 19 W. Va. 299.

When a decree does not show upon its face that the court heard parol evidence, given at the bar of the court, but declares that the cause was heard upon the papers in the cause, and the "depositions of witness," the appellate court will consider that the cause was heard as declared by the decree, and that no parol evidence was heard by the court, in connection with the cause. Sims *v.* Bank of Charleston, 8 W. Va. 274.

Necessity for Bill of Exceptions.—A deposition taken in a case is not a part of the record, although copied in the transcript and certified by the court, and certified by the clerk, where there is no bill of exception; it is not the province of the clerk to add anything to the record. Cunningham *v.* Mitchell, 4 Rand. 189; Bowyer *v.* Chesnut, 4 Leigh 1; Ramsburg *v.* Erb, 16 W. Va. 777. In the case of the Roanoke Land, etc., Co. *v.* Karn, 80 Va. 592, this subject is fully considered and the authorities controlling this question cited

and approved. In that case the deposition taken in this case, and certified by the clerk, and affidavits filed in the case, and notices copied and certified by the clerk, were not considered by this court. Johnson *v.* Norton Land, etc., Co., 90 Va. 267, 18 S. E. 36. See the title EXCEPTIONS, BILL OF.

C. BRINGING UP DEPOSITIONS BY CERTIORARI.

When the record, as certified, does not contain all the depositions read by the court at the hearing of the cause, generally, the deficiency may be supplied in the appellate court by certiorari before the hearing of the cause in such court. Sims *v.* Bank of Charleston, 8 W. Va. 274.

XVII. Bill to Perpetuate Testimony.

Necessity for Order and Final Decree.—Upon a bill in chancery to perpetuate testimony, there must be an order of the court to take the testimony sought to be perpetuated, and a final decree to perpetuate it. A decree perpetuating testimony without such order and before the filing of the bill should be set aside upon appeal. Smith *v.* Grosjean, 1 Pat. & H. 109.

Equity Proceedings Not Changed.—The provision of Va. Code, 1849, ch. 176, § 34, p. 666, for the perpetuation of testimony, merely prescribes a new mode in which testimony may be perpetuated, and does not change the form of proceeding by suit in equity for the same purpose. Smith *v.* Grosjean, 1 Pat. & H. 109.

Who May Be Defendant.—Under the act of assembly concerning proceedings against absent defendants, a court of chancery can not entertain a suit to perpetuate testimony against a defendant, who is absent from the state, residing in foreign parts, who has no property within the jurisdiction of the court or of the commonwealth, who claims no title to any thing within our jurisdiction which the plaintiff demands as his right, and who is not a necessary party with home defendants. Miller *v.* Sharp, 3 Rand. 41.

It is error for a bill in chancery to pray that testimony may be perpetuated, and at the same time to ask for relief. Miller *v.* Sharp, 3 Rand. 41.

Deposit of Funds in Court.

See the title PAYMENT INTO COURT.

Deposits.

See the title BANKS AND BANKING, vol. 2, p. 262.

Depots.

See the title RAILROADS.

DEPUTY.—In Herring *v.* Lee, 22 W. Va. 669, it is said: "A **deputy** is one authorized by an officer to exercise the office or right, which the officer possesses, for and in his place." See also, the titles CLERKS OF COURT, vol. 3, p. 834; PUBLIC OFFICERS; SHERIFFS AND CONSTABLES.

Derange.

See the title INSANITY.

DESCENDANTS.—See CHILD—CHILDREN, vol. 2, p. 815; ISSUE. And see the title WILLS.

The term **descendants** is defined as "Those who have issued from an individual, including his children, grandchildren and their children to the remotest degree." Waldron *v.* Taylor, 52 W. Va. 289, 45 S. E. 336.

The word **descendant,** as used in § 13, ch. 78, W. Va. Code, 1899, means one who proceeds from the body of another, however remotely, and is coextensive with "issue," but does not embrace others not of issue. Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336.

In Robinson *v.* Robinson, 89 Va. 918, 14 S. E. 916, it is said: "In various places throughout the will of John A. Robinson he uses the words children and **descendants** as equivalent and synonymous words."

In Neilson *v.* Brett, 99 Va. 677, 40 S. E. 32, it is said: "The words, children and **descendants** are not synonymous as is argued, but the word **descendants** includes children; comprises issue of every degree. 2 Jarman on Wills, 98."

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CROSS REFERENCES.

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As to whether an instrument for the conveyance of land is a deed of gift or a deed of purchase, see the title DEEDS. As to liability of heirs for debts, see the titles EXECUTORS AND ADMINISTRATORS; MARSHALING ASSETS AND SECURITIES. As to the right and remedies of creditors of heirs and distributees in an intestate's estates, see the title EXECUTORS AND ADMINISTRATORS. See also, the title MARSHALING ASSETS AND SECURITIES. As to the point that lands, at death of ancestor, descend to heir charged with payment of debts, see the title EXECUTORS AND ADMINISTRATORS. As to right of heirs to distribute among themselves personal property of an intestate, see the title EXECUTORS AND ADMINISTRATORS. As to interest of pretermitted children in deceased parent's estate, see the title WILLS.

I. Definitions and General Considerations.

A. WORDS AND PHRASES.

1. "Descents."

"In Co. Litt. 237, a., Lord Coke says: 'This word (descents) cometh of the latin word discendere, id est' ex loco superiore and inferiorem movere; and in legal understanding it is taken when land, etc., after the death of an ancestor, is cast by course of law, upon the heir, which the law calleth a descent.' Blackstone, and all the elementary books use the term in the same sense. The title of our law is, 'an act to reduce into one the several acts directing the course of descents' which I understand to mean, the course in which lands shall descend from one to another; the first section of the act says, 'that when a person having title to real estate of inheritance, shall die intestate, it shall descend and pass in parcenary, to his kindred, male and female, in the following course.' All going to show that wherever in the act the word descent is used, it means the passage of the inheritance, and not the blood, the pedigree." Jacksons *v.* Sanders, 2 Leigh 109.

"Title by descent is a phrase of the largest and most comprehensive sense." Jackson *v.* Sanders, 2 Leigh 109.

2. Descendant—Descendants.

Descendants are "'Those who have issued from an individual, including his children, grandchildren and their children to the remotest degree.' Ambl. 327; 2 Bro. Ch. 30, 230; 1 Roper, Leg. 115; A. & E. E. of L. (2d Ed.) 399, gives the definition of descendants, 'A person who is descended from another. Any one who proceeds from the body of another, however remotely, is a descendant of the latter. The word in the converse or opposite of "ascendant" rather than of "ancestor;" taking all these words in the legal technical sense "descendants" can not be construed to include any but lineal heirs without clear indication of a contrary

intention. Thus the term does not include collateral relations nor ancestors.' Page on Wills, § 527, says: 'A descendant is one who descends as offspring, however remotely; correlative to ancestor or ascendant. The term includes the most remote lineal offspring, and is practically synonymous with "issue" in its lineal meaning; hence it excludes collateral relations; nor does it include relatives in the ascending line.' In Baker *v.* Baker, 8 Gray (Mass.), 101, it is held: 'The word descendants in a will can not be construed to include any but lineal heirs without clear indications in the will of the testator of his intention to extend it;' and in Armstrong *v.* Moran, 1 Bradf. (N. Y.), 314: 'A legacy to a sister's child is not a legacy to a descendant of the testator's. By descendant is not meant any relative to whom in some possible contingency property might descend, but lineal descendants—issue of the body.' In Tichenor *v.* Brewer, 98 Ky. 349, 'The word "descendants" does not embrace collateral relations,' citing Ripalje & L. Dic.; Van Beuren *v.* Dash, 30 N. Y. 393 and Bouv. L. Dic. In Bates *v.* Gillett, 132 Ill. 287, it is held: 'Children are eo nomine descendants but the latter are not necessarily children. A descendant is one who proceeds from the body of another however remotely. The word is coextensive with "issue" but does not embrace others not of issue. It does not embrace next of kin or heirs at law, for these phrases comprehend persons in the ascending line and may also include collaterals. When the word "descendant" is used in a will it means only lineal heirs in the direct descending line from the person named unless there is a clear indication of intention on the part of the testator to enlarge its meaning. It is a good term of description in a will.'" Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336.

The word "descendants" comprises issue of every degree. Nielson *v.* Brett, 99 Va. 673, 40 S. E. 32.

The word "descendants" is more comprehensive than "children." The former embraces the latter, and a devise to "descendants by stocks" includes all persons who would be included a devise to "children and descendants by stocks." Nielson *v.* Brett, 99 Va. 673, 40 S. E. Rep. 32. See also, the title WILLS.

The word "descendant" as used in § 13, ch. 78, of Va. Code, means one who proceeds from the body of another, however remotely, and is coextensive with "issue" but does not embrace others not of issue. (p. 286). Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336.

"In Hawlin *v.* Osgood, 1 Redf. 409, it is held: 'Brothers and sisters can not take under the term "descendants." The term does not mean next of kin or heirs at law generally but it means the issue of the body of the person named of every degree, as children, grandchildren and great-grandchildren.'" Waldron *v.* Taylor, 52 W. Va. 284, 45 S. E. 336. See post, "Next of Kin," I, A, 4.

3. Heir, Heirs and the Like.

See the title HEIR, HEIRS AND THE LIKE.

4. "Next of Kin."

The ordinary meaning of the phrase "next of kin" is nearest blood relation. Seabright *v.* Seabright, 28 W. Va. 412, 465.

Kin Living at Death of Decendent.—The meaning of the words "next of kin" are to be ascertained at the period at which the person himself dies. "'Next of kin' are words having a distinct and legal meaning, which do not point to persons who are different persons at different times, but point to persons who must be ascertained at a future period, namely, on the death of the person to whom they are to be next of kin. And, therefore, if you say next of kin to a person at a period when he did not die, you really are using words with no sensible meaning

or expression; but you ought to make them sensible by saying persons who would have been his next of kin if he had died at a period after that when he did die. This is giving a very peculiar and strong force to words which I do not think there is any rule of law to justify." Brent *v.* Washington, 18 Gratt. 526.

The primitive meaning is not always given to this phrase. "This phrase frequently occurs in wills, and while it is true, that the courts interpret it very generally as meaning nearest blood relation, yet when from the context or other portions of the will it is apparent, that the testator intended to include in the phrase all his distributees, the courts will so construe the phrase and include in it a widow or surviving husband, though to justify such a construction of a will, it must be very apparent, that the testator meant, that it should have this comprehensive meaning according to the decided weight of the authorities. (Haraden *v.* Larrabee, 113 Mass. 430; Garrick *v.* Camden, 14 Ves. 372; Levee *v.* Durham and wife, 60 N. Y. 43; Johnston *v.* Johnston, 12 Rich. Eq. 259.)" Seabright *v.* Seabright, 28 W. Va. 412. See also, the title WILLS.

"If all the distributees of a decedent come clearly within the spirit of the statute law, the phrase next of kin used in the statute will be interpreted to mean all distributees of the decedent. If by confining the meaning of these words to nearest blood relations, the obvious purpose of the statute would be defeated, the courts will without hesitation put a broader meaning on the phrase and interpret it, as though the statute had used the phrase 'distributee.'" Seabright *v.* Seabright, 28 W. Va. 412. See the succeeding paragraphs.

In Construing Statutes.—Where statutes were to be construed the courts have been less strict in confining the phrase "next of kin" to blood relations and have frequently interpreted it to include a husband or wife. Seabright *v.* Seabright, 28 W. Va. 412, 465. See the preceding paragraph.

In designating the persons against whom the party to a suit shall not testify in his own behalf as to certain transactions, by the words "next of kin" the law does not intend simply the nearest blood relation of the decedent but the distributees, as for instance the decedent's widow. By the statute under consideration an interested witness is not permitted to testify against the "next of kin" of a decedent as to a personal transaction with the deceased, not because of their blood relation with the deceased, but simply because they were distributees of such intestate. It would seem to follow, that such a witness as to such a transaction ought not to be allowed to testify against the widow of the decedent when she is one of the distributees, unless there has been uniformily attached to the phrase "next of kin" the meaning of nearest blood relation. Seabright *v.* Seabright, 28 W. Va. 412, 415. See also, the title WITNESSES.

"Thus in 15 How. Prac. R. 182, it was decided, that in the statute authorizing a creditor to recover the sum of the next of kin of the deceased, to whom any assets have been paid or distributed, the words 'next of kin' did not mean blood relations but all distributees." Seabright *v.* Seabright, 28 W. Va. 412.

"So in Dewey *v.* Goodenough, 56 Barb. 54, it was held, that a husband should be regarded as next of kin within the § 399 of the Code, because he came within the spirit and intention of the statute." Seabright *v.* Seabright, 28 W. Va. 412.

"In the Merchants' Insurance Company of New York *v.* Inman, 34 Barb., the words next of kin were interpreted to mean any distributee including the widow in a statute thus worded: 'Actions against the next of kin of any deceased person to recover the value of

any assets that may have been paid to them by an executor or administrator, may be brought against all of the said relatives jointly, or one or more of them, for the amount recovered by each of them.' And I doubt not, that in a number of New York statutes other than this one, which statutes are cited in the argument of counsel, the court would have held the phrase next of kin to mean distributees. The court, p. 418, simply say: 'The term next of kin (in regard to the remedy) means those to whom under the statute of distribution the personal estate of the deceased would pass.'" Seabright *v.* Seabright, 28 W. Va. 412.

"In Steele's administrator *v.* Kurtz et al., 28 Ohio State Rep. 191, it was decided, that 'In an action by the personal representative under statute of 1851 (S. & C. 1139-1140) to recover damages for causing by wrongful act and neglect the death of a woman, who died intestate leaving a husband but no children or their legal representative, the surviving husband within the meaning of this act is the next of kin, and as such entitled to the fruits of any judgment obtained in such action.'" Seabright *v.* Seabright, 28 W. Va. 412.

Mother.—Where in an action for damages for death caused by wrongul act, brought under ch. 98, acts of 1863, it was shown that the decedent was the son of G., lived with and supported her, and that he was only twenty-three years of age and unmarried; it was held, that it might be fairly implied that G. was the "next of kin" to the decedent. Baltimore, etc., R. Co. *v.* Gettle, 3 W. Va. 376.

Children.—See CHILD—CHILDREN, vol. 2, p. 815, and cross references there given.

5. Distributees.

The distributees of any person are those entitled to take his personal property after his death according to the statute of distributions. The statute must be referred to to ascertain the persons who are to take their respective shares. Brent *v.* Washington, 18 Gratt. 526.

The distributees of a person can not be ascertained until his death for the living have no distributees. Nielson *v.* Brett, 99 Va. 673, 40 S. E. 32.

6. Representatives—Legal Representatives, etc.

The primary sense of the words "representatives," or "legal representatives," or "personal representatives" is executors or administrators. But this primary sense of the word "representatives" may be controlled, where an intention is clearly indicated in the instrument in which it is used to employ it in a different sense. Sometimes it has been held to mean "next of kin" according to the statute, and sometimes to mean "descendants." In the present case the sense in which the word is employed is explained by the addition of the words "according to the statute of distribution." There is no room for construction. The words according to their plain and necessary interpretation describe those who are entitled to take the personal property of the persons to whom they refer after their death according to the statute of distributions. Brent *v.* Washington, 18 Gratt. 526. See also, Dickinson *v.* Hoomes, 1 Gratt. 302, where the word "representatives" was held to mean "descendants."

"In the phrase, 'representations in a remote degree,' the term 'degree' may mean the degree of kindred, either between the representatives and their stocks, or between the intestate and his collateral kindred." Case upon the Statute for Distribution, Wythe 302.

7. Distribution—Distributable Surplus.

With respect to decedents' estates the terms "distribution" and "distributable surplus" are applicable to personal estates only. Williams *v.* Stonestreet, 3 Rand. 559.

8. "The Estate Descended."

The phrase "the estate descended"

with respect to decedents' estates is applicable only to real estate. Williams *v.* Stonestreet, 3 Rand. 559.

9. Child—Children.

As to construction of the words "child" and "children," see CHILD—CHILDREN, vol. 2, p. 815.

10. Brothers and Sisters.

If a statute provide, "if after the death of a father any of his children shall die intestate, without wife or children in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her," and though all the children of one woman by divers men are brothers and sisters to one another, yet in the same statute the words "and if all the children shall die intestate, without wife or children in the lifetime of the mother, then the portion of the child so dying shall be equally divided between the mother and the next of kindred by the father," it was held that the clause "brother and sister" here meant "brothers and sisters by the same father." Bailey *v.* Teackle, Wythe 179. See also, M'Clintic *v.* Manns, 4 Munf. 328, where the term brothers is extended to mean brothers and their heirs.

11. Transmit.

The word "transmit," as used in 1 Rev. Va. Code, 1819, p. 357, § 18, providing that, bastards shall be capable of inheriting and transmitting inheritance on the part of their mother," etc., implies in connection with the word "inheritance," the transmission of an estate by descent either from or through the bastard. "It speaks of transmitting inheritance, in the most general sense; not merely inheritance or inheritances acquired on the part of the mother; and it is the same thing as if the legislature had said, 'bastards also shall be capable of inheriting or of transmitting, on the part of their mother, inheritance, in like manner as if they had been lawfully begotten of such mother.' Much criticism has been expended on the word transmit, which I shall no further notice than to observe, that in its first and original sense, it means to send from one person or place to another, and is therefore appropriate to express the legislative will, as I think it ought to be interpreted. It would be equally appropriate, I admit, if the context justified it, to indicate the estate to be transmitted." Garland *v.* Harrison, 8 Leigh 368. See § 2552, Va. Code, 1904; ch. 78, § 5, W. Va. Code, 1899.

B. MODES OF ACQUIRING TITLE TO LAND.

In General.—Purchase and descent are the only modes of acquiring title to land. Jackson *v.* Sanders, 2 Leigh 109.

In Virginia title to land can only pass or be acquired by a grant, or deed, or devise, or descent, or by an adverse holding. Clarke *v.* McClure, 10 Gratt. 305.

Title by Descent.—See ante, "Descents," I, A, 1.

C. COMMON-LAW CANONS OF DESCENT.

From the date of our existence as a colony, to the Revolution, the common law, regulating the descent of real estates, was the law of the land. Of this law the first canon, as noticed by Blackstone, is, that inheritance shall lineally descend to the issue of the person who last died actually seised, in infinitum, but shall never lineally ascend: Secondly, that the male issue shall be admitted before the female; thirdly, that where there are two or more males in equal degree, the eldest only shall inherit but the females all together; fourthly, that the lineal descendants in infinitum of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living; fifthly, that on failure of the lineal descendants or issue, of the person last seised, the inheritance shall descend to his collateral relations, be-

ing of the blood of the first purchaser; sixthly, this collateral heir must be the next collateral kinsman of the whole blood. Davis *v.* Rowe, 6 Rand. 355.

D. COURSE OF DESCENT PRESCRIBED EXCLUSIVELY BY STATUTE.

The statute of descents passed in 1785, which was re-enacted at the revisals of 1792 and 1819, and which is now found in chapter 113 of the Virginia Code of 1904, and in chapter 78 of the West Virginia Code of 1899, entirely repealed, abrogated and annulled the common-law course of descents and all the principles thereof; and established a new system. Its enactments stand in diametrical opposition to all the rules and canons of the common law. It is a complete and perfect whole, containing within itself a provision for every case that can arise. Medley *v.* Medley, 81 Va. 265; Bowne *v.* Turberville, 2 Call 390; Tomlinson *v.* Dillard, 3 Call 105; Owen *v.* Cogbill, 4 Hen. & M. 487; Dillard *v.* Tomlinson, 1 Munf. 183; Templeman *v.* Steptoe, 1 Munf. 339; Addison *v.* Core, 2 Munf. 279; Davis *v.* Rowe, 6 Rand. 355; Stones *v.* Keeling, 5 Call 143; Garland *v.* Harrison, 8 Leigh 368; Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90. See also, Walker *v.* Boaz, 2 Rob. 485.

"In Brown *v.* Turberville, 2 Call 390, the question was, whether the case was to be decided by the statute, or the principles of the common law. The legislature having omitted some words in the seventh section, which, if they could not be supplied, would operate, as was contended, a repeal of the statute of 1785, as to the case at bar, and the case being thus without the statute, must be decided by the common law. The effect of the statute of 1785, upon the common law, was thus brought directly before the court. Judge Fleming says: 'The legislature, conceiving that the rule of descents by the common law was not well adapted to the genius of the people, and the form of our government, totally changed it by the act of 1785, which appears to have provided for every possible case.' Judges Carrington and Lyons, though they do not express themselves so explicitly, seem to have had the same idea. But Mr. Pendleton (who, it must be recollected, was one of the three who drew the act of descents), could not be more clear and explicit than he is. He says: 'To inquire from what source the force of the common law of England, in this state, is derived, would at present be a useless speculation, since all agree that it is the general law of the land, where it is not taken away by our statutes. That the act of 1785, has totally done away that common law, as to the course of descents, has not been nor can be doubted. The rights of primogeniture are wholly abolished; and wherever there are more persons than one, of equal degree of kindred to the intestate, they share equally in the succession. The succession in the right line ascending, excluded by the common law, is here permitted. The objection to the half blood is removed, and the inquiry, through what blood the lands have descended to the intestate, is abolished. The intestate is in all cases considered as the unrestrained proprietor; and his supposed preference, from natural affection, pursued under this act, it must be acknowledged, that no possible case, not provided for, can arise, so as to let in the rule of the common law.'" The common law of descents can no more be resorted to at this day to influence the decision of causes, than if it had never existed. Davis *v.* Rowe, 6 Rand. 355.

"The very first rule, 'that estates shall descend and pass in parcenary to the kindred, male and female, of the intestate,' destroys, at a single blow, three favorite and cherished principles of the common law; primogeniture, sole seisin, and the preference of males. In defect of children, and their descendants, we give the estate to the father.

By the common law, it would sooner escheat than ascend lineally. We pay no respect to the blood of the first purchaser (except in the case of infants, and that by a law after 1785). At common law, land would escheat sooner than descend to any, however near of kin, if not of the blood of the first purchaser. We give collaterals of the half blood, half portions. The common law excludes them wholly. With us, bastards may inherit and transmit inheritance, on the part of the mother. At common law, they are utterly incapable of inheritance. We say, that where there is no kindred, paternal or maternal, the inheritance shall go to the wife or husband of the intestate. At common law, husband or wife can never inherit from each other. Do not these instances prove, that the framers of our law, looked at the common law canons of descent to avoid, not to imitate? To pull down, not to build up? All its principles are violated, its landmarks removed, its fences broken down, its traces obliterated. While these marks of reprobation would seem (even if our act were confessedly defective) to forbid our resorting to this exploded system to supply the defect, such resort is entirely unnecessary." Davis *v.* Rowe, 6 Rand. 355. See also, Garland *v.* Harrison, 8 Leigh 368; Stones *v.* Keeling, 5 Call 143; Medley *v.* Medley, 81 Va. 265.

"In Templeman *v.* Steptoe, 1 Munf. 339, Judge Roane says: 'The first section of the act of descents purports to provide a rule of inheritance as to all cases, and which idea is entirely supported by the opinion of this court in Brown *v.* Turberville (2 Call 390).'" Davis *v.* Rowe, 6 Rand. 355.

By this act there was not, perhaps, a single case unprovided for. The fifth and sixth sections of the act of 1792, were taken from the act of 1790, and from the only exceptions to the general rules prescribed by the act of 1785; and which show the correct construction of these to be this, that which does not come within the exceptions must be governed by the general provisions of the act as they stood in the act of 1785. Owen *v.* Cogbill, 4 Hen. & M. 488.

E. STATUTORY PROVISION STATED AND CONSTRUED.

Statutory Provision.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male or female, as are not alien enemies, in the following course:

First, To his children and their descendants;

Second, If there be no child, nor the descendant of any child, then to his father;

Third, If there be no father, then to his mother, brothers and sisters, and their descendants.

Fourth, If there be no mother, nor brother, nor sister, nor any descendant of either, then one moiety shall go to the paternal, the other to the maternal kindred, in the following course:

Fifth, First to the grandfather;

Sixth, If none, then to the grandmother, uncles and aunts, on the same side, and their descendants;

Seventh, If none such, then to the great-grandfathers, or great-grandfather, if there be but one;

Eighth, If none, then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers, and their descendants;

Ninth, And so on in other cases, without end, passing to the nearest lineal male ancestors, and for want of them, to the nearest lineal female ancestors, in the same degree, and the descendants of such male and female ancestors.

Tenth, If there be no father, mother, brother, or sister, nor any descendant of either, nor any paternal kindred, the whole shall go to the maternal kindred, and if there be no maternal kindred,

the whole shall go to the paternal kindred. If there be neither maternal nor paternal kindred, the whole shall go to the husband or wife of the intestate; or if the husband or wife be dead, to his or her kindred, in the like course as if such husband or wife had survived the intestate and died entitled to the estate. (Code, 1849, p. 522, ch. 123, § 1.) Va. Code, 1904, § 2548; § 78, W. Va. Code, 1899. See Davis *v.* Rowe, 6 Rand. 355, in which the original statute of descent is quoted. Moore *v.* Conner, 2 Va. Dec. 56. The West Virginia statute is identically with that of Virginia except that the words "as are not alien enemies" are omitted from the first section. See also, Medley *v.* Medley, 81 Va. 265. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650. See post, "Order of Descent and Persons Entitled to Inherit under the Statute," II; "Inheritance by Representation—Per Capita and Per Stirpes," III.

Nature and Object of Succession.—"Our law of descents was formed in no small degree upon the human affections; the legislature very justly conceiving that the object of the law of descents was to supply the want of a will, and that it should therefore conform in every case, as nearly as might be, to the probably current of those affections which would have given direction to the provisions of such will." Garland *v.* Harrison, 8 Leigh 368; Davis *v.* Rowe, 6 Rand. 355.

The object of the act of 1787 altering the course of descents, considering the person last seized as the absolute owner of the land, was to make that will for him, in case of intestacy, which the natural affections of mankind authorizes us to infer, he would have made for himself. For instance, the descent was ordained to the father or the mother, in preference to collateral relations on the part of the mother or father, as the case may be. No person acquainted with the feelings of human nature can say, that this canon of descent was not conformable with the general policy of that law; none can pretend that a father or mother is, in respect of the son, a stranger, or that he or she would have been preferred, by him, to a collateral kinsman of the other line. Tomlinson *v.* Dillard, 3 Call 105. See post, "Preference Shown Blood of First Purchaser," I, G.

"Our laws for the descent and distribution of the estates of the intestate decedents are simple, and produce perfect equality, while our statute upon the subject wisely regulates, without unduly restraining, the power of testamentary disposition." Headrick *v.* McDowell, 102 Va. 124, 45 S. E. 804.

Construed by Analogies of Civil Law.—The statute of descents should be interpreted according to the analogies of the statute of distribution of a decedent's personal property and of the civil law, from which the statute of descents as well as the statute of distribution was in most particulars taken. Davis *v.* Rowe, 6 Rand. 355.

Construed so as to Give Effect to Legislative Intent.—In Brown *v.* Turberville, 2 Call 390, it was held, that the statute of descents would be construed as a whole and so as to give effect to the obvious intent of the legislature. See generally, the title STATUTES.

"The case of Brown *v.* Turberville depends upon the § 7 of the law of descents, directing that 'if there be no mother, nor brother, nor sister, nor their descendants, and the estate shall not have been derived, either by purchase or descent, from either the father or the mother, then the inheritance should be divided into moieties, one of which should go to the paternal, and the other to the maternal kindred.' The intestate in that case was an adult person, and the legislature having omitted to confine it to the case of an infant intestate, although it was the apparent intention to refer to the former parts of the law, which so confined it, the court in construction interposed the words in the case of an in-

fant intestate, so as to make the clause read, 'and the estate shall not in the case of an infant intestate have been derived from either father or mother,' to comply with the apparent intention of the law." Tomlinson *v.* Dillard, 3 Call 105.

Prescribes Courses of Descent and Designates Who Shall Inherit.—Section 2548 of the Virginia Code, 1887 (same section Va. Code, 1904), provides two courses of descent, the first commencing with intestate's children and their descendants, and ending with his mother, brothers, and sisters and their descendants; and the second beginning with the grandfather and ending with the husband or wife and his or her kindred. Moore *v.* Conner, 2 Va. Dec. 56.

The law in general terms prescribes the course of descents, and designates the persons or classes who shall inherit. Moore *v.* Conner, 2 Va. Dec. 56.

The first three clauses of § 2548, Va. Code, 1887 (same section, Va. Code, 1904), provide for the most prominent and usual features in the course of descents. Moore *v.* Conner, 2 Va. Dec. 56.

New classes in the "course of descents" can not be constructed out of the subsequent explanatory provisions, and contrary to the previously established "course of descents generally," as prescribed by § 2548 Va. Code, 1887 (same section, Va. Code, 1904). Moore *v.* Conner, 2 Va. Dec. 56.

In every case arising under the statute, reference must first be had to § 2548, Va. Code, 1887 (same section, Va. Code, 1904), to ascertain to which class it belongs. "The other divisions are but explanatory of how the estate shall be partitioned under the proper class when discovered, especially when some of those entitled to take are descendants of deceased members of the class, or some of the class are collaterals of the half blood." Moore *v.* Conner, 2 Va. Dec. 56.

Effect of Deaths within Class.—When the class in the course of inheritance which is entitled to the intestate's estate has been determined, no number of deaths in it, short of its total extinction, will effect the interest of any survivor of that class. Moore *v.* Conner, 2 Va. Dec. 56.

Resort to Jus Representationis.—When the statute takes up a class, it exhausts it, before it calls another: "Thus, it is not mother, brothers, and sisters, only; but, mother, brothers, and sisters, and their descendants, or such of them as there be, and so of the other grades; and this is by the extension of the jus representationis, which, embracing the whole class, brings the most remote members of it into the succession with the rest." Davis *v.* Rowe, 6 Rand. 355.

"Our statute, setting out with the broad declaration, that the estates shall descend to the kindred, male and female, of the intestate in parcenary; and calling that kindred to the succession by classes, has resorted to the right of representation, for the sole and exclusive purpose of adjusting the proportions in which the nearer and more remote branches of each class shall share the inheritance; and so far as it is necessary for this purpose, the statute has applied the principle without limit, as well to the collateral as the descending line." Davis *v.* Rowe, 6 Rand. 355.

Has No Retrospective Operation.—The act of descents does not have a retrospective operation. "Such a construction is reprobated, 1st, by the general principle that all laws, or at least all which concern rights, are only prospective in their nature; 2d, that that act is declared to commence its operation from and after a future and a given day; and the court is of opinion that these words, 'from and after, etc.,' are to be considered as if they were set out and repeated in the commencement of every section of the act; and 3d, that

this is emphatically the case in relation to this act; it declaring that 'henceforth,' when any person, etc., shall die intestate, etc., plainly excluding from its operation cases of deaths before the commencement of the act. That act therefore is not to be regarded, in making a construction, in the case before us; the appellants can in no case be regarded as heirs, but in relation to ancestors dying after the commencement of the act." Dickenson *v.* Holloway, 6 Munf. 422; Blankenbeker *v.* Blankenbeker, 6 Munf. 428. See post, "Statute in Force at Death Governs Deposition," I, F.

A testator, who died in the year 1781, devised a tract of land to his wife for life, and at her death to be equally divided among his three sons and their heirs. The eldest son died before the 1st of January, 1787, intestate and without issue; and the widow died after that day. At her death, the second son was entitled to one-third of the land in his own right, and to the whole of another third as heir to his father, who was the person last actually seized of the freehold and inheritance. Blankenbeker *v.* Blankenbeker, 6 Munf. 427. See also, Dickenson *v.* Holloway, 6 Munf. 422. See post, "Maxim 'Seisina Facit Stipiten' Abrogated," I, I, 2, b.

Devise in 1777, to the testator's two daughters, after the marriage or death of their mother; but if they died under age, and without issue, to the children of the testator's sister, except the child who should be heir to her husband. One of the daughters died an infant of tender age, in the lifetime of her mother. Upon the death of the mother, the surviving daughter married and had issue, which died immediately, and then she died without other issue, leaving her husband tenant by the curtesy of all the testator's lands. The eldest son of the testator's sister lived till 1788, and then died intestate and without issue. It was held, that his father was not entitled to a proportion of the estate in right of that son, although the act for regulating the course of descents had defeated the exception in the will. Taliaferro *v.* Burwell, 4 Call 321.

Thus before January 1, 1787 (when the act of descents took effect), if a person entitled to a reversion in fee, expectant upon an estate for life, died in the lifetime of the tenant for life, such person never had seisin of the inheritance, and therefore could not transmit to his heir; but the heir of the person last actually seized was entitled. Dickenson *v.* Holloway, 6 Munf. 422.

Effect of Suspending Act of 1792.—The act of 1785, concerning descents, was restored by the suspending act of 1792. Harrison *v.* Allen, 3 Call 289.

The act of December 8, 1792, repealed the statute of descents of 1785, but this statute was restored by the act of December 28, 1792, which also suspended the operation of the first-named act till October, 1793; and land acquired by a son after 1793, when he had willed all of his estate to his father, passed at his death in May, 1793, to his father, and the land so willed by the son would, at the father's decease (who had devised his estate to his deceased son), in July, 1793, pass to the heirs of the father, under the act of 1785. Harrison *v.* Allen, 3 Call 289. See Harrison *v.* Allen, Wythe 291.

F. STATUTE IN FORCE AT DEATH GOVERNS DISPOSITION.

Statute in force at the death of an intestate governs the disposition of his estate. Dilliard *v.* Tomlinson, 1 Munf. 183; Harrison *v.* Allen, 3 Call 289. See ante, "Statutory Provision Stated and Construed," I, E.

The law which was in force at the time of the descent governs with reference to the capacity to take and hold real property. Hauensteins *v.* Lynham, 28 Gratt. 62.

G. PREFERENCE SHOWN BLOOD OF FIRST PURCHASER.

At common law land would escheat sooner than descend to any, however near of kin, if not of the blood of the first purchaser. Davis *v.* Rowe, 6 Rand. 355. See ante, "Statutory Provisions Stated and Construed," I, E.

The Virginia statute pays no respect to the blood of the first purchaser, except in case of infants and that by a law enacted after 1785. Medley *v.* Medley, 81 Va. 265. See post, "Descent of Infant's Estates," II, I.

In the year 1787, the legislature passed an act, altering the course of descents, the great principle of which was, "to lose sight of the stock from whence the land descended (or, in the feudal language, blood of the first purchaser), and, considering the person last seized as the absolute owner of the land, to make that will for him, in the case of intestacy, which the natural affections of mankind uathorize us to infer, he would have made for himself." Tomlinson *v.* Dilliard, 3 Call 105.

H. TITLE BY DESCENT PREFERRED.

Where a title by descent and a title by devise concur in the same individual, the heir is held to be in by descent and not by purchase. This old rule since the statute of 3 and 4 Will. 4, ch. 106, § 3 has ceased to have any practical value in England and many of the reasons for it no longer exist in this country. Biedler *v.* Biedler, 87 Va. 300, 12 S. E. 753.

Where testator devises property to his heir to take effect in the same manner as he would take as heir, he is regarded as taking by descent, and not by purchase. Biedler *v.* Biedler, 87 Va. 300, 12 S. E. 753.

Reason for Adoption of Rule.—"This doctrine, however, that where the devise is to the testator's heir, to take in the same manner as he would take as heir, he must be regarded as taking by descent and not by purchase, was probably adopted, says Mr. Minor, to prevent a confusion of the title by descent with the title by purchase, in feudal times, when such confusion would have affected the tenure of lands, and at a later period would have impaired the interests of creditors, certain of whom could charge with their debts lands descended but not devised only applies, according to all the authorities, where the devisee is sole heir, to the land devised; for, if he is only one of several coheirs, although the very same share be given as he would take by descent, he does not take it in the same way; for, as coheir, he would take it in coparcenary with his fellows, whereas, as devisee, he would take it in severalty if it was devised to him alone; and if devised to him along with others he would take as joint tenant or tenant in common. In like manner a devise to several coheirs is not within the doctrine, but is good, because, as devisees, they will take as joint tenants or tenants in common; whereas, as heirs, they will take as coparceners. 2 Minor's Inst., p. 1054; 3 Lom. Dig., marg. p. 106; 1 Jarman on Wills (Randolph & Talcott's Ed.), p. 195; Powell on Devises, 428." Biedler *v.* Biedler, 87 Va. 300, 12 S. E. 753.

I. TITLE AND RIGHTS OF ANCESTOR PASSED TO HEIR.

1. In General.

Chapter 78, § 1, W. Va. Code, 1899, passes all and whatever title, right and interest of inheritance in land vested in an intestate to his heirs. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

2. Seizin of Ancestor.

a. Descends to Heir.

Under ch. 78, § 1, W. Va. Code, 1899, if one die intestate seized in fact or law of land, whichever was vested in the intestate passes to his heir. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90. See also, Brooks *v.* Hatch, 6 Leigh 534. See the title CURTESY, ante, p. 148.

Where the decedent dies seized of

the fee simple, the same estate and seizin devolves upon his heirs. Brooks *v.* Hatch, 6 Leigh 534.

When Heir Has Seisin in Fact without Entry.—If one die intestate seized in fact of land, that seisin in fact is cast by descent on his heir, and the heir has seisin in fact without entry. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90. See also, Brooks *v.* Hatch, 6 Leigh 534.

Where an ancestor dies in possession of land, the presumption of law is, that the heir is in possession after the death of the ancestor. Tapscott *v.* Cobbs, 11 Gratt. 172. See also, Trent *v.* Trent, Gilmer 174.

"Where the ancestor is not in actual possession, and thus has not seisin in fact, it is rational to say that his heir has not seisin in fact; but where the ancestor has seisin in fact, why does it not go by law to the heir? Under the doctrine given in Lomax, Coke says that 'if a man dies seised of lands in fee simple or fee tail general, and they descend to his daughter, who marries, has issue and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had seisin in law. But if she or her husband had entered during her life, he would have been tenant by curtesy.' 1 Inst. 29a; 1 Greenl. Cruise 140. But some books do not lay down the doctrine of seisin as quoted from Lomax. 1 Washburn on R. Prop., § 97, says that where the possession is vacant at the ancestor's death, the heir has only seisin in law, and in vol. 3, § 1953, says: 'There is a seisin in deed and a seisin in law, and the difference between the two is, that in one case an actual possession has been taken, and in the other there is a right like that of an heir upon descent from his ancestor, while the possession is vacant, before he has made an actual entry.' Coke upon Lit. by Coventry, 266b, says that it is only where the ancestor is out of actual possession that descent cast on heirs mere seisin in law. Hilliard on R. Prop. 82, says entry by the heir is not necessary. The prevailing doctrine of the United States, is that no actual entry is necessary, either by an heir or grantee, in order to give him a seisin in deed; provided the ancestor or grantor was seized at the time, or the possession was vacant (not in a disseisor), 'and the ancestor or grantor had the right.' Kerr on R. Prop., § 232." Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

"Seisin" Imports "Seisin in Fact."—When a bill alleges that a person was "seised and possessed" of land, it prima facie imports seisin in fact, not mere seisin in law. Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

b. Maxim "Seisina Facit Stipitem" Abrogated.

"By common law in order that one might as heir inherit from another, that other must have had seisin in fact, not mere seisin in law. If the ancestor had no seisin in fact, nothing could be inherited from him, but the estate went from the last person having seisin in fact, under the maxim seisina facit stipitem, seisin makes or points to the root of descent. 1 Lomax Dig. 586; 2 Minor Inst. 525; 4 Kent. 385. But this common-law rule was wiped away by the statute of descents of Virginia passed in 1785, saying that 'Henceforth, when any person having title to any real estate of inheritance, shall die intestate as to such estate, it shall descend and pass' to certain persons. Such is our Code, 1899, ch. 78. Under this statute it is not necessary that there be conjunctio seisinae et juris, an union of seisin and title, or both possession and title in a person, to enable his heirs to take from him by descent whatever he has. 'The common-law rule "seisina facit stipitem," may now be regarded as abrogated in Virginia, and estates of intestates, whether in possession or vesting title, whether present or reversionary, will all of them descend to the same heir, without any

regard to the seisin of the ancestor.' Lomax Dig. 594. See 4 Kent. § 88. So, whatever title or right a man has descends to his heir. If he has title merely, that descends. If he has title, and under it actual possession that title and that possession both descend, as possession is a valuable element of title." Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90. See ante, "Statutory Provision Stated and Construed," I, E.

"The common-law rule, seisina facit stipitem," is abrogated in Virginia. "Having title to any real estate is alone sufficient to make the intestate the root of the inheritance." Dickenson *v.* Hoomes, 8 Gratt. 353; Medley *v.* Medley, 81 Va. 265. See post, "Estates of Inheritance in General," I, I, 3, a.

Before the act of descents went into effect, if a person entitled to a reversion in fee, expectant upon an estate for life, died in the lifetime of the tenant for life, such person never had seizin of the inheritance, and could not transmit it to his heir, but the heir of the person last actually seized was entitled. Dickenson *v.* Holloway, 6 Munf. 422. See Blankenbeker *v.* Blankenbeker, 6 Munf. 427.

3. Estates Descendible.

a. Estates of Inheritance in General.

If any interest in or claim to real estate be an estate of inheritance, it will pass by descent as from one having title to real estate. "And of this opinion was Judge Lomax, who says: 'If the expression having title were, in the construction of the act, to be confined to title in its most restricted sense, where there is the conjunctio seisinae et juris—a complete title—the consequence would be that, as to incomplete titles, there would be no law of descents, or a law varying from that where the title is complete. Such inconsistencies could not be contemplated by the legislature. The common-law rule seisina facit stipitem may now, therefore, be regarded as abrogated in Virginia; and estates of intestates, whether in possession or resting in title, whether present or reversionary, will all of them descend to the same heir, without any regard to the seisin of the ancestor.' 1 Lom. Dig. 594." Medley *v.* Medley, 81 Va. 265. See ante, "Maxim 'Seisina Facit Stipitem' Abrogated," I, I, 2, b.

The real estate of an intestate in no wise, and for no purpose, goes into the possession or control of the administrator, but the legal title to the same descends directly to the legal heirs, subject, of course, to the just debts of the intestate, in so far at least as the personalty falls short of paying the same. Laidley *v.* Kline, 8 W. Va. 218. See the title EXECUTORS AND ADMINISTRATORS.

Inheritance Absolute or Fee Simple.—Freehold estates of inheritance absolute or in fee simple upon the death of the owner intestate descends to his heirs at law unfettered. Turner *v.* Dawson, 80 Va. 841. See also, Gregory *v.* Gates, 30 Gratt. 83; Brooke *v.* Hatch, 6 Leigh 534.

b. Equitable Estates.

An equitable interest in real estate descends to the owner's heirs just as a legal estate. Ratliff *v.* Ratliff, 102 Va. 881, 47 S. E. 1007.

Quasi Equity of Redemption.—Where a grantor in a deed of trust to secure debts, which conveys real and personal property, dies intestate, before sale of the trust subject, the quasi equity of redemption descends to the heirs. Harvey *v.* Steptoe, 17 Gratt. 291.

Equitable Separate Estates of Married Women.—See post, "Separate Estates of Married Women," I, I, 3, d.

c. Remainders, Reversions and Executory Interests.

(1) Vested Remainders.

The general rule is, that when property, real or personal, is given by will to one for life, and afterwards to his or her children, so that the children, if any, living at the death of the testator,

take vested interests in remainder, upon the death of any of the children before the life tenant, their interest devolves upon their representative, that is to say, in the case of land, upon the heirs or devisees; and in the case of personal property upon the executors or administrators. Brent *v.* Washington, 18 Gratt. 526; Waring *v.* Waring, 96 Va. 641, 32 S. E. 150. See post, "Property Distributable as Personal Estate," IV, E.

Devise, in 1777, to the testator's two daughters, after the marriage or death of their mother; but if they died under age, and without issue, to the children of the testator's sister, except the child who should be heir to her husband. One of the testator's said daughters died an infant of tender age, in the lifetime of her mother; the other is heir to her, as it was a vested remainder in the daughters. Taliaferro *v.* Burwell, 4 Call 321. See post, "Estates Not Derived from a Parent," II, I, 2.

(2) Executory and Contingent Interests.

In General.—The fact of vested or nonvested does not always determine the question of transmissibility under the statute of descents. Vested is not always the opposite of contingent or of executory. "The word 'vested' had originally no reference to the absence of contingency. Hawk. Wills, 221; Gray, Perp., p. 62, § 99. See Id. § 11, note 2. So that it by no means follows that, because an estate is contingent, therefore it is nontransmissible, for many contingent remainders and contingent executory interests are transmissible by descent." Contingency does not necessarily negative transmissibility. "It is in a state of contingency and doubt whether it will ever go to anyone save the unborn devisee; but if it does not go there, by reason of his not coming into existence, then by reason thereof, the interest in the fund comprised in such devisee has become, by an event after the death of the testator, incapable of taking effect. By law it then comes by descent, as a right now vested in possession, to the heirs of the testator then living. As a possibility of a resulting trust, coupled with an interest, it had come to the heirs of the testator living at his death. Such possibility came to an ascertained class, but one liable to open and let in others before the contingent and future event giving the right of enjoyment might happen." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650. See also, Boisseau *v.* Aldridges, 5 Leigh 222.

Executory Devises. — Executory devises are transmissible by descent. Medley *v.* Medley, 81 Va. 265.

Executory devises as respects transmissibility, stand on the same footing with contingent remainders. If the contingency whereon the vesting depends, is a collateral event irrespective of attainment to a given age and surviving a given period, the death of the devisee pending the contingency, works no exclusion, but simply substitutes and lets in the devisee's representative. Medley *v.* Medley, 81 Va. 265.

"And here, it may be observed, there is a distinction between a remainder created by will and an executory limitation. If, in the first case, the remainder can not take effect, the property, according to the circumstances of the particular case, will either fall into the residuum or remain undisposed of; whereas, in case an executory limitation can not take effect, the estate will, ordinarily, unless the will otherwise directs, continue in the first taker, as was held in Jackson *v.* Noble, 2 Keen. 590, and other similar cases." Medley *v.* Medley, 81 Va. 265.

" 'An executory interest,' says Fearne, 'whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens.' Fearne on Rem. 44. Undoubtedly, if the limitation over is to

children who shall attain a certain age, or survive a given period or event, the effect of the death of any child pending the contingency, will be to strike the name of such deceased child out of the class of presumptive objects. 'But where,' says Jarman, 'the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.' 1 Jarman on Wills 861. See also, 1 Lom. Ex'ors, marg. p. 319; 4 Kent's Comm. 261-284; 3 Lom. Dig. 324; 2 Min. Inst. 389. These views are fully supported by the adjudged cases." Medley *v.* Medley, 81 Va. 265.

Testator devised lands to G., but if G. died without having had lawful issue, the lands to be divided between testator's four daughters. G. died without having had such issue. M., one of the daughters, died before G., leaving children, all of whom died before G., under age and without issue, except one, who attained majority, but died intestate and without issue. M.'s husband, L., survived her, and all their children, and died intestate, after G. It was held, that the executory devise to M. was transmitted by descent to her children, and so to the survivor of them, and at his death, intestate, to his father, L., and at L.'s death intestate, to his heirs at law. Medley *v.* Medley, 81 Va. 265.

Contingent Remainders.—If the contingency whereon the vesting of a contingent remainder depends, is a collateral event irrespective of attainment to a given age and surviving a given period, the death of the remainderman pending the contingency, works no exclusion, but simply substitutes and lets in the remainderman's representative. Medley *v.* Medley, 81 Va. 265.

Possible Resulting Trust.—A possible resulting trust to heirs at law is transmissible under the statute of descents and distributions. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650. See also, Boisseau *v.* Aldridges, 5 Leigh 225.

By the fourteenth clause of his will a testator by executory devise and request in fee simple and in absolute ownership created and declared in favor of unborn beneficiaries, designated, and to take effect in the event prescribed, certain contingent executory interests in the residuary fund of his estate which was to be held in trust. For the contingency that the unborn devisees will not come into existence the testator did not provide, but left such contingency to be met and provided for by law. It was held, if such contingency should happen, then such equitable executory interest will spring up in its integrity and vest in possession, in present right of enjoyment in those who are then the heirs at law and personal representatives of the testator, who will take by descent and representation, and not by purchase. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

"Unless the testator meets the contingency of its failing to take effect by giving it to some one else (Boisseau *v.* Aldridges, 5 Leigh 222), it results to the heirs at law in analogy to descent cast." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

At the death of the testator, his then heirs at law, etc., had the possibility of a resulting trust, contingent and dependent upon the unborn devisee not coming into being, somewhat in analogy to the possibility of reverter at law. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

Such possibility of resulting trust was coupled with an interest. It was not vested, but the ones who would have taken if such contingency of the executory interest being incapable of taking effect should happen, compose the class, and such class who would then take was ascertained. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

Such possibility of a resulting trust to such heirs at law, etc., was transmissible under the statutes of descent and distribution, and therefore by devise and bequest under the statute of the wills; also, by alienation inter vivos. Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

Here the devisee is of the residuary fund itself, and therefore § 14, ch. 122, of the Code of 1849 (1860, § 13, ch. 77, W. Va. Code, 1899), modifying the doctrine of lapse, and substituting the residuary legatee for the heirs of the testator, where there is a residuary devise, can have no application. "This, however, leaves such possibility of the contingent resulting trust to go to his heirs at law at the testator's death to become an executory interest vested in right of possession in such heirs as may be living, and therefore able to take in the event of the devise to the unborn donee being henceforth incapable of taking effect by his failure to come into being on the event prescribed; and then, and not before, such interest goes to the heirs at law of the testator as if he had died intestate thereof, meaning, by necessary implication, that it did not fail to take effect by reason of partial or total intestacy. For the law as it now is, see Code (Ed. 1891-1899), p. 660, ch. 77, § 13. The heirs at the death of the testator had no present interest vested in right." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

Lapsed Devises.—See post, "In Absence of Residuary Clause," I, K, 2.

Contingent Devises Incapable of Vesting.—W. A. by his last will devised that "in case he should die before his brother, R. A., all his estate, both real and personal, should descend to him and his heirs forever; but, in case his said brother should die without a lawful heir, it should then be equally divided between his brother, W. A., and nephew, S. A., to them and their heirs forever." R. A. having died in the lifetime of the devisor, and without issue, the limitation over could not take effect; but the estate descended to the heirs general of the devisor. Allen *v.* Parham, 5 Munf. 457. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

A testator left at his death a widow and two infant sons. By his will the testator gave to his said infant children an estate for life, each, in certain property, and conferred a contingent remainder on the children of the said infant devisees. One died a minor, unmarried and without issue. It was held, that the contingent remainder to his children failed and the inheritance passed to his brother. Robinson *v.* Robinson, 89 Va. 916, 14 S. E. 916.

d. Separate Estates of Married Women.

The separate real estate of a married woman descends at her death to her heirs at law. Smith *v.* Bradford, 76 Va. 758.

The equitable separate estate of a married woman, upon her death, descends to her children, just as an estate recognized at law. Sayers *v.* Wall, 26 Gratt. 354.

Where an equitable separate estate is created in the wife, in real property, with power to alien it, and she does not exercise that power, such estate passes at her death according to the law of descents. Andes *v.* Roller, 98 Va. 620, 37 S. E. 297.

Where the rights of a husband to the real property of his wife are intercepted by an agreement to that effect before and in contemplation of marriage, upon the death of the wife, her property will pass as if she had died sole and intestate. Charles *v.* Charles, 8 Gratt. 486.

In November, 1855, S. made a deed by which he conveyed in fee to his wife, E., his entire real estate lying in the county of P., his then residence, of about 700 acres, and seven days afterward acknowledged the deed in the clerk's office of the county, thus vesting in his wife an equitable separate

estate and in equity divesting himself of all title to the premises conveyed. At the time he owed no debts, and had personal property, including slaves, amounted to ten or twelve thousand dollars. He afterwards, in course of business, contracted debts; and, losing his slaves by the result of the war, his personal property was not sufficient to pay his debts. His wife died in 1864, leaving children. It was held, that upon the death of the wife, her heirs were entitled to the immediate possession of the land, the estate having descended to her children, just as if it had been an estate recognized at law. Sayers *v.* Wall, 26 Gratt. 354.

B. and wife sold and conveyed her maiden land. The purchase bonds were secured by trust deed thereon. At the same time, B. conveyed his encumbered land to a trustee for Mrs. B.'s separate use, and in the trust deed it is stipulated that the trustee shall collect the bonds and discharge the liens. B. collected and misapplied the money. Later, when insolvent, B. assigned to the trustee two other bonds and his interest, jure mariti, in the personal estate of his wife's father, P., deceased, in lieu of the trust funds so misapplied. W., a brother of Mrs. B., was indebted to P.'s estate. B. was indebted to W. Mrs. B. died, leaving children. In suit to settle the administration of P.'s estate, W. filed petition alleging that B. owed him, and praying that what he owed B. on account of his distributive share in P.'s estate, might be set off by B.'s indebtedness to him. It was held, that the bonds given for the maiden land of Mrs. B., and by the trust deed securing their payment, settled to her separate use and directed to be applied to discharge the liens on the land conveyed to her for her separate use, so far as needed for the purpose, are, to that extent, to be considered as her separate real estate, at her death descendible to her children as her heirs at law. Smith *v.* Bradford, 76 Va. 758.

e. Escheated Lands.

Where one dies, leaving estate unclaimed, which escheats to the commonwealth, after-discovered heirs of the deceased may recover the value of the estate so escheated. Adie *v.* Com., 25 Gratt. 712. See also, the title ESCHEAT.

f. Lands Converted into Money.

In General.—The general rule is that land ordered by will to be converted into money is to be deemed personalty for the purposes of the will in order that it may be applied conveniently in the manner directed by the will and for no other purpose, but if these are disappointed, it descends as realty. "'For,' as said by Mr. Jarman, 'every conversion, however absolute in its terms, will be deemed to be a conversion for the purpose of the will only, unless the testator distinctly indicates an intention that it is, on the failure of the purposes, to prevail as between persons on whom the law casts the real and personal estate; namely, the heir and the distributee. 1 Jarman on Wills, top of page 624 (5 Amer. Ed., Biglow). And it seems to be established by the weight of authority that, where a testator directs his real estate to be sold, and the mixed fund arising from the proceeds of the realty and personalty to be applied to certain specified purposes, if any part of the disposition fails, either, because void ab initio or by lapse, then in proportion to the extent or amount which the real estate would have contributed to that disposition, the proceeds thereof retain the quality of real estate for the benefit of the heirs, although the real estate has been in fact sold, and the money when paid over to the heir, has in his hands the character of money and no longer the character of real estate." Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446, citing Gallagher *v.* Rowan, 86 Va. 823-825, 11 S. E. 121. See also, Phillips *v.* Ferguson, 85 Va. 509, 8 S. E. 241; Carney *v.* Kain, 40 W. Va. 758.

23 S. E. 650. See generally, the title CONVERSION AND RECONVERSION, vol. 3, p. 498.

Where Purpose of Conversion Wholly Fails.—"With respect, however, to the conversion of land into money, the rule, independent of any statute on the subject, is that where the purpose of the conversion wholly fails, the land results to the heir." Gallagher *v.* Rowan, 86 Va. 823, 11 S. E. 121.

Where Purpose of Conversion Partially Fails.—"Where the purpose of the conversion only partially fails, the conversion must still be made by selling the land in order to satisfy the purposes which remains effective, and, after satisfying those purposes, the surplus, unless the will otherwise directs, results to the heir of the testator as money, and in case of his death will go to his personal representative, even though the sale did not take place until his death." Gallagher *v.* Rowan, 86 Va. 823, 11 S. E. 121.

Residuary Clause of Will Void.—All of the property real and personal of a testator had been converted into money in accordance with the directions of the will. The residuary clause of the will disposing of the entire residuum of the estate, real and personal, was held to be void. It was held, that the residuum of the estate should be distributed between the heirs and the distributees of the testator, giving the heirs such proportion of the fund as the real estate bore to his whole estate, and to the distributees such proportion as the personal estate bore to his whole estate. Fifield *v.* Van Wyck, 94 Va. 557, 27 S. E. 446. See the title CONVERSION AND RECONVERSION, vol. 3, pp. 501, 502.

Partition Sale.—Where a court of equity causes land to be sold for partition the proceeds is not by the sale of such land converted from realty into personalty so that they pass to the distributee in preference to the heir. Turner *v.* Dawson, 80 Va. 841.

D.'s land was sold in a partition suit for that purpose. One-third of the proceeds was set apart for his widow. D.'s daughter, A., was of age, unmarried and a party to the suit. She afterwards married T., and, without having had issue, died in the lifetime of D.'s widow. After the widow's death, T. sued to recover the share of A., his deceased wife, in the third of the property set apart for the widow, claiming it had been converted into personalty. There was no evidence that A., whilst sui juris, ever elected or that any election in her lifetime, whilst she was non sui juris, had been made, that said third should be personalty. Since it is the rule that when, for any reason, a party is incapable of making such election, the court will hold the proceeds of the sale subject to all the incidents of realty, it was held that A.'s share in said third of the proceeds of sale of D.'s land passes as realty to her next of kin and that her widower has no interest therein. Turner *v.* Dawson, 80 Va. 841. See the title CONVERSION AND RECONVERSION, vol. 3, p. 498.

Proceeds of Sale of Infant's Land.—See the title CONVERSION AND RECONVERSION, vol. 3, pp. 503, 504.

Instance of Conversion for All Purposes.—A testator wills "the Grange," to M. "and her heirs forever" and if she die without issue it should be sold and one-half the proceeds to be given to "the cause of domestic and foreign missions," and the other half to certain relatives. By residuary clause he willed all his remaining estate to said M., who died without issue, C., her husband, surviving. The direction to sell upon failure of M.'s defeasible fee in "the Grange" converted it into personalty. The legacy to the missions was void for uncertainty. It was held that half of the proceeds given to the missions went into the residuary fund, and to C. as husband and sole distribute of M. Gallagher *v.* Rowan, 86 Va. 823, 11 S. E. 121.

g. Money Converted into Land.

"The law is that where money is directed by will to be laid out in land, and the purpose of the conversion wholly fails, the fund results in its original form to the personal representative for the next of kin or the residuary legatee, as the case may be; and the same rule applies where the failure or purpose is only partial. Phillips *v.* Ferguson, 85 Va. 509, 8 S. E. 241; 3 Pom. Eq., § 1172." Gallagher *v.* Rowan, 86 Va. 823, 11 S. E. 121; Carney *v.* Kane, 40 W. Va. 758, 23 S. E. 650. See generally, the title CONVERSION AND RECONVERSION, vol. 3, p. 498.

h. Profits of Real Estate Descended.

See the title EXECUTORS AND ADMINISTRATORS.

i. Inchoate Right to Lands.

An inchoate right to lands, held by entry and survey only, is real estate, and will descend to the heirs of the holder. Morrison *v.* Campbell, 2 Rand. 207.

j. Insurance Money.

See the title EXECUTORS AND ADMINISTRATORS.

k. Debt Secured by Trust Deed.

See the title EXECUTORS AND ADMINISTRATORS.

4. Liable to Claims of Creditors.

See the titles EXECUTORS AND ADMINISTRATORS; MARSHALING ASSETS AND SECURITIES.

Where the personal property is insufficient to pay the debts of the ancestor, the heirs take only in subordination to the rights of creditors. Martin *v.* Paper Co., 101 Va. 699, 44 S. E. 918; Max Meadows, etc., Co. *v.* McGavock, 96 Va. 131, 30 S. E. 460. See also, Menefee *v.* Marge, 1 Va. Dec. 644; Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577; Hairston *v.* Medley, 1 Gratt. 96.

J. DISINHERISON OF HEIRS.

General Rule.—A man can not disinherit his heirs or next of kin, in any other way than by giving his estate to someone else. Boisseau *v.* Aldridges, 5 Leigh 222.

The heir at law will not be disinherited, unless it is done by the express terms of the will or by necessary implications. Graham *v.* Graham, 23 W. Va. 36; Irwin *v.* Zane, 15 W. Va. 646. See post, "Intestacy as to Portion of Estate," I, K.

"The heir at law never takes by the act or intention of the testator. His right is paramount to and independent of the will, and no intention of the testator is necessary to its enjoyment. On the contrary, such right can only be displaced or precluded by direct words or plain intention, evincing a desire upon the part of the testator, that he shall not take, etc. He needs no argument or construction showing intention in his favor to support his claim. They belong to the party claiming under the will and in opposition to him. Augustus *v.* Senbolt, 3 Metc. (Ky.) 155." Graham *v.* Graham, 23 W. Va. 36.

"In Creswell *v.* Lanson, 7 Gill. & Johns. 227, it was held, that the heir being favored in law, there should be no strained construction to work a disherison, where the words are ambiguous." Graham *v.* Graham, 23 W. Va. 36. See also, Irwin *v.* Zane, 15 W. Va. 646.

B. in his lifetime, signs and seals the following instrument: "Not having made a will so as to dispose of my property, and two of my sisters having married contrary to my wish, I wish this instrument to prevent either of their husbands from having one cent of my estate, say the husbands of my two sisters, M. and D., nor either of them to have one cent, unless they survive their husbands; in that case, I leave them $500 each, to be paid," etc. On which he endorses, "Mem. to prevent Bennett and Burwell Aldridge (the two husbands) from having any part of my estate that each might claim in right of their wives, without a will made by me." It was held, that

while the instrument is a testamentary paper. It is not a devise and bequest of the testator's estate, by implication, to his heirs and next of kin other than the two sisters, M. and D., and their husbands; therefore, these two sisters are entitled to their shares of his estate undisposed of by the will. Boisseau *v.* Aldridges, 5 Leigh 222.

By Agreement of Parties.—Upon the death of the ancestor the descent is cast by operation of law upon the heirs, and the personalty passes in accordance with the statute of distribution. This rule is unaffected by the fact that advancements may have been made to some of the heirs, who at the time of receiving their advancements, entered into covenants with the parent, whereby they relinquish all interest in or claim to any portion of the estate then owned or which may be thereafter acquired by the parent, and as to which he may die intestate. Where advancements have been made in the lifetime of the parent, they must be brought into hotchpot by him who receives it, with the result that perfect equality is attained with respect to estates of intestate decedents. Headrick *v.* McDowell, 102 Va. 124, 45 S. E. 804. See the title ADVANCEMENTS, vol. 1, p. 189.

"In Cannon *v.* Nowell, 51 N. C. 437, Judge Ruffin uses the following language: 'Heirs take by positive law when the ancestor dies intestate, and the course of descents can not be altered by words excluding particular heirs or by any agreement of parties. Suppose the father to have had no other child at his death but the plaintiff. Being the sole heir, he must have taken the whole of the descended land ex necessitate, there must therefore, be a disposition to another, so as to break the descent, otherwise the land descends according to law; that is, in this case, to the heirs in general, subject to the provision for bringing advancements into hotchpot.' See, also, Coffman *v.* Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69; Denson *v.* Autrey, 21 Ala. 205." Headrick *v.* McDowell, 102 Va. 124, 45 S. E. 804.

If a child accept from a parent a deed of present conveyance of land, providing that it shall be in full discharge and satisfaction of the child's expectant share in the parent's estate, it will bar any further claim for participation by such child in such estate, though the child did not sign the deed. Roberts *v.* Coleman, 37 W. Va. 143, 16 S. E. 482.

Where a child has received a certain portion in full of his share of his father's estate, on the death of his father he is ordinarily barred from further participation in the distribution or partition of the residue of such estate, and, in case of his death before his father's, his children will be barred from such participation for the same reason, and to the same extent. their father would be barred. Coffman *v.* Coffman, 41 W. Va. 8, 23 S. E. 523. See also, succeeding paragraph.

Failure to Bring Advancement into Hotchpot.—A grandson of a decedent whose lands were partitioned, and whose father had received, in his lifetime, advancements greater than his share of the estate, which advancements were not brought into hotchpot, is not seized of any legal title to any portion of the land by virtue of heirship. Flesher *v.* Mitchell, 5 W. Va. 59. See also, the four preceding paragraphs.

K. INTESTACY AS TO PORTION OF ESTATE.

1. In General.

It would seem that the rule is that where a party dies intestate as to a portion of his estate, that particular portion passes under the statute of descents and distribution to his heirs and distributees. McCamant *v.* Nucholls, 85 Va. 331, 12 S. E. 160. See also, Headrick *v.* McDowell, 102 Va. 124, 45 S. E. 804; Carney *v.* Kain, 40 W. Va.

758, 23 S. E. 650. See ante, "Disinherison of Heirs," I, J.

A testator devised a tract of land to trustees, in trust to convey the same to a particular grandson, son of testator's son, W. B., on his attaining the age of twenty-one, and in case of his death before that age without leaving issue, to convey the same to any afterborn son of W. B. who might then be the oldest surviving son, on his attaining the age of twenty-one; but if there should be no son of W. B. to take his said land, then to convey the same to any daughters of W. B. in fee simple, in equal proportions; and for want of any children of W. B. then in trust for his right heirs and their heirs forever. By another clause of his will he gave slaves and personal property, to the same trustees, in trust to divide the same equally among the children of his son, W. B., taking his land, in proportion to the quantity held by each. The particular grandson named died an infant and unmarried, and W. B. died without ever having any other child. Held, no division of the slaves and personalty could be made under the will, but as to the same the decedent was intestate. Hayes *v.* Goode, 7 Leigh 452.

2. In Absence of Residuary Clause.

Section 14, ch. 122, Va. Code, 1849 (§ 2524, Va. Code, 1904), provides that: "Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." To this the Code of West Virginia, § 13, ch. 77, adds: "And if there be no residuary devise therein, such real estate or interest shall go to the heirs at law of the testator, as if he had died intestate." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

"The chief object of § 14 of chapter 122 of the Code of 1849 (1860) was to modify the doctrine of lapse, and substitute residuary legatees for the heirs of the testator, where there is a residuary devise. Haymond, J., in Hoke *v.* Hoke (1878), 12 W. Va. 427, 472. See 1 Jarm. Wills (Bigelow's 6th Ed.) ch. 11, side pages 307, 309; McGreevy *v.* McGarth, 152 Mass. 24, 25 N. E. 29. The statute in question (§ 14, ch. 122, Code 1860) was taken from St. 1 Vict., ch. 26, § 25. See 1 Jarm. Wills, side pages 321, 322. See 3 Lomax Dig. (2d Ed.), side page 114, top page 188; 2 Minor, Inst., top page 1057, side page 947, as to lapse. In 1 Jarm. Wills top page 336, it is said the doctrine of lapse is properly extended to the case of gifts on contingency. See 2 Woerner, Adm'r, 911." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650.

Testator devises slaves and personal estate to his wife, during widowhood, and then to be divided at her discretion amongst his children. The wife gave one of the slaves, in 1774, to one of his children, by parol gift; which was a good execution of the power as to that slave. It was held, that the part of the property which was ineffectually appointed, or not appointed at all, remained as part of the residuary estate of the testator undisposed of by his will; and ought to be divided amongst his children, according to the statute of distributions. Morris *v.* Owen, 2 Call 520.

3. Election against Will by Legatee.

Though a legatee under a will which devises away property belonging to him, elect to retain such property and to waive the legacy, the testator is not therefore rendered intestate as to the subject of such legacy, but it shall go to the disappointed devisee, in satisfaction of his loss. Kinnaird *v.* Williams, 8 Leigh 400. See the title WILLS.

L. PROPERTY DEVISED ACCORDING TO STATUTE OF DESCENTS.

See ante, "Title by Descent Preferred," I, H.

M. WHEN RIGHTS OF INHERITANCE VEST.

Rights of inheritance become vested at the death of the person from whom they are derived. Dilliard *v.* Tomlinson, 1 Munf. 183; Harrison *v.* Allen, 3 Call 289.

II. Order of Descent and Persons Entitled to Inherit under the Statute.

A. IN GENERAL.

See ante, "Statutory Provision Stated and Construed," I, E.

B. WHEN REAL ESTATE PASSES TO HUSBAND OR WIFE.

By our statute, ch. 119, § 1, Va. Code, 1873 [§ 2548, Va. Code, 1887, same section Va. Code, 1904], when any person having title to any real estate of inheritance shall die intestate as to such estate, if there be no father, mother, brother, or sister, nor any descendants of either, and neither paternal nor maternal kindred, the whole shall go to the husband or wife of the intestate; or if the husband or wife be dead, to his or her kindred in the like course as if such husband or wife had survived the intestate and died entitled to the estate. Thus, it is only in the last resort that land passes by descent from or to husband or wife. All this is in recognition of the right of blood on the side from which the land comes. Turner *v.* Dawson, 80 Va. 841. See also, Moore *v.* Conner, 2 Va. Dec. 56; Davis *v.* Rowe, 6 Rand. 355; Hannon *v* Hounihan, 85 Va. 429, 12 S. E. 157. The provisions of the W. Va. statute are the same in this respect.

Where a wife died, leaving no children or descendants, under W. Va. Code, 1873, her sole heir was her husband. Milhollen *v.* Rice, 13 W. Va. 510.

C. INHERITANCE BY POSTHUMOUS CHILDREN.

"Any person in ventre sa mere, who may be born in ten months after the death of the intestate, shall be capable of taking by inheritance in the same manner as if he were in being at the time of such death. (Code, 1849, p. 523. See 123, § 8.)" Virginia Code, 1904, § 2565; W. Va. Code, 1899, § 8, ch. 78, p. 713. See post, "Inheritance by and from Half Bloods," II, G. See also, the title WILLS.

Rights of Pothumous Child.—A posthumous child is entitled to such share of the real and personal estate, as it would have been entitled to, if the father had died intestate; including profits of lands, hires of negroes and interests and profits of other personal estate. Armistead *v.* Dangerfield, 3 Munf. 20.

A posthumous child unprovided for by settlement and pretermitted by the last will of his father, is entitled to a share of the real estate, notwithstanding such child be a daughter, and it appear, from the will, that the testator intended to give all his lands to his sons. Armistead *v.* Dangerfield, 3 Munf. 20.

How Portion Raised.—The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees and those claiming under them. Armistead *v.* Dangerfield, 3 Munf. 20.

M. has four children. To two of them he makes considerable advancements in his lifetime, and then dies leaving a will, by which he devises his estate to the four in nearly equal portions. After his death a posthumous child is born (pretermitted by the will). The act in regard to such child, provides that he shall be entitled to such "portion of the father's estate," as if he "had died intestate; towards raising which portion the legatees and devisees shall contribute proportionally," out of their legacies and devises. (Code of 1819, p. 376, ch. 104, § 3.) Held, the doctrine of hotchpot does not apply to such a case. The advanced children may therefore take their legacies without bringing in their advancements, and the pretermitted child is

only entitled, under any circumstances, to one-sixth of the estate left by the father at the time of his death, to be made up by ratable contribution among the legatees. Advancements constitute no part of the "father's estate," within the meaning of the law, or in any sense. Wilson *v.* Miller, 1 Pat. & H. 353.

Liability of Purchaser from Devisees.—Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such posthumous child, by their having purchased without notice of such claim. Armistead *v.* Dangerfield, 3 Munf. 20.

Effect of Devise to "Testator's Children."—A devise in general terms, to the testator's "children," does not comprehend a posthumous child, so as to prevent it from claiming, under the act of assembly, as pretermitted by the will. Armistead *v.* Dangerfield, 3 Munf. 20.

Quære, does the testator's knowing, at the time of making the will, that his wife is pregnant, make any difference in the case? Armistead *v.* Dangerfield, 3 Munf. 20.

D. INHERITANCE BY AND FROM BASTARDS.

In General.—See the title BASTARDY, vol. 2, p. 338.

Case of Slave Marriages.—See the title BASTARDY, vol. 2, p. 336.

As Collaterals of Half Blood.—See post, "Inheritance by and from Half Bloods," II, G.

E. INHERITANCE BY AND FROM CHILDREN OF SLAVES.

See post, "Inheritance by and from Half Bloods," II, G. See the titles BASTARDY, vol. 2, pp. 336, 338; SLAVES.

F. INHERITANCE BY AND FROM ALIENS.

See the title ALIENS, vol. 1, p. 294.

"In making title by descent, it shall be no bar of a party, that any ancestor (whether living or dead), through whom he derives his descent from the intestate, is or has been an alien." Jackson *v.* Sanders, 2 Leigh 109; Garland *v.* Harrison, 8 Leigh 374; Hannon *v.* Hounihan, 85 Va. 433, 12 S. E. 157. See also, Hauensteins *v.* Lynham, 28 Gratt. 62.

This statute removes the bar of alienage in making title by descent through collateral as well as lineal kindred. Garland *v.* Harrison, 8 Leigh 374. See also, Hannon *v.* Hounihan, 85 Va. 433, 12 S. E. 157; Jackson *v.* Sanders, 2 Leigh 109.

G. INHERITANCE BY AND FROM HALF BLOODS.

While the common law wholly excluded collaterals of the half blood from the inheritance, the Virginia statute calls them along with those of the whole blood, but gives them half portions only. Davis *v.* Rowe, 6 Rand. 355. Section 2549, Va. Code, 1887; same section, Virginia Code, 1904, provides: "Collaterals of the half blood shall inherit only half so much as those of the whole blood; but if all the collaterals be of the half blood, the ascending kindred, if any, shall have double portions." Moore *v.* Conner, 2 Va. Dec. 56.

"This section relates only to collaterals of the half blood. Its caption is, 'How collaterals of the half blood inherit.' It states affirmatively not what others shall inherit, but what collaterals of the half blood shall inherit. Its obvious meaning is that, if all who inherit are collaterals of the half blood, some of them of the ascending kindred and some not, those of the ascending kindred shall have double portions. The clause relied upon was not intended to alter in any way a previously established class. On the contrary, the disjunctive words 'but if,' introducing the last clause of the section, show that the class of persons referred to is the same mentioned in the first clause of said section." Moore *v.* Conner, 2 Va. Dec. 56.

Illustrations.—If under the sixth clause of § 2548, Va. Code, 1887, same

section, Va. Code, 1904, a living uncle of the half blood came into partition with the child of a deceased uncle of the half blood, and the two inherited an estate from the child of a half brother of these uncles; the living uncle, being of the ascendant kindred, would take a double portion. Moore *v.* Conner, 2 Va. Dec. 56.

Where an intestate left surviving no father and no children or descendants, but left a mother and four neices and nephews of the half blood, it was held, that the collaterals being of the half blood, the intestate's mother takes a double portion. Moore *v.* Conner, 2 Va. Dec. 56.

"Now, if the heirs in this case consisted of the four nephews and nieces of the half blood and a nephew of the whole blood—say, for instance, a child of Susan Bagby—and no others, then the estate would have to be divided into six parts, and the nephew of the whole blood would get a double portion, or two-sixths. All who inherit would then be in the same degree of kindred to the intestate." Moore *v.* Conner, 2 Va. Dec. 56.

In Garland *v.* Harrison, 8 Leigh 368, "a bastard son died without issue, leaving his mother and two bastard brothers by other fathers as his heirs, and it was held that the two bastard brothers, being regarded as of the half blood only, could take only half so much as the mother." Moore *v.* Conner, 2 Va. Dec. 56.

Where three children of the same mother, born slaves, one of whom, after emancipation, acquires real estate, and dies intestate, and without children, the mother dead, the other two take the estate as heirs of their deceased sister. Hepburn *v.* Dundas, 13 Gratt. 219. See the title BASTARDY, vol. 2, p. 336-338.

C. N. in 1788 devises a tract of land to C. D. N. and the residue of his land to his, the testator's son, J. N. J. N. attained to the age of twenty-one years and then died intestate and without issue, leaving a mother, two sisters of the whole blood, E. N. and S. N., a brother of the half blood, and a sister of the half blood not born at his death. It was held, that his whole estate should be divided as follows: To his mother two-seventh parts, to his sisters of the whole blood two-seventh parts, each, and to the brother of the half blood one-seventh part; but his sister of the half blood unborn at his death was entitled to no part therein. Blunt *v.* Gee, 5 Call 481. See ante, "Inheritance by Posthumous Children," II, C.

Afterwards S. N. died under age, without issue; it was held, that her land derived from her brother, J. N., were to be divided as follows: To her mother, one-third; to her sister of the whole blood, one-third; to her brother of the half blood, one-sixth; to her sister of the half blood, one-sixth. Blunt *v.* Gee, 5 Call 481. See post, "Descent of Infants Estates," II, I.

W., of full age, dies intestate, without issue and unmarried, seized and possessed of an estate partly derived by devise from his father, G. W., and partly by descent from his brother, R. W., leaving an uncle and three cousins, children of a deceased uncle of the whole blood on the mother's side, and an uncle of the half blood likewise on the mother's side. One moiety of his estate was allotted to these, his maternal kindred. It was held, that the moiety allotted should be divided as follows: two-fifths to the uncle of the whole blood; two-fifths to the three cousins; and one-fifth to the uncle of the whole blood. Browne *v.* Turberville, 2 Call 390.

H. MOIETIES TO PATERNAL AND MATERNAL KINDRED.

See post, "Descent of Infant's Estates," II, I.

"By the fourth clause of said section, it is provided that, if there be no mother, nor brother, nor sister, nor any descendant of either, then one

moiety shall go to the paternal, the other to the maternal, kindred, in the following course: First, to the grandfather; if none, then to the grandmother, uncles, and aunts, on the same side, and their descendants; if none such, then to the great-grandfathers, or great-grandmothers, if there be but one; if none then to the great-grandmothers, or great-grandmother, if there be but one, and the brothers and sisters of the grandfathers and grandmothers and their descendants; and so on in other cases without end, passing to the nearest lineal male ancestors, and, for want of them, to the nearest lineal female ancestors in the same degree, and the descendants of such male and female ancestors." Moore *v.* Conner, 2 Va. Dec. 56. See also, Tomlinson *v.* Dillard, 3 Call 105.

W. of full age, died intestate, without issue and unmarried, seized and possessed of an estate partly derived, by devise, from his father, G. W., and partly by descent from his brother, R. W., leaving an uncle and three cousins, children of a deceased uncle of the whole blood on the mother's side, and an uncle of the half blood likewise on the mother's side, and leaving, also, two relations on the father's side. It was held, that the estate should be divided into two moieties; of which one was to be divided between the two relations on the father's side, and the other moiety was to be allotted those on the mother's side. Browne *v.* Turberville, 2 Call 390. See post, "Personal Estate of Infants," IV, I.

I. DESCENT OF INFANT'S ESTATES.

1. Estates Derived from a Parent.

See post, "Estates Not Derived from a Parent," II, I, 2.

a. Statutory Rules and Construction.

"If an infant die without issue, having title to real estate derived by gift, devise or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from whom it was so derived—if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent." Section 2556, Va. Code, 1904. Medley *v.* Medley, 81 Va. 265; Browne *v.* Turberville, 2 Call 398, 404; Tomlinson *v.* Dillard, 3 Call 105; Dilliard *v.* Tomlinson, 1 Munf. 183; Templeman *v.* Steptoe, 1 Munf. 339; Addison *v.* Core, 2 Munf. 279; Liggon *v.* Fuqua, 6 Munf. 281; Vaughan *v.* Jones, 23 Gratt. 444; Bailey *v.* Teackle, Wythe 173. See ante, "Preference Shown Blood of First Purchaser," I, G.

Under the present statute the real estate of an infant dying without issue under twenty-one passes to his heirs on the part of the parent from whom the estate was derived. Vaughan *v.* Jones, 23 Gratt. 444; Va. Code, 1887, § 2556. See ante, "Inheritance by and from Half Bloods," II, G.

Where the estate possessed by an infant, unmarried and without issue at his death, has been derived from his father, it passes at his death to his paternal kindred, to the exclusion of his maternal kindred. Robinson *v.* Robinson, 89 Va. 916, 14 S. E. 916.

The true construction of the 7th section of the act of 1792 "reducing into one the several acts directing the course of descents," as to the case of an infant, is, that if there be no mother, etc., and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. Addison *v.* Core, 2 Munf. 279. See ante, "Moieties to Paternal and Maternal Kindred," II, H.

b. Estates Immediately Derived from Parent.

An infant's estate to pass in accordance with the rule prescribed in § 2556, Va. Code, 1904, must be derived by gift devise of descent immediately from the parent. Thus where an infant, having

title to real estate of inheritance, derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either, the father being dead, but the mother living, the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants; and, vice versa, such estate being derived immediately from the mother, and she being dead, but the father living, it goes in parcenary to her brothers and sisters, or their lineal descendants. Templeman *v.* Steptoe, 1 Munf. 339. See Addison *v.* Core, 2 Munf. 279; Dilliard *v.* Tomlinson, 1 Munf. 183; Tomlinson *v.* Dillard, 3 Call 105; Waring *v.* Waring, 96 Va. 641, 32 S. E. 150.

Application of Rule to Particular Instances.—A testator left at his death a widow and two infant sons. By his will the testator gave to his said infant children an estate for life, each, in certain property, and conferred a contingent remainder on the children of the said infant devisees. One son died a minor and without issue. So that the contingent remainder to his children failed and the inheritance passed to his brother. Afterwards the remaining son of the testator died an infant, unmarried and without issue. All the estate possessed by him, having been thus derived from his father, passed at his death to his paternal kindred. The maternal kindred were entitled to no portion of the real estate as devised as aforesaid to the decedent. Robinson *v.* Robinson, 89 Va. 916, 14 S. E. 916.

Under the 5th section of the act of descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father; leaving no relations in the paternal line, but a grandmother and uncle, the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole. Liggon *v.* Fuqua, 6 Munf. 281. But see, Rev. Va. Code, 1819, ch. 96, §§ 11, 12, vol. 1, p. 356.

The real estate of R., a female infant, was sold under decree of court, and turned over to V., her guardian, upon his giving bond and security for the faithful accounting therefor. R. married B., to whom V. paid over the estate upon his giving security to idemnify V. Afterwards R. died still under the age of twenty-one years, leaving a child which survived but a few hours, and her husband who survived the child. It was held, that the proceeds of the real estate of R. descended as real estate to her child, and that the child of the deceased infant would inherit subject to the life estate of the husband of the infant, and upon the death of the child, under twenty-one years of age, such estate passed as real estate to the heirs of the child on the part of the mother. Vaughan *v.* Jones, 23 Gratt. 444. See the title CONVERSION AND RECONVERSION, vol. 3, p. 503, 504.

A mother owning land dies intestate, leaving a husband and five children, two of whom died successively in infancy without issue, survived by their father and three brothers. On the question of succession, it was held, that on the death of the first infant his share descended to his four brothers without regard to the father, and on the death of the second infant the share he derived by descent from his mother passed to his brothers, also, but the share he derived from his deceased brother, one-fourth of one-fifth, of the estate, descended to his father. Walkers *v.* Boaz, 2 Rob. 485. See also, Liggon *v.* Fuqua, 6 Munf. 281; Dickenson *v.* Holloway, 6 Munf. 422.

c. Estates Derived by Intervening Succession.

Where the estate of an infant is derived by intervening succession from the parent, the rule does not apply. Thus neither the mother nor her issue

is excluded, where the property is derived, not immediately, but by intervening succession from the father. Dilliard *v.* Tomlinson, 1 Munf. 183. See ante, "Estates Immediately Derived from Parent," II, I, 1, b; post, "Estates Not Derived from a Parent," II, I, 2.

2. Estates Not Derived from a Parent.

Infant's estates which were not derived from a parent by gift, devise or descent, descend and pass to their heirs at law in accordance with the course of descent prescribed in § 2548, Va. Code, 1904; ch. 78, W. Va. Code, 1899. See ante, "Estates Derived from a Parent," II, I, 1.

Applications of Rule.—Where one devises land to the children of his daughter, who marries and has five children, three of whom die in infancy without issue and unmarried after the death of testator, the interest of the deceased children in the land passed by statute to their father. Cosgray *v.* Core, 2 W. Va. 353.

Where a testator devises lands to his son during his natural life, and at his death to his children so that each of the children take vested remainders in the lands thus devised, upon the death of any of the infant children their interest in such lands are inherited by their father. Va. Code, 1887, § 2548. Waring *v.* Waring, 96 Va. 641, 32 S. E. 150. See ante, "Remainders, Reversions and Executory Interests," I, I, 3, c.

A mother owning land dies intestate, leaving a husband and five children, two of whom die successively in infancy without issue, survived by their father and three brothers. On the question of succession, it was held, that on the death of the second infant the one-fourth of one-fifth of his mother's estate which he derived from his deceased brother descended to his father. Walkers *v.* Boaz, 2 Rob. 485. See also, Liggon *v.* Fuqua, 6 Munf. 281; Dickenson *v.* Holloway, 6 Munf. 422.

When Mother Takes One Moiety.—Where an infant inherits land from a great uncle in the paternal line, and dies, the mother of the infant will inherit one moiety, and the next of kin, the father, the other. Owen *v.* Cogbill, 4 Hen. & M. 488. See also, Bailey *v.* Teackle, Wythe 173.

III. Inheritance by Representation—Per Capita and Per Stirpes.

Statutory Provision Stated and Continued.—"When the children of the intestate, or his mother, brothers, and sisters, or his grandmother, uncles, and aunts, or any of his female lineal ancestors living, with the children of his deceased lineal ancestors, male and female, in the same degree, come into the partition, they shall take per capita or by persons; and where, a part of them being dead and a part living, the issue of those dead have right to partition, such issue shall take per stirpes or by stocks, that is to say, the shares of their deceased parents; but whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita or by persons. (Code, 1849, p. 523, ch. 123, § 3.)" Va. Code, 1904, § 2550. Moore *v.* Conner, 2 Va. Dec. 56. See Ball *v.* Ball, 27 Gratt. 326; Davis *v.* Rowe, 6 Rand. 355. See ante, "Statutory Provision Stated and Construed," I, E; "Order of Descent and Persons Entitled to Inherit under the Statute," II.

Whenever persons entitled to partition take per stirpes, or by stocks, they take the share which their deceased ancestor if living would have taken. Va. Code, 1904, § 2550; Ball *v.* Ball, 27 Gratt. 326; Davis *v.* Rowe, 6 Rand. 355; Moore *v.* Conner, 2 Va. Dec. 56; Dickinson *v.* Hoomes, 1 Gratt. 302; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Vashon *v.* Vashon, 98 Va. 170, 35 S. E. 457; Taliaferro *v.* Burwell, 4 Call 321. See also, Richmond,

etc., R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573.

Whenever persons are entitled to partition per capita they take by persons and share equally in the estate. Davis *v.* Rowe, 6 Rand. 355; Ball *v.* Ball, 27 Gratt. 326; Moore *v.* Conner, 2 Va. Dec. 56; Dickinson *v.* Hoomes, 1 Gratt. 302; McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809; Vashon *v.* Vashon, 98 Va. 170, 35 S. E. 457; Va. Code, 1904, § 2550.

This section is meant to establish it as a general rule, that equals in degree of kindred take equally, but where part of the class is dead leaving issue, such issue take per stirpes. The last clause is in these words: "Whenever those entitled to partition are all in the same degree of kindred to the intestate, they shall take per capita, or by persons." Davis *v.* Rowe, 6 Rand. 355; Moore *v.* Conner, 2 Va. Dec. 56. See also, McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809.

"When all of a class are alive, they take per capita, by persons; and when some are alive, and some dead, leaving children, the latter take per stirpes, the shares of their deceased parents; in relation to each other, they take equal shares, being in equal degree of kindred to the intestate; but, in relation to those of the class who are alive, and stand in one degree of kindred nearer to the intestate, they take unequal share, where the deceased parent leaves more than one child, as in the case before us, the niece and nephew alive at the death of the intestate, and standing in equal degree of kindred to him, take equal shares of the inheritance, and the children of the deceased nieces, representing their dead parents, take their shares equally among the stirpes, but standing in one degree more remote from intestate, take unequal shares in relation to the shares of the living niece." Davis *v.* Rowe, 6 Rand. 355.

"Whenever those entitled to partition are in the same degree of kindred of the intestate, they shall take per capita or by persons; and where a part of them being dead and a part living, the issue of those dead shall take per stirpes. And the same rule applies to the living descendants however remote may be their degree of kindred to the intestate. While the statute does not expressly enumerate all the degrees of kindred of the remote descendants, it expressly includes all and plainly provides a rule for all. There is nothing in the decision of the case of Davis *v.* Rowe, 6 Rand. 355, which is at all in conflict with the foregoing opinion. On the contrary the principles of that decision seem fully to accord with what has been said in this case." Ball *v.* Ball, 27 Gratt. 326. See also, Case upon Statute for Distribution, Wythe 302. McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809.

Classes of Course of Descents to Which Rule Applies.—The provision for taking per stirpes or per capita applies to four distinct classes, embraced in § 2550, Va. Code, 1887; same section, Va. Code, 1904, capable of taking by descent in case some of the members of the class are dead, to wit: (1) The children of the intestate; (2) his mother, brothers and sisters; (3) his grandmother, uncles and aunts; (4) any of his lienal female ancestors living; etc. These four classes are distinctly in unison and explanatory of the like number of classes mentioned in the "course of descents," prescribed by § 2548, Va. Code, 1887; same section, Va. Code, 1904, in which the question may arise and be arranged in the same order. In this respect the course of descents prescribed in § 2548, Va. Code, 1887; same section, Va. Code, 1904, is as follows: First, "To his children and their descendants," Second (clause 3), "To his mother, brothers and sister;" Third (clause 6), "To his grandmother, uncles and aunts;" Fourth, Other cases respecting the division of moieties under the subsequent clauses of said § 2548. In none

of the intervening cases can the question of taking per stirpes arise. Moore *v.* Conner, 2 Va. Dec. 56.

Application to Specific Instances.— Where an intestate left surviving no father and no children or descendants, but left a mother and four nieces and nephews of the half blood, such nieces and nephews took per stirpes, and not per capita. Moore *v.* Conner, 2 Va. Dec. 56.

In 1777 a testator devised his estate to his two daughters, after the marriage or death of their mother; but if they died under age, and without issue, to the children of the testator's sister, except the child who should be heir to her husband. One of the daughters died an infant of tender age. Upon the death of the mother, the surviving daughter married and had issue, which died immediately, and then she died under age without other issue. The testator's sister had five children. One of her daughters married and died, leaving two children. It was held, that the descendants of such deceased daughter were entitled to their mother's proportion of the estate. Taliaferro *v.* Burwell, 4 Call 321.

B. dies intestate, leaving as her heirs five children of her deceased son, S.; six children of her deceased son, W.; and a grandchild of W., the only child of a deceased daughter of W. B.'s real estate is to be divided into twelve equal parts, of which the five children of her son, S.; the six children of her son, W.; and the grandchild of W., representing her deceased mother, are each to take one part. Ball *v.* Ball, 27 Gratt. 325.

If an intestate dies (without children or their descendants, without a father, without a mother, brother, or sister, but having had a brother and a sister, both of whom died before him); leaving a niece the only child of the brother, and two nephews, and two nieces, the children of the sister, the real estate of the intestate will descend, and the personal estate be distributed to all of these nieces and nephews per capita, and not per stirpes, they being all in the same degree of consanguinity to the intestate. Davis *v.* Rowe, 6 Rand. 355. See also, McCoy *v.* McCoy, 29 W. Va. 794, 2 S. E. 809.

In such case, the estate will not be divided into moieties, to be given, one moiety to the child of the brother, according to the common law doctrine of jus representationis, and the other moiety to the four nephews and nieces, as representing their mother, but it will be divided into five equal parts, one to each of the nephews and nieces, each one taking jure proprio. Davis *v.* Rowe, 6 Rand. 355.

If in such case, the two nieces (children of the deceased sister), be dead before the intestate, living the two nephews, and the niece (the child of the brother), and one of those deceased nieces has left two children, and the other six children, the estate will still be divided into five parts; of which, one part will be allotted to the niece (the daughter of the brother), another part to each of the nephews, one other part to the two children of the deceased niece, as representing their mother, and the other fifth part to the six children as representing their mother; and this, on the principle, that if a part of those in the same degree be dead, and a part living, the issue of those dead shall take per stirpes; that is, the share of their deceased parent. Davis *v.* Rowe, 6 Rand. 355.

Although the sixteenth section of the act of 1785 does not provide in terms for the case of a brother and sister dying before the intestate, and leaving an unequal number of children, and does not in words declare what portion of the inheritance shall descend to those children, yet the spirit of that section taken in connection with the first and fourth section justifies the construction that they will take per capita. Davis *v.* Rowe, 6 Rand. 355.

It is a just inference from this decision, that if a grandfather die in-

testate, having had two children, A and B, both of whom died before their father, but leaves one child, and B six children, the estate of the grandfather will descend to all the grandchildren equally, and the child of A will only get a seventh part, although if A had been alive, and the other brother dead, A would have got a moiety, and the other moiety would have been divided between the six children of B, and so of all other cases of like kind. Davis *v.* Rowe, 6 Rand. 355.

In Jackson *v.* Sanders, 2 Leigh 109, it was held, that, under the statute of descents, if a citizen died seized of lands in Virginia, leaving a brother who was a citizen, a sister who was an alien yet living, children of the alien sister, who were citizens, though their father as well as their grandfathers were aliens, the descendants of the alien sister take by descent one moiety, to be divided among them per stirpes, and the citizen brother the other moiety. See ante, "Inheritance by and from Aliens," II, F. See also, the title ALIENS, vol. 1, p. 291.

Statute of 1705.—In the Case upon the Statute for Distribution enacted in 1705, Wythe 302, it was held: On the words, "provided that there be no representations admitted among collaterals, after brothers and sisters children," which are literally transcribed into our statute, English courts have decided that the collateral kindred, whose representatives succeed to the shares, to which their parents, if they had been living, would have succeeded, must have been brothers and sisters of intestate; so that although B, the surviving brother, and D, the child of C, a deceased brother, would succeed to the goods of A, dying intestate, and childless, etc. Yet B, the surviving uncle, should succeed to all, excluding D, the child of C, a deceased uncle, from succession to a part of the goods of A in the same circumstances. So, if B and C had been nephews of A; or if B had been the uncle and C the nephew, who, by the case in 1 Atkyns Rep. 454, or in equal degree of kindred to A. The argument of North, C. J. (in T. Ray. Rep. 496), in support of these decisions, examined by the chancellor; who holds that: The children of those next of kindred to the intestate in equal degree, however remote, are not excluded from succession, to the portion to which their stock, if living, would have succeeded.

Under the act of 1705, it was held, that the children of those next of kin to the intestate in equal degree, however remote, are not excluded from succession to the portion to which their stock, if living, would have succeeded. Case upon the Statute for Distribution, Wythe 302.

IV. Distribution of Personal Estate.

A. UNKNOWN TO THE COMMON LAW.

"The distribution of personal estates was unknown to the common law, and was introduced into the temporal courts by the statute of distributions, 22 and 23 Car. 2c. 10." Chinn *v.* Murray, 4 Gratt. 348.

B. CONTROLLED BY LEX DOMICILI.

The laws of the state in which the domicile of a decedent is at the time of his death control and govern the distribution of his personal estate, although he may die, in another state. White *v.* Tennant, 31 W. Va. 790, 8 S. E. 596. See also, Mears *v.* Sinclair, 1 W. Va. 185. And see the title CONFLICT OF LAWS, vol. 3, pp. 105-113.

J. W. died testate in the county of Brooke, leaving a widow and two children, between whom he divided his estate equally. The widow qualified as guardian of the children, and married J. S. in 1851, and remained with him in Virginia two years, when they removed to Ohio, taking with them the two infant children of J. W. One of

them, Mary A., died about two years after so removing. Held, that the mother during coverture, who was also guardian, could not change the domicile of the infant heir of J. W., so as to alter the succession to her estate, and that it must be distributed according to the statute of descents and distribution of Virginia. Mears *v.* Sinclair, 1 W. Va. 185.

C. GENERAL PROVISION AND RULE OF CONSTRUCTION.

General Statutory Provision.—The statute of descents and distributions found in ch. 78, W. Va. Code, and ch. 123, Va. Code, 1860, § 9, provides that, "when any person shall die intestate as to his personal estate, or any part thereof, the surplus, after payment of personal expenses, charges of administration, and debts, shall be distributed to and among the same persons, and in the same proportion, to whom and in which real estate is directed to descend, with certain specified exceptions." Carney *v.* Kain, 40 W. Va. 758, 23 S. E. 650; Va. Code, 1904, § 2557.

Rule of Construction.—The statute of distribution "was taken from the civil law, and must be construed according to its rules. All the numerous cases upon the statute lay this down." Davis *v.* Rowe, 6 Rand. 355. See post, "Computing Degrees of Proximity of Blood," IV, D.

D. COMPUTING DEGREES OF PROXIMITY OF BLOOD.

"When the statute says, that in defect of children the estates shall pass to the next of kin, we must look to the civil law to ascertain who they are. In Lloyd *v.* Tench, 2 Ves. sen. 213, Sir John Strange says: 'Some things are so clear they need only to be mentioned; as first, in all questions on the statute of distribution, the rule to go by, in computing the degrees of proximity of blood, must be taken from the civil law; and on this ground and foundation, stand all the cases which have come in judgment since the statute of distribution, either at law or in this court.'" Davis *v.* Rowe, 6 Rand. 355. See ante, "General Provision and Rule of Construction," IV, C.

E. PROPERTY DISTRIBUTABLE AS PERSONAL ESTATE.

In General.—By the common law, the whole personal estate devolved on the executor; and if after payment of debts, legacies, and other charges, a surplus remained, it vested in him beneficially. But the words of "or any part thereof" refer to and direct the distribution of any such surplus not actually disposed of by the will. Since 1785 the executor is not in any instance entitled to the residuum of his testator's personal estate not actually disposed of by the will. Paup *v.* Mingo, 4 Leigh 163; Shelton *v.* Shelton, 1 Wash. 53; Hendren *v.* Colgin, 4 Munf. 235. But see Wernick *v.* McMurdo, 5 Rand. 78.

Generally, as to what constitutes personalty, thereby passing to the personal representative and not to the heir, see the title EXECUTORS AND ADMINISTRATORS.

Separate Estate of Married Women.—Where an equitable separate estate created in the wife, in personal property or money, with power to alien, and she does not exercise that power, such estate passes at her death according to the law of distribution. Andes *v.* Roller, 98 Va. 620, 37 S. E. 297.

B and wife sell and convey her maiden land. Purchase bonds secured by trust deed thereon. At the same time, B conveys his encumbered land to trustee for Mrs. B's separate use, and in trust deed it is stipulated that trustee shall collect the bonds and discharge the liens. B collected and misapplied the money. Later, when insolvent, B assigned to the trustee two other bonds and his interest, jure mariti, in the personal estate of his wife's father, P, deceased, in lieu of the trusts funds so misapplied. W, a brother of Mrs. B, was indebted to P's

estate. B was indebted to W. Mrs. B died, leaving children. In suit to settle the administration of P's estate, W filed petition alleging that B owed him, and praying that what he owed B on account of his distributive share in P's estate, might be set off by B's indebtedness to him. The assignment by B, dated December 1st, 1869, in trust for Mrs. B is valid, and the assigned property, so far as needed to discharge said liens, is to be considered as her separate real estate. But the surplus, if any, is to be considered as her separate personal estate. Smith *v.* Bradford, 76 Va. 758. See post, "Personalty to Which Entitled," IV, F, 1.

Damages for Death by Wrongful Act.—The money received by administrator upon a compromise of an action for damages for the killing of his intestate, must, after paying the costs and attorney's fees, be distributed according to the statute of distribution. Code, 1873, ch. 145, § 9; Va. Code, 1904, § 2903. Powell *v.* Powell, 84 Va. 415, 4 S. E. 744. See also, the title DEATH BY WRONGFUL ACT, ante, p. 226.

"Where a compromise is effected, as was done in the present case, the money paid is to be distributed according to the statute of distributions, just as where a verdict is rendered for the plaintiff, and the jury fail to direct how the damage awarded shall be distributed." Powell *v.* Powell, 84 Va. 415, 4 S. E. 744.

Vested Remainders in Personal Property.—A testator gave to his son, H., the sum of 1,000 pounds, Va. currency, in trust to apply the interest and profits towards the support of his daughter, A., to her sole and separate benefit, free from the debts, etc., of her husband, during her natural life, and after her decease to divide the principal equally amongst "her children and their representatives according to the statute of distributions;" so that the children of A. took vested interests in the remainder on the death of testator subject to be divested on their dying in the lifetime of A. The testator died in 1823; A. died in 1861. It was held, that on the death of a child of A., in her lifetime, unmarried, the next of kin of the child took a vested interest in his or her share which was absolute, and not subject to be divested by the death of such next of kin in the lifetime of A. Brent *v.* Washington, 18 Gratt. 526; Waring *v.* Waring, 96 Va. 641, 32 S. E. 150. See ante, "Vested Remainders," I, I, 3, c, (1); post, "Personalty to Which Entitled," IV, F, 1.

Chattels Real.—"It is a rule of law that a term (which is a chattel real) given to one and his heirs shall, nevertheless, go to his executors, (1 Vern. 163)." Robinson *v.* Brock, 1 Hen. & M. 212, opinion of Lyon, J. See the title EXECUTORS AND ADMINISTRATORS.

Still Not Fixed to the Freehold.—A still, not fixed to the freehold, in a house which might be injured by its removal, is personal property, and goes to the executor, not to the heir. Crenshaw *v.* Crenshaw, 2 Hen. & M. 22.

"But the court does not mean to say that this rule would apply to stills really fixed to the freehold in a house which might be injured by their removal. When a question of this sort shall occur, it shall be settled." Crenshaw *v.* Crenshaw, 2 Hen. & M. 22. See the title FIXTURES.

Personalty Listed for Taxation in Name of Distributee.—Father owned and occupied farm, and possessed valuable utensils, stock, furniture, etc. Son lived with him as manager. For nine years before father's death, personalty was listed in son's name, and after father's death son claimed it as his under parol purchase. Evidence to establish purchase was deficient, and showed that personalty was so listed to avoid execution levy for surety debts, and that father claimed and exercised ownership over it up to his

death. In suit between son and his co-distributees, held, the presumption of ownership in son, arising from listing the personalty in his name, was overcome by other evidence, and the property is a part of ancestor's estate for equal distribution. Saunders *v.* Greever, 85 Va. 252, 7 S. E. 391.

Property Distributable by Agreement of Distributees.—But, where a widow, administratrix of an estate, appropriates the profits to the purchase of other personal property, and afterwards she and her second husband agree that the property so purchased is part of the intestate's estate (in lieu of an accounting to the estate); and to take the property purchased as part of her dower, or distributable share for life, such agreement is binding on them, and on purchasers from them, so as to vest the title, after the death of the widow, in the distributees of the first husband, in like manner as if that particular property had belonged to the intestate in his lifetime. Hunter *v.* Jones, 6 Rand. 541. The property in dispute in this case was slaves.

Slaves.—See the title SLAVES.

F. HUSBAND AS DISTRIBUTEE OF DECEASED WIFE.

1. Personalty to Which Entitled.

Rule in Virginia.—If the intestate was a married woman, her husband shall be entitled to the whole of the surplus of her personal estate (subject to the provision of chapter 178, Va. Code, 1904), after payment of funeral expenses, charges of administration and debts. Va. Code, 1904, § 2557. See Andes *v.* Roller, 98 Va. 620, 37 S. E. 297; Smith *v.* Bradford, 76 Va. 758.

A husband is the sole distributee of his deceased wife. Gallagher *v.* Rowan, 86 Va. 823, 11 S. E. 121; Smith *v.* Bradford, 76 Va. 758; Beard *v.* Beard, 22 W. Va. 130. See also, Turner *v.* Dawson, 80 Va. 841.

"The husband is the legal heir, or representative of the wife as to her personal estate, which vests in him, immediately on her death, as her administrator, without account or distribution. If in possession, he need not administer; but, if not in possession, he has a right to administer; and the right is said in 1 Wils. 169, to be transmissible to his executors; but the correctness of the last position appears to me to be doubtful." Robinson *v.* Brock, 1 Hen. & M. 212, opinion of Lyons, J.

Rule in West Virginia.—If the intestate was a married woman, and leave children surviving, her husband shall be entitled to one-third of the surplus of her personal estate, after payment of funeral expenses, charges of administration and debts, and if she leave no children, he shall be entitled to the whole thereof. W. Va. Code, ch. 78, § 9. See Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139.

Property Settled to Sole and Separate Use of Wife.—"Mr. Burks, in his valuable book on 'Separate Estates' (page 15), says: 'If the property be settled to the sole and separate use of the wife, without more, the husband, during the coverture, has no interest in the property, real or personal, so settled; but if the wife die, the husband surviving is entitled to qualify as her administrator and is sole distributee of her personal estate.'" Andes *v.* Roller, 98 Va. 620, 37 S. E. 297. See ante, "Property Distributable as Personal Estate," IV, E.

"If the husband survives the wife, he will as her administrator and sole distributee, be entitled to all her separate personal estate, when she leaves no children, where the instrument creating such separate estate does not otherwise provide." See W. Va. Code, ch. 78, § 9, cl. 2. Beard *v.* Beard, 22 W. Va. 130. See post, "Bars to Husband's Rights," IV, F, 2.

Upon Failure of Wife to Exercise Power of Disposal.—"And Mr. Minor, 1 Minor's Inst. (4th Ed.) 347, states the law thus: 'When by settlement, the

wife is allowed to dispose of certain property by deed or will, but dies without making any disposition of it, there is no separate estate created, and the husband surviving is entitled as her distributee to the personalty.'" Andes *v.* Roller, 98 Va. 620, 37 S. E. 297, citing Mitchell *v.* Moore, 16 Gratt. 275; Pickett *v.* Chilton, 5 Munf. 467.

Mitchell *v.* Moore, 16 Gratt. 275, said: The deed of marriage settlement only excluded the rights of the husband surviving his wife in the event of her exercising the power of appointment conferred upon her. She died without having exercised that power and leaving her husband surviving, so that he became entitled to all the personal estate embraced in the settlement, subject only to the payments of the debts for which it was bound, if any such there were, funeral expenses and charges of administration. See also, Pickett *v.* Chilton, 5 Munf. 467; Andes *v.* Roller, 98 Va. 620, 37 S. E. 297.

A deed of marriage settlement settling the wife's property on her for her sole and separate use and authorizing the wife to dispose of her separate property by deed or will concluding with these words: "that they," the husband and wife, "relinquish all claim, title or interest in each other's property that might vest in them under the law by reason of their expected marriage," can not be construed as clearly relinquishing and releasing all the interest which the husband shall have in her separate personal estate as her sole distributee, if she dies leaving no descendants and intestate without having disposed of her separate estate, and therefore the husband surviving her and she dying intestate and without descendants, he is entitled to the whole of her personal estate to the exclusion of her next of kin. Beard *v.* Beard, 22 W. Va. 130. See also, Pickett *v.* Chilton, 5 Munf. 467.

Construction of a marriage settlement, by which the personal estate of the intended wife was conveyed to trustees for her use until the marriage; then, upon trust that the husband and wife should enjoy the profits during the coverture; and, afterwards, that the trustees should assign, transfer and pay over all the said property (that might remain) to the wife in case she survived the husband; but, if she died before him, then to such person or persons, as she should, notwithstanding her coverture, appoint by deed or will, "to the intent that the same might not be at the disposal of, or subject to the control, debts, forfeitures or engagements of the husband;" with a provision that, in the event of her surviving him, and claiming any part of his estate, by right of dower or otherwise, the trustees should hold for his benefit and that of his executor, etc.; but without any provision for the event of his surviving her, and her failing to make any appointment. The husband having survived the wife, who made no appointment, was entitled to the property as her administrator, and not compelled to make distribution to her children by a former husband. Pickett *v.* Chilton, 5 Munf. 467.

By a marriage settlement, certain slaves are conveyed in trust, for the use of the husband and wife for life, and for the life of the survivor; and after the deaths of both, for the use of the children of the marriage; and if there be no child, a part of the said slaves for the use of the heirs of the husband, or of such person as he shall appoint and direct; and another part for the use of the heirs of the wife, or to be disposed of as she shall appoint and direct. The wife dies, in the lifetime of the husband, without any child; and the husband dies having all the slaves in his possession; no appointment having been made. The heirs of the husband shall not take those conveyed to the use of the heirs of the wife; but they shall go to her next of kin. In such case, the trustee being dead, the heirs of the husband, or wife, may maintain an action of

detinue for the slaves conveyed to their use respectively. Robinson *v.* Brock, 1 Hen. & M. 212.

Intestate died, leaving a widow and children, one daughter being married, and a marriage settlement was made fixing her property on herself and children. After the death of the testator, another daughter died, an infant and without issue. It was held that the husband of the married daughter was entitled, in right of his wife, to a fixed portion of the estate of the deceased daughter, and could make good title to the extent of such portion as against his children claiming under the marriage settlement. Tabb *v.* Archer, 7 Gratt. 408.

Remainders, Reversions and Executory Interests.—A testator gave to his son, H., the sum of 1,000 pounds, Virginia currency, in trust to apply the interests and profits towards the support of his daughter, A., to her sole and separate benefit, free from the debts, etc., of her husband, during her natural life, and after her decease to divide the principal equally amongst "her children and their representatives according to the statute of distributions;" so that the children took vested interests in the remainder on the death of testator subject to be divested on their dying in the lifetime of A. The testator died in 1823; A. died in 1861. It was held, that on the death of a child of A., in her lifetime, leaving a husband and child surviving her, the husband took the interest of the wife; and this though such child of A. died before the act, Va. Code, of 1860, ch. 123, § 10. Brent *v.* Washington, 18 Gratt. 526. See ante, "Property Distributable as Personal Estate," IV, E.

"A feme sole, being entitled to slaves in remainder or reversion, and afterwards marrying, and dying before the determination of the particular estate, the right vests in the husband. The president stated, that this was the constant decision of the old general court from the year 1753 to the revolution, and has since been confirmed in this court in the cases of Sneed *v.* Drummond and Hord *v.* Upshaw, that it had become a fixed and settled rule of property." Dade *v.* Alexander, 1 Wash. 30.

Testator bequeaths slaves to his wife for life, remainder to be equally divided between his seven children and their heirs, to them and their heirs forever; one of testator's children, at time of his death, is a married woman; she dies before the widow legatee for life, leaving a husband and children surviving her; held, this daughter took a vested remainder in her seventh part of the slaves, which at her death devolved to her husband, not to her children. Wade *v.* Boxley, 5 Leigh 442.

W. B. devised slaves to his daughter, A. W., for life, remainder to all her children. One of whom by the name of C. married E. C. and died in the lifetime of her mother and husband. Her husband took administration on her estate. A division was afterwards made of the slaves; and one by the name of Lazar, was assigned, as the share of the said C. C. The said E. C., the surviving husband, took possession of the said slave, and sold him to C. S. for a valuable consideration. After this M. C., the eldest son of the said C. C., took possession of the said slave and sold him to R. D. The sale by E. C., the husband, was good, and C. S., the purchaser, is entitled to the slave. Drummond *v.* Sneed, 2 Call 491.

In 1777, a testator willed his estate to his two daughters, after the marriage or death of their mother; but if they died under age, and without issue, to the children of the testator's sister, except the child who should be heir to her husband. One of the daughters died an infant of tender age, in the lifetime of her mother. Upon the death of the mother, the surviving daughter married and had issue, which died immediately, and then she died.

under age, without other issue. It was held, that her husband had no interest in the slaves and personal estate. Taliaferro *v.* Burwell, 4 Call 321.

If, however, part of the rents and profits of the lands were applied by the executor to payment of the testator's debts, the husband of the testator's daughter is entitled to compensation for them. Taliaferro *v.* Burwell, 4 Call 321. See the title CURTESY, ante, p. 155.

The testator's sister had five children; one of the daughters married and died without issue. It was held, that her husband was entitled to her share of the slaves and personal estate. Taliaferro *v.* Burwell, 4 Call 321.

2. Bars to Husband's Rights.

Marriage Settlements.—Where the rights of a husband to the personal property of his wife are intercepted by an agreement to that effect before and in contemplation of marriage, upon the death of the wife, her property will pass as if she had died sole and intestate. Charles *v.* Charles, 8 Gratt. 486. See ante, "Personalty to Which Entitled," IV, F, 1.

By Will of Wife.—As to election to take under or against will of deceased wife, see the title WILLS.

"In regard to the personal estate of the wife, the law gives the husband no right to a distributive share thereof, except where he renounces the will, or the wife dies intestate. Section 9, ch. 78, Code." Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139.

G. WIFE AS DISTRIBUTEE OF DECEASED HUSBAND.

1. Personalty to Which Entitled.

Statutory Provisions.—If the intestate leaves a widow, and issue by her, the widow shall be entitled to one-third of the surplus (subject to the provisions of ch. 178, Va. Code, 1904), after payment of funeral expenses, charges of administration and debts. Va. Code, 1904, § 2557. See Gentry *v.* Bailey, 6 Gratt. 595; Findley *v.* Findley, 11 Gratt. 434; Neilson *v.* Kownslar, 79 Va. 468.

"If the intestate leave a widow, but no issue by her, the widow shall be entitled absolutely to such of the personal property in the said surplus as shall have been acquired by the intestate in virtue of his marriage with her prior to the fourth day of April, eighteen hundred and seventy-seven, and remain in kind at his death; she shall also be entitled, if the intestate leave issue by a former marriage, to one-third; if no such issue, to one-half of the residue of such surplus. (Code, 1849, p. 524, ch. 123, § 10.)" Va. Code, 1904, § 2557. See Knight *v.* Oliver, 12 Gratt. 33.

If the intestate leave a widow by the same or a former marriage, the widow shall be entitled to one-third of the surplus of his personal estate or any part thereof, after payment of funeral expenses, charges of administration and debts, and if he leaves no children, she shall be entitled to the whole thereof. W. Va. Code, 1899, ch. 78, § 9.

Where Advancements Made to Children.—Advancements to children are not brought into hotchpot for the benefit of the widow. She is only entitled to share in the estate of the intestate of which he died possessed. Knight *v.* Oliver, 12 Gratt. 33. See also, the title ADVANCEMENTS, vol. 1, p. 189.

"In no legal sense can advancements, made by the decedent to his children in his lifetime, be said to constitute part of 'his goods and chattels' as to which he died intestate. Such advancements are, to all intents the property of the children to whom they have been made, and no longer the property of the parent who made them." Knight *v.* Oliver, 12 Gratt. 33.

Slaves of Deceased Husband.—Formerly a widow's distributive share in her deceased husband's estate was a third of the slaves for life and of the other personal estate absolutely. Findley *v.* Findley, 11 Gratt. 434. See

also, Knight *v.* Oliver, 12 Gratt. 33; Gentry *v.* Bailey, 6 Gratt. 595; Neilson *v.* Kownslar, 79 Va. 468.

Certain slaves having been deported, and the owner dying without issue, leaving a widow, before receiving indemnity therefor, and such indemnity having been paid to the administrator of the deceased owner, it was held that the widow was entitled to one-half the distributable surplus of that money as her absolute property, and not merely to such interest therein as she would have been entitled to in the slaves. Foushee *v.* Blackwell, 1 Rob. 488.

And where a testator dies possessed of slaves, to a third of which the widow, who renounces the will, is entitled, her interest in the slaves is not measured by their estimated hires, but should be an annual sum from the death of her husband until her death, equal to the annual interest of one-third of the gross amount of the sale of the slaves, or their value. Hickerson *v.* Helm, 2 Rob. 628. See Foushee *v.* Blackwell, 1 Rob. 488.

Under the first article of the treaty of Ghent, and the subsequent conventions between the United States and Great Britain, of London in October, 1818, and of St. Petersburg in July, 1822, the owners of slaves which were carried away from the territories of the United States by the British forces at the close of the late war, were entitled to indemnity for all such slaves, but not to the slaves in specie; and a citizen of Virginia, the owner of certain slaves so deported, having died in 1825 without issue, leaving his wife surviving him, and his administrator having afterwards received, under the act of congress of March 2, 1827, a sum of money as indemnity for those slaves, the widow is entitled to half the distributable surplus of that money, as her absolute property, not merely to such interest therein as she would have been entitled to in the slaves. Foushee *v.* Blackwell, 1 Rob. 488. See also, the title SLAVES.

Money Paid under Act of Congress Prescribing Distributive Shares.—Where a special act is passed by congress, directing an amount to be paid the administrator of a deceased officer, and that one-fourth of this amount be paid to the widow of such officer, it was held that though, under the laws of Virginia at that time, the widow was not entitled to any part thereof, it being personalty, yet, by virtue of the special act of congress, she should be paid the one-fourth. Walden *v.* Winston, 9 Leigh 160.

2. Bars to Wife's Rights.

The right of a wife to a distributive share of her husband's personal estate in case she survives him can not be defeated by the will of her husband. The statutes secure to the wife her distributive share of whatever personal property belongs to the husband at the time of his death, whether he dies testate or intestate. Findley *v.* Findley, 11 Gratt. 434; Gentry *v.* Bailey, 6 Gratt. 595; Mitchell *v.* Johnson, 6 Leigh 461; McReynolds *v.* Counts, 9 Gratt. 242; Dupree *v.* Cary, 6 Leigh 36; Thornton *v.* Winston, 4 Leigh 152; Cocke *v.* Philips, 12 Leigh 248; Kinnaird *v.* Williams, 8 Leigh 400; Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139. See also, Newton *v.* Poole, 12 Leigh 112.

Generally, as to election to under or against the will of the deceased husband, see the title WILLS.

Alienation by Husband in His Lifetime.—The husband had the power according to the modern common law, to alienate by sale or gift in his lifetime, the whole or any part of his personal estate, and thereby exclude his wife from any interest therein. This power is impliedly recognized by the statutes. Gentry *v.* Bailey, 6 Gratt. 595.

A conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and

though he retains the power to sell and reinvest or account, and also the power to reappoint among specified objects, is valid to bar the wife of her distributable share therein. Gentry *v.* Bailey, 6 Gratt. 595.

A wife has not such an interest in that portion of the personal estate of her husband, to which she may be entitled in the event of his dying intestate, or leaving a will which she may renounce, as that an absolute and irrevocable, though merely voluntary deed thereof, executed by him to his children by a former marriage, can be considered a fraud on her rights, or be set aside at her instance; and though the instrument be a deed of trust, by which he reserves to himself the possession and control of the property during life. Gentry *v.* Bailey, 6 Gratt. 595, stating principle laid down in Lightfoot *v.* Colgin, 5 Munf. 42. See also, Ruth *v.* Owens, 2 Rand. 507.

"Where the deed of gift of the husband is in its essence absolute and irrevocable, so as to separate a portion of his personal property, of its value, from the rest of his estate, and divest him of his dominion over it, the circumstances that the gift is to become effectual during his life, or after his death, is immaterial; for, as the law confers upon him the power to alienate his whole ownership of the property, so he is not restrained from giving away a part of that ownership, whether the gift is to take effect before his death, or from that period." Gentry *v.* Bailey, 6 Gratt. 595.

It is not at all material by what motive the husband was actuated in making the disposition of his property. "Inasmuch as the law recognizes his perfect right to give away from his wife in his lifetime his whole personal estate, it is nowise relative to inquire by what sentiment, or prejudice, or passion, he was impelled to exercise that right. On the other hand, a design on his part to prevent the lawful interest of the wife from accruing, can not be accomplished by any ways or means of dying testate in relation to the subject." Gentry *v.* Bailey, 6 Gratt. 595.

Two circumstances must concur to render the gift testamentary in its nature; one is, that it is not to be substantially effective until his death; and the other is, that the husband does not divest himself of the capacity to recall it, and so resume to himself, or his estate, the ownership granted. Gentry *v.* Bailey, 6 Gratt. 595.

"It follows, that where a husband by a voluntary deed of gift of personals, in whatever form made, retains to himself the possession and enjoyment of the property during his life, and making the gift effectual only from the time of his death, reserves on his own part an absolute and complete power of revoking the same; such an instrument, so far as regards the distributive share of the wife, is in its nature testamentary only, and can not affect the rights conferred upon her by law in contemplation of his dying either testate or intestate. In such a case the dominion of the husband over the subject continues unlimited, and the question is not varied by the circumstance that the gift takes effect by his failing to exercise the power of revocation, for that is incidental to every testamentary disposition of property." Gentry *v.* Bailey, 6 Gratt. 595.

Compensation for Dower Not a Bar.—By an agreement in contemplation of marriage, the intended husband bound his estate to pay to his intended wife certain sums of money if she survived him; which were to be in bar of and in full compensation for her dower. It was held, that this agreement, although a bar to her claiming dower in her husband's real estate, does not deprive her of her distributive share of his personal estate. Findley *v.* Findley, 11 Gratt. 434.

When Widow's Deed Ineffectual to Relinquish Interest.—The real and personal estate of an intestate being

undivided between his widow and daughter, and the latter soon to be married, a deed of settlement by the daughter and her intended husband was executed, conveying to the widow and other trustees certain lands by description and slaves by name, describing them as the property of the daughter, the same being, in fact, all the land and slaves of which the intestate died seized. It was held that the widow's right to her portion of the personal estate was not relinquished by her being a party to the deed of settlement. Wilcox *v.* Hubard, 4 Munf. 346.

H. HOW CHILDREN SHARE.

The portion of an intestate's estate which goes to his children is to be distributed in equal proportion to and among such children. Knight *v.* Oliver, 12 Gratt. 33; Davis *v.* Rowe, 6 Rand. 355.

I. PERSONAL ESTATE OF INFANTS.

The personal estate belonging to an infant will follow the same rules of distribution and go to the same persons as the realty. Tomlinson *v.* Dillard, 3 Call 105; Dilliard *v.* Tomlinson, 1 Munf. 183. See W. Va. Code, 1899, § 9, ch. 78. But see § 2557, Va. Code, 1904, which provides that: "The personal estate of an infant shall be distributed as if he were an adult." See ante, "Descent of Infant's Estates," II, I.

The mother of a deceased infant is not entitled to any part of the infant's personal estate derived from the father. Tomlinson *v.* Dillard, 3 Call 105; Templeman *v.* Steptoe, 1 Munf. 339; Addison *v.* Core, 2 Munf. 279; Dillard *v.* Tomlinson, 1 Munf. 183; Vaughan *v.* Jones, 23 Gratt. 444; Bailey *v.* Teackle, Wythe 179.

As to the distribution of unbequeathed personal estate derived from the father or mother belonging to infants, who died between the first of October, 1793, and the twenty-second of January, 1802, the whole shall go to the kindred of that parent from whom the estate was derived. Addison *v.* Core, 2 Munf. 279.

Rents and Profits Follow Corpus of Estate.—The profits of the estate of an infant dying intestate (including the increase of slaves) accruing to such infant in his lifetime but not applied to his use or otherwise lawfully disposed of ought to go to the person inheriting such estate generally. Dilliard *v.* Tomlinson, 1 Munf. 183.

Moieties to Paternal and Maternal Kindred.—A son was possessed of a life estate in slaves, with a contingent limitation to his mother, and her heirs, upon his dying without issue living at his death. The mother died in his lifetime, leaving him her only heir, and he afterwards died without issue. It was held that the son was sole distributee of his mother and succeeded to her estate as such, and, having died without mother, brother or sisters, or their descendants, the whole of his personal estate was devisible into moieties, to go to the paternal and maternal kindred, according to the provisions of the act of descent. Royall *v.* Royall, 5 Munf. 85. See ante, "Moieties to Paternal and Maternal Kindred," II, H.

The testator devises lands to his wife during her widowhood, and then to his daughter, A, and her heirs after the time limited to her mother; also, other land, and a negro to another daughter, and her heirs; and then added: "In case my two children should die without heirs of their bodies, then I give my said wife my plantation (before devise to her and to A), during her life and after her death to my brother. My will is that my wife have all my estate until the first child marries or arrives to the age of twenty-one years; and my will is that there shall be an equal division of my estate and settlement." A died an infant intestate and unmarried; and her share of the personalty was distributed among her mother, sister, and two

half-sisters. It was held, that the half-sisters were not entitled to share A's personal estate; and the feme plaintiff not being of age when married, the statute of limitations is no bar to recovering the portions received by the half-sisters. Bailey *v.* Teackle, Wythe 173.

Interest of Pretermitted Child.—The interest of a child, who was born after the date of a will, disposing of the testator's personal property, and who is, therefore, entitled, under the statute, to the same portion of his father's estate as if he had died intestate, which he is to have by way of charge upon the other legatees, upon his death, devolve upon his personal representative for the benefit of his next of kin. Hansford *v.* Elliott, 9 Leigh 79, opinion of Tucker, P. See also, the title WILLS.

Between January 1, 1787, and October 1, 1793.—Where an infant died intestate between the 1st of January, 1787, when the act of 1785 took effect, and the 1st of October, 1793, the distribution in the interval was regulated by the acts of 1785. Dilliard *v.* Tomlinson, 1 Munf. 183.

Between October 1, 1793 and January 22, 1802.—In Dilliard *v.* Tomlinson, 1 Munf. 183, it was held, that the mother of an infant who died intestate between the 1st of October, 1793, when the suspending act of 1792 took effect, and the 22d of January, 1802, when the act "concerning the distribution of unbequeathed personal estate" was passed, or any of her issue by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father. And see Harrison *v.* Allen, 3 Call 289.

J. ESTATES OF PERSONS DYING WITHOUT DISTRIBUTEES.

To the state, shall accrue all the personalty of every decedent, of which there shall be no distributee. Va. Code, 1899, ch. 78, § 9.

To the commonwealth shall accrue all the personal estate of every decedent, of which there is no other distributee. Va. Code, 1904, § 2558.

K. WHEN RIGHT OF DISTRIBUTION VESTS.

"There should be no distribution either to widow or to other distributees until the debts are paid." Scott *v.* Ashlin, 86 Va. 581, 10 S. E. 751; Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577. See the title EXECUTORS AND ADMINISTRATORS.

L. SUITS TO RECOVER DISTRIBUTABLE SHARE.

1. Parties.

Next of Kin.—The next of kin may maintain a bill to settle a decedent's estate. Hansford *v.* Elliott, 9 Leigh 79; Samuel *v.* Marshall, 3 Leigh 567; Frazier *v.* Frazier, 2 Leigh 642; Moring *v.* Lucas, 4 Call 577; Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371. See also, Miller *v.* Jeffress, 4 Gratt. 472.

Widow.—Where a husband dies, owning slaves, but not in possession of them, and the administrator of the deceased refuses to sue for the recovery of such slaves, the widow may bring a suit in equity for her distributive share in them. Roberts *v.* King, 10 Gratt. 184.

Personal Representative.—It seems that the executor or administrator of a husband who had survived his wife, but had never taken administration on her estate, may sue the guardian of the wife for her estate committed to him. Templeman *v.* Fauntleroy, 3 Rand. 434.

Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they can not have distribution thereof without having the executor or administrator of the decedent before the court as a party in the cause. Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371; Samuel *v.* Marshall, 3 Leigh 567; Frazier *v.* Frazier, 2 Leigh 642; Moring *v.* Lucas, 4 Call 577; Hansford *v.* Elliott, 9 Leigh 79. See also, Miller *v.* Jeffress, 4 Gratt. 472.

The distributees of a decedent may maintain a bill in equity to set aside, as fraudulent, a deed of gift of personalty made by the deceased; but the subject itself can only be decreed to the personal representative of the decedent or to the distributees, in a case in which the personal representative is a party. Samuel *v.* Marshall, 3 Leigh 567.

Codistributees.—In general one distributee can not maintain a suit to recover his distributable share of the estate without making the other distributees parties so that the rights and claims of all may be conveniently established at the same time and in the same suit. Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. 371; Sillings *v.* Bumgardner, 9 Gratt. 273; Richardson *v.* Hunt, 2 Munf. 149; Sheppard *v.* Starke, 3 Munf. 29.

In a suit for distribution all of the distributees of the intestate are proper and necessary parties; and when not made parties to the suit a sufficient excuse must be assigned in the bill for failing to make them or any of them parties by name or description. Moore *v.* George, 10 Leigh 228.

In Sheppard *v.* Starke, 3 Munf. 29, it is held, that courts can not decree a distribution in favor of persons not parties to the cause.

Application of Rules to Particular Instances.—A husband of one distributee who was also one of the personal representatives, and guardian of the other distributee, files a bill in his own name as guardian of the infant distributee, against the other personal representative and the sureties, charging that the personal representative was indebted to the estate and insolvent; and asking a decree against the sureties. There is a decree accordingly in the court below. Upon appeal the decree is reversed for want of proper parties; but the husband having an interest in right of his wife, the bill is not dismissed, but is sent back, that he may amend his bill and make proper parties. The only distributees were the widow and child of the decedent; neither of them was a party. Both were necessary parties. So that if this suit had been properly brought in the name of either of the distributees, it could not have been sustained without making the other a party. But is it properly brought in the name of neither. Sillings *v.* Bumgardner, 9 Gratt. 273.

"The appellee was otherwise interested in the case. He was interested as husband of one of the distributees, and was therefore a proper party to the suit. He should have joined his wife with him, who was also a proper party. But his omission to do so, though a defect, is not a radical one, and may be cured by amendment." Sillings *v.* Bumgardner, 9 Gratt. 273.

Objection for Nonjoinder of Parties.—Eight years after the death of an intestate who had no child his widow files a bill in equity to recover her moiety of his personal estate, without making any other distributee a party. The statement in the bill is, that to the other moiety the decedent's brother, G., became entitled, he being his only relation by consanguinity in the United States (for the decedent was native of Ireland), and the complainant has understood that the administrator fully satisfied and paid off the said G. his share of the estate after which the said G. left this county, and either died, or, if living, it is not known in what part of the world he resides. The sureties of the administrator, in their answer to the bill, do not controvert this statement, nor is it objected that the necessary parties are not made, until after a decree in favor of the widow against the administrator his sureties, when the decree is appealed from, and the objection made for the first time in the court of appeals. Held, the statement in the bill respecting the next of kin must be taken as true, and the objection is therefore untenable: "1st, Because the bill has treated the brother as the only distributee; and that not being controverted,

there was no occasion for the plaintiff to seek out or make other parties. 2d. If it had been admissible to act on the supposition that there were other but unknown distributees, the proper course would have been, not that suggested by the objection, but by the direction to the master to inquire and state to the court who were the next of kin; and this inquiry the defendants might have had, if the case had left room for it, and they had thought proper to ask it." Moore *v.* George, 10 Leigh 228. See generally, the title PARTIES.

2. When Allegations as to Parties Taken as True.

See ante, "Parties," IV, L, 1.

3. Limitations.

The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till the qualification of an executor or administrator of the decedent. Hansford *v.* Elliott, 9 Leigh 79; Bowles *v.* Elmore, 7 Gratt. 385. See the title LIMITATION OF ACTIONS.

4. Judgment or Decree.

When Decree Proper.—When the personal representative is party to such suit, and objects not to decree directing payment to distributee, and the existence of no debts is suggested, there can be no valid objection to such decree. Robertson *v.* Gillenwaters, 85 Va. 116, 7 S. E. Rep. 371.

The bill of a distributee, besides making the administrator and his sureties defendants, states, that the complainant has understood that the administrator, who has gone out of the commonwealth, appointed B his agent to transact his business in this state, and that he put property or moneys into B's hands to satisfy his debts, but she is not sure that the fact is so, and therefore does not think it just to aver it positively. She makes him a defendant, and calls on him to state whether he has, or expects to have, any such funds, and, if any, what. B dying, and the cause being revived against his executrix, she answers that her testator, so far from being indebted to the administrator, or having in his hands any estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of the administrator to a very considerable amount, and that the administrator is still considerably indebted to her as executrix; that she has a lien upon certain slaves, in which the wife of the administrator has an interest at the termination of a life estate; but even this property, if it could be sold now, would be insufficient to pay the debt due to her as executrix. An account having been taken ascertaining the amount due to the plaintiff from the administrator, held, there ought to be a decree for the same against the administrator and his sureties, without delaying the plaintiff for an account to be stated between B and the administrator. Moore *v.* George, 10 Leigh 228. See also, the title JUDGMENTS AND DECREES.

Revisal for Want of Proper Parties.—As to reversal of decree for want of proper parties and amendment of bill so as to make proper parties, see ante, "Parties," IV, L, 1.

5. Witnesses.

Distributee Claiming under Parol Purchase.—When one distributee claims as his own personalty in possession of the ancestor at his death, under parol purchase by such distributee, he is not, in a suit with his codistributees, competent to testify to said purchase, unless his case comes within some one of the conditions contained in Va. Code, 1873, ch. 177, §§ 21, 22, as amended by acts, 1876-77, ch. 256, p. 265. Saunders *v.* Greever, 85 Va. 252, 7 S. E. 391. See also, the title WITNESSES.

V. Determination of Heirship.

A. SUIT BY WIDOW TO ESTABLISH HEIRSHIP.

Proper Remedy.—A widow claiming

to be the sole heir of her deceased husband has not a right to file a bill in chancery against parties claiming to be heirs of her husband, who are in possession of the property of her deceased husband as his heirs, and obtain from the court a decision, as to who are the true heirs of the husband, and be put into possession of her husband's land, if she establish herself to be sole heir. In such case her remedy is in a common-law court by a writ of unlawful entry or detainer or by ejectment. Jones *v.* Fox, 20 W. Va. 370.

Effect on Jurisdiction of Assignment of Dower.—A court of chancery would not have any jurisdiction to entertain a suit by a widow claiming to be the sole heir of her deceased husband, though on motion of the defendants as heirs of her husband under § 9, ch. 110, Code of Virginia, 1860, dower had been assigned her in the lands of her deceased husband. Jones *v.* Fox, 20 W. Va. 370.

Nor would the fact that such widow had, or had not, notice of such motion, alter the case. Jones *v.* Fox, 20 W. Va. 370.

Nor would an allegation in the bill, that the circuit court on such motion had assigned her dower by reason of a fraudulent representation of the defendants, whereby the court was induced to assign her dower, as though the defendants in the chancery suit were heirs of the deceased husband, and she was not his sole heir. Jones *v.* Fox, 20 W. Va. 370.

Such assignment of dower in such case, whether with or without notice to the widow, is not an adjudication of the question, who are the heirs of the deceased. This question in any controversy between the parties subsequently will in no manner be affected by the action or judgment of the court in such proceeding. (p. 379.) Jones *v.* Fox, 20 W. Va. 370.

Nor would the case in any of these respects be altered if such motion or assignment of dower was made under ch. 65, § 9, Code of West Virginia, instead of ch. 110, § 9, Code of Virginia, 1860. (p. 379.) Jones *v.* Fox, 20 W. Va. 370.

The court in this case declines to consider, whether if in such a case the widow accepts the dower assigned her and surrenders the possession of her late husband's real estate, except the dower land assigned her, to such persons claiming to be heirs of her husband, she is by such acts estopped from thereafter claiming that she is the sole heir of her husband and as such entitled to all his real estate, or the effect on such estoppel, if it be one, of these acts of hers being done under a misapprehension of facts or of the law. Or whether their possession under such circumstances is adversary to her. These questions can not properly be considered in such a chancery suit, which ought to be dismissed, but only properly arises in the suit at common law, if one should be instituted. Jones *v.* Fox, 20 W. Va. 370. See generally, the title ESTOPPEL.

Effect of Defendant's Seeking Similar Relief by Cross Bill.—If in a chancery suit by a widow claiming to be the sole heir of her deceased husband against parties claiming to be the heirs of her husband, who are in possession of his property as his heirs to obtain a decision as to who are the true heirs, one of the defendants claims, that he is the sole heir of the plaintiff's husband and in his answer asks as affirmative relief, that he be so adjudged by the court and his title and possession of the land quieted, the court should not determine the question, whether he is such sole heir or grant the relief he seeks, but should dismiss his answer, so far as it is intended as a cross bill, a court of equity having no jurisdiction to consider and decide the case presented by such answer. Jones *v.* Fox, 20 W. Va. 370.

B. PROOF OF HEIRSHIP BY RECITALS IN DEED.

Heirship may under certain circum-

stances be proved by the recital of a deed. The plaintiffs by deed from the heir, P., deceased, bearing date June 10, 1856, duly recorded in recorder's office of the county in which the land lies. Upon a demurrer to the evidence by the defendant the circuit court properly held, that a party, under whom the plaintiff claimed the land, was the heir of a certain other part and that such party was dead when the deed to them recited this as a fact and was signed not only by the party named as such heir but by the brothers and sisters of the person named and stated to be dead. Postlewaite *v.* Wise, 17 W. Va. 1.

A recital in a deed of partition that a person died, and that the parties to the deed are his heirs, is not evidence of these facts against strangers. Warren *v.* Syme, 7 W. Va. 474.

DESCRIBE.—Described with Convenient Certainty.—In Gorman *v.* Steed, 1 W. Va. 14, it is said: "Chapter 134, § 1, of Code of 1860, requires the premises to be **described** in the summons of unlawful entry or detainer. And ch. 135, § 8, on ejectment, requires that the premises claimed shall be **described with convenient certainty.** Here, then, one chapter requires the premises to be **described,** and the other requires them to be **described with convenient certainty.** The different phraseology employed does not indicate greater certainty of description in the one case, than in the other, for, to **describe** a thing or place, and to **describe it with convenient certainty,** would seem to mean the same." See also, Board of Education *v.* Crawford, 14 W. Va. 803.

Description in Deeds.

See the title BOUNDARIES, vol. 2, p. 597.

DESCRIPTIO PERSONÆ.—See the titles AGENCY, vol. 1, p. 256; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; TRUSTS AND TRUSTEES.

In Carr *v.* Branch, 85 Va. 605, 8 S. E. 476, it is said: "'An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason that the one has no principal to bind, and the other substitutes himself for his principal.' Duvall *v.* Craig, 2 Wheat. 45. And the same rule applies to the contracts of guardians, trustees, and all other persons acting en autre droit; the addition to the signature of the word 'agent,' 'executor,' 'trustee,' etc., being regarded as a mere **descriptio personæ,** unless, indeed, it appear that the party so signing his name was recognized as contracting in his representative character when the contract was made, in which case he will not be personally bound. Taylor *v.* Davis, 110 U. S. 330; Metcalf *v.* Williams, 104 U. S. 93; Staples *v.* Staples, ante, p. 76; 1 Pars. Cont. 128." See also, Crim *v.* England, 46 W. Va. 480, 33 S. E. 311; Vance *v.* Kirk, 29 W. Va. 344, 1 S. E. 717; Belvin *v.* French, 84 Va. 81, 3 S. E. 891.

DESCRIPTIVE CALL.—In Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 533, it is said: "Entries generally call for some prominent, notorious object, directing attention to the neighborhood of the land (and this is called the 'general' or **descriptive call),** and contain a reference to objects which more specially describe or locate the land entered (and these are denominated the 'particular' or 'locative' call)." See also, the title PUBLIC LANDS.

Desertion.

As ground of divorce, see the title DIVORCE.

DESIGNEDLY.—Upon the use of terms in an indictment for false pretenses, the court, in State *v.* Halida, 28 W. Va. 503, 504, said: "The pretense could not be knowingly false without at the same time being **designedly** false. * * * The word 'knowingly,' I think, is at least the equivalent of the words '**designedly** and unlawfully,' and therefore, the latter being sufficient without the former, the former must be sufficient without the latter." See also, the title FALSE PRETENSES AND CHEATS.

DESIRE.—See the title WILLS. And see Crump *v.* Redd, 6 Gratt. 375; Roneys *v.* Roneys, 7 Leigh 17.

A decree overruling a demurrer by the defendant to the plaintiff's bill uses these words, "and the defendant not asking further time to answer said bill." Held, these words, as construed by the context, are equivalent to the words, "and the defendant not **desiring** further time," etc., and therefore operated as a waiver of a rule upon the defendant to answer the bill. Mitchell *v.* Evans, 29 W. Va. 569, 2 S. E. 84.

DESTROY.—See State *v.* Porter, 25 W. Va. 689.

Detainer.

See the title FORCIBLE ENTRY AND DETAINER.

Detectives.

Detective permitting prisoner to escape, as accessory after the fact, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 74. Confessions made to private detectives, see the title CONFESSIONS, vol. 3, p. 83. See also, the title DIVORCE.

DETERMINED.—In Field *v.* Marye, 83 Va. 882, 3 S. E. 710, it is said: "Mr. Webster defines 'prescribed' thus: 'To set down authoritatively; to order; to direct; to dictate; to appoint;' while he defines **determines**, thus: 'To fix permanently; to settle; to adjust.' 'To set down authoritatively,' and 'to fix permanently, or to settle,' do not admit of a wide distinction."

Detinet.

See the title DETINUE AND REPLEVIN.

DETINUE AND REPLEVIN.

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CROSS REFERENCES.

See the titles ACTIONS, vol. 1, p. 122; TROVER AND CONVERSION.

I. Detinue.

A. NATURE AND SCOPE OF REMEDY.

Nature.—Detinue is, in one particular, an anomolous action; it is difficult to decide whether it ought to be classed amongst actions ex contractu or ex delicto. The right to join detinue with debt, and the ability to use detinue to recover goods in pursuance of the terms of a bailment to the defendant, seem to afford grounds for reckoning it an action ex contractu; whilst the fact that it lies wherever the chattel in question is illegally withheld, notwithstanding there be no contract, but the possession of the defendant was acquired exclusively by tort, marks it as an action ex delicto. 4 Min. Inst. (2d Ed.) 484; Catlett *v.* Russell, 6 Leigh 344; Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Scope and Status.—So far from the action of detinue having gone out of use in these states, it has been in long and constant use, and by liberal construction has been advanced and promoted as a remedy for the recovery of the possession of all tangible personal property capable of being described and identified with such reasonable degree of certainty that it may be known, and the possession delivered. And the usefulness and remedial scope of the action of detinue has been still further extended by giving the plaintiff the immediate possession by means of a statutory replevy bond, and the defendant may within three days have the property returned to him, on giving a proper forthcoming bond. Va. Code, 1904, ch. 138; W. Va. Code, 1899, ch. 102. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

B. FOR WHAT DETINUE LIES.

In General.—The action of detinue is employed to recover in specie personal chattels from one in possession, who unlawfully detains them from the real owner, or from one having a special property therein, with damages for the detention. Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907.

The action of detinue lies where a party claims the specific recovery of goods and chattels or deeds and writings detained from him. Steph. Pl. p. 15, approved in McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408. See also, Arthur *v.* Ingels, 34 W. Va. 639,

12 S. E. 872. "The design of the action of detinue is to recover the specific chattel illegally taken (and of course, therefore, illegally detained), together with damages for the detention. And in case the specific chattel is not to be had, the value thereof is to be recovered, together with damages for detention. The action itself contemplates that it may be needful to resort to the alternative of recovering the value, and, therefore, as well in the writ of summons as in the declaration, the value of the chattel is stated." 4 Min. Inst. (2d Ed.) 483, 490; 4 Min. Inst. (3d Ed.) 429.

Real Estate.—The action of detinue does not lie for the recovery of real estate. McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408.

Fixtures Attached to Freehold.—See the title FIXTURES.

Therefore, detinue does not lie for the recovery of fixtures which are attached to and a part of the realty. McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408.

Emoluments of Public Office.—See the title PUBLIC OFFICERS.

Detinue is not an appropriate remedy by a board of public officers to recover public property unlawfully withheld by their predecessors in office, because the judgment is in the alternative, that the plaintiff recover the property sued for, or its value, if the specific chattel can not be returned. The money value of official "books, papers, and seal would prove a poor equivalent for specific articles, indispensable to the discharge of official functions. The alternate judgment, too, would be for the benefit of one having no personal interest in the subject matter. It can hardly be affirmed of such a proceeding that it would afford a complete and adequate remedy in the case under consideration." Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907.

Saw Logs.—See the title LOGS AND LOGGING.

An action of detinue may be brought to recover saw logs amounting in value to a certain sum. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

C. RIGHT TO MAINTAIN THE ACTION.

1. Certainty of Things Demanded.

See the title DEBT, THE ACTION OF, ante, p. 269.

To support an action of detinue the things demanded must be certain, as in debt. Marston *v.* Parish, Jeff. 1.

2. Title to and Possession of Property.

a. In General.

In an action of detinue, it is necessary for the plaintiff to aver and prove that he has title to the property, with a present right of possession in himself; and, secondly, actual possession thereof by the defendant anterior to the bringing of the suit. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62, citing Burnley *v.* Lambert, 1 Wash. 308; Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

In Bac. Abr., under the title "Detinue," p. 135, we find that, "to entitle the plaintiff to recover in an action of detinue, he must have the right of possession when the action is brought." Quoted in Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872.

Detinue can never lie against one who was never in possession of the property sued for. Allen *v.* Harlan, 6 Leigh 42, 29 Am. Dec. 205.

Constructive possession on the part of the defendant is not sufficient; constructive possession accompanies the title. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

Replication.—In an action of detinue, defendant pleaded the statute of limitations, and plaintiff replied that within five years, etc., defendant acknowledged the article detained to be plaintiff's property. Held, insufficient, in not averring a promise to deliver the possession. Morris *v.* Lyon, 1 Va. Dec. 615.

Loss of Possession.—In detinue, the plaintiff must prove property in him-

self, and possession in the defendant; but proof of possession anterior to the bringing of the suit is sufficient, unless the defendant can show that he was legally dispossessed. Burnley *v.* Lambert, 1 Wash. 308; Lynch *v.* Thomas, 3 Leigh 682.

Proof of Defendant's Possession.—"The pleadings, generally, are the best tests of the law. The plea of non detinet traverses the allegation in the declaration, and puts it upon the plaintiff to prove them. As to the possession of the defendant, that need only be proved either at the suing out of the writ, or at some time before." Austin *v.* Jones, Gilmer 341; Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872.

b. Title Under Void Execution Sale.

If the proceedings under an execution are wholly void, no title passes by the sale to the purchaser, and the defendant may have redress in an action of detinue. Hamilton *v.* Shrewsbury, 4 Rand. 427.

c. Special Property.

The plaintiff in detinue, must have, at the time of bringing the action, a general or special property in what he seeks to recover, or some right of possession thereto. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602; Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907.

Thus, a person who has only a special property as a bailee, etc., may also support the action when he delivered the goods to the defendant, or they were taken out of such a bailee's possession. Boyle *v.* Townes, 9 Leigh 158.

d. Committee of Lunatic.

See the title INSANITY.

Until the revisal of 1819, no action could be maintained in detinue, nor any action except for debts, by the committee of a lunatic, and these last only by the committee of a lunatic "sent to the hospital." Ashby *v.* Harrison, 1 Pat. & H. 1.

e. Husband and Wife.

See the title HUSBAND AND WIFE.

A direct sale and transfer, for a fair and valuable consideration, of personal property, by husband to wife, confers, as against strangers who are not creditors of the husband, a title thereto upon the wife, which may enable her to maintain an action of detinue, in the name of herself and husband, to recover the same, when unlawfully detained. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Separate Estate of Married Women.—And a married woman may bring an action of detinue to recover her separate personal property, and join her husband as coplaintiff. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

After the termination of the coverture by death, the widow may maintain an action of detinue against her deceased husband's personal representative for her separate property unlawfully withheld from her, whether acquired from her husband or others. "If such administrator refused to deliver her the property, on demand, she could maintain an action of detinue for the recovery of the same, as all her legal disabilities are removed by the death of her husband, and she sues, not for a tort committed by her husband, but for the wrong done her by his administrator, in repudiating the trust, and unlawfully withholding the property from her, as property belonging to the estate. See Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602, 9 Am. & Eng. Ency. Law 800." Good *v.* Good, 39 W. Va. 357, 19 S. E. 382.

f. Parent and Child.

See the title PARENT AND CHILD.

Where, in an action of detinue, it appears that a slave was given to an infant, and left by the donor with the mother of such infant, for its benefit (the father being dead), the possession by the mother is to be considered possession by the infant. Mortimer *v.* Brumfield, 3 Munf. 122.

g. Curator and Receiver.

A person appointed curator and re-

ceiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property, but if he brings detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator and receiver being surplusage. Boyle *v.* Townes, 9 Leigh 158.

h. Bailees.

See the title BAILMENTS, vol. 2, p. 223.

A bailee of chattels may maintain detinue for them upon his right of possession as bailee. Boyle *v.* Townes, 9 Leigh 158.

i. Mortgagees.

An action of detinue may be maintained by mortgagees against the purchaser of the property which has been taken under execution by a creditor of the mortgagor, although the property remained in the possession of the mortgagor for five years or more, and the deed contained no clause giving him such authority. Rose *v.* Burgess, 10 Leigh 186.

j. Trustee and Cestui Que Trust.

See the title TRUSTS AND TRUSTEES.

A trustee in a deed of trust on personal property, who has never had actual possession of the property conveyed, may maintain an action of detinue against a purchaser for property fraudulently removed and sold, and may recover not only the property itself, but also reasonable damages for the use and hire of the property from the time he demanded possession thereof. "In the case of Nichols *v.* Campbell, 10 Gratt. 560, 573, which was an action of detinue for slaves, brought by trustees in a deed of trust to secure a debt, the defendant claimed as a purchaser under a subsequent trust deed from the same grantor, and the right of the trustees to recover the hire of the slaves was upheld upon the ground that in law the slaves were the property of the trustees, and if the slaves were theirs, so also were the hires from the time they were held adversely, or at least from the institution of the action." Hardaway *v.* Jones, 100 Va. 481, 41 S. E. 957.

R. executes a deed of trust on two mules to H., trustee, to secure Y. in the sum of $165. The deed is recorded in R. county, November 23, 1895, the day of its execution. The property is removed to C. county, and the deed recorded there December 5, 1895. The property is removed to F. county, and the deed recorded there November 28, 1896. On November 30, 1896, action is brought by H., trustee, in detinue for the mules, before a justice, in F. county, against C., who is in possession. At the trial the deed of trust is given in evidence, mules identified, possession is proven with C., and that $100 on the trust lien is still due and unpaid. H., the trustee has shown superior title, and is entitled to recover, unless C. shows that he purchased the mules without notice, and for valuable consideration, without C. and R. counties, three months or more prior to the recordation of the deed in F. county. Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

Cestui Que Trust.—By a marriage settlement, certain slaves are conveyed in trust, for the use of the husband and wife for life, and for the life of the survivor; and after the deaths of both, for the use of the children of the marriage; and if there be no child, a part of the said slaves for the use of the heirs of the husband, or of such person as he shall appoint and direct; and another part for the use of the heirs of the wife, or to be disposed of as she shall appoint and direct. The wife dies, in the lifetime of the husband, without any child; and the husband dies having all the slaves in his possession, no appointment having been made. The heirs of the husband shall not take those conveyed to the use of

the heirs of the wife; but they shall go to her next of kin. In such case, the trustee being dead, the heirs of the husband, or wife, may maintain an action of detinue for the slaves conveyed to their use respectively. Robinson *v.* Brock, 1 Hen. & M. 212.

k. Buyer and Seller.

See the title SALES.

The vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if therefore the buyer should pay the said sum, and another sum annually for hire of the said slave until he should pay the said purchase money, which he might do at any time (when the said hire should cease), then the vendor should convey to him a lawful right and title to the said slave; which title in the mean time should remain in the vendor. The buyer was not entitled, under this bond, to the possession and property of the slave; but the vendor could recover in detinue. Ervine *v.* Dotton, 6 Munf. 231.

l. Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS.

In Absence of Possession.—"I have never had a doubt, that an executor can not be charged in detinue, merely on the possession of, and detention by, the testator. The thing sued for, which is demanded in specie, must have come to the hands of the executor himself, and be detained by him, to justify an action of detinue against him." Per Brockenbrough, J. Catlett *v.* Russell, 6 Leigh 344.

Detinue against an executor for property destroyed or converted by his testator, or in the possession of a coexecutor, can not be sustained. Allen *v.* Harlan, 6 Leigh 42, 29 Am. Dec. 205.

Where Executor Acquires Possession.—But detinue for a chattel lies against an executor as such, provided the chattel actually came to the executor's possession. Catlett *v.* Russell, 6 Leigh 344; Allen *v.* Harlan, 6 Leigh 42; Greenlee *v.* Bailey, 9 Leigh 526.

And detinue for property in the possession of an executor, although it was first taken and detained by the testator, is maintainable, and the judgment and process should be against the executor, and not against the estate. Allen *v.* Harlan, 6 Leigh 42, 29 Am. Dec. 205.

Letters of Administration.

Administrator.—If an administrator brings detinue, he is not bound at the trial to produce the certificate for his obtaining letters of administration, unless he receives notice that it will be required. Hughes *v.* Clayton, 3 Call 554.

m. Lienors.

A common-law lien on personal property for work and labor performed, secures to the lienor the right of possession; therefore, the lienor may maintain detinue for the deprivation of such possession. Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371.

n. Five Years' Adverse Possession.

Five years' peaceable possession of a slave, will entitle a plaintiff in detinue, who has lost the possession, to recover on the mere ground of his previous possession, but without prejudice to the titles of those who were not parties to the suit. Newby *v.* Blakey, 3 Hen. & M. 57.

The court, in Morris *v.* Lyon, 84 Va. 331, 4 S. E. 734, said: "In Newby *v.* Blakey, 3 Hen. & M. 57, it was held that five years' adverse possession of certain slaves, acquired without force or fraud, gave to the party holding such possession a legal right which entitled him to recover the slaves in an action of detinue. And in Elam *v.* Bass, 4 Munf. 301, it was decided that such possession constituted a complete defense under the plea of non detinet. And to the same effect are the cases of Spotswood *v.* Dandridge, 4 Hen. & M. 139, and Garland *v.* Enos, 4 Munf. 505."

"In the cases of Newby *v.* Blakey, 3

Hen. & M. 57, and Elam *v.* Bass, 4 Munf. 301, it was held, that a defendant may protect himself on the plea of non detinet by proof of five years' possession of the negroes, before the emanation of the writ." Austin *v.* Jones, Gilmer 341.

Disclaimer of Title by Defendant.—But the plaintiff in detinue may adduce evidence of parol acknowledgments by the defendant, or by the person under whom the defendant claims, that the property belonged to the plaintiff; for the purpose of rebutting an alleged adverse possession. Smith *v.* Townes, 4 Munf. 191.

o. Possession of Defendant Under Bill of Sale.

Where, in detinue, a demurrer to evidence states that the defendant in support of his right offered a bill of sale, and no other evidence of the defendant's possession is mentioned, that is sufficient to prove the possession. The plaintiff, however, may prove parole declarations of the defendant disclaiming title to the property, under the bill after he had notice of the plaintiff's purchase, and before he had perfected his own title by obtaining possession. Biggers *v.* Alderson, 1 Hen. & M. 54; Fowler *v.* Lee, 4 Munf. 375.

p. Effect of Parting with Possession.

Where possession is proved on the part of the defendant, before suit brought, the plaintiff's action can not be defeated by his parting with that possession, unless he has been divested by due course of law. This is the well-established doctrine. Burnley *v.* Lambert, 1 Wash. 308; Lynch *v.* Thomas, 3 Leigh 682.

Conditional Transfer.—Where the vendor of a slave gave a bond to the buyer, with a condition, reciting that, whereas he had sold him a slave for a certain sum of money, if, therefore, the buyer should pay him the said sum, and another sum annually for hire of the said slave until he should pay the said purchase money, which he might do at any time (when the said hire should cease), then the vendor should convey to him a lawful right and title to the said slave; which title in the meantime should remain in the vendor, the buyer was held not entitled under this bond, to the possession and property of the slave; but the vendor could recover in detinue. Ervine *v.* Dotton, 6 Munf. 231.

D. DEFENSES.

1. Death or Destruction of Property.

Death or destruction of the property pending the action will not defeat a recovery, but judgment may still be given for the property if to be had; but if not, then its value, the plaintiff actually recovering, of course, its alternative value, unless the matter is brought to the attention of the court by plea puis darrein continuance. Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872, citing Austin *v.* Jones, Gilmer 341.

2. Want of Title or Possession.

In his defense, the defendant in an action of detinue may prove a want of sufficient title to the property in the plaintiff, or he may prove a want of possession in himself. If the plaintiff shall have proved an anterior possession in the defendant, the burden is shifted, and it devolves upon the latter to prove that he has been legally dispossessed. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62, citing Staton *v.* Pittman, 11 Gratt. 99.

3. Divestiture of Property.

If in detinue for chattels, the plaintiff proves that he had title at the time of the action brought, and that defendant then had the possession, defendant to defeat the action must show that he had been divested of the property by due course of law. Lynch *v.* Thomas, 3 Leigh 682, following Burnley *v.* Lambert, 1 Wash. 308.

4. In Action against Executors.

It was said by Cabell, J., in Catlett *v.* Russell, 6 Leigh 360, in speaking of the defenses that an executor might make in action of detinue brought against him for a chattel detained by

the testator in his lifetime, "He might have pleaded that he did not detain the property sued for, and this would have thrown upon the plaintiff the burthen of proving, not only his own title, but possession in the defendant. He chose, however, to rely on the plea that the testator did not detain. I see no objection to the form of this plea, nor to its matter, as constituting an effectual defense."

E. THE PLEADINGS.

See generally, the title PLEADING.

1. The Declaration.

a. In General.

In detinue the plaintiff must aver and prove the kind, quality or number and value of the property claimed by him, and that he is entitled to recover the same, and that the defendant wrongfully detains it. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602, citing Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62.

b. Title and Possession.

In an action of detinue, it is necessary for the plaintiff to aver and prove that he has title to the property, with present right of possession in himself; and, secondly, actual possession thereof by the defendant anterior to the bringing of the suit. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62, citing Burnley *v.* Lambert, 1 Wash. 308; McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408.

Cure by Verdict.—A declaration in detinue, for a slave, is insufficient to support the action, if it omits to state that the slave in question belonged to, or was the property of, the plaintiff; and such defect is not cured by the verdict. Kent *v.* Armistead, 4 Munf. 72.

Harmless Error.—In an action of detinue there are two counts in the declaration. The first does not allege property in the plaintiff. The second does allege it. The court refuses to allow the defendant to demur to the several counts. The jury find expressly that the property is the property of the plaintiff. Held, if the first count is defective, yet the second being good, and the jury finding that the property was the property of the plaintiff, the defendant is not injured by the refusal of the court to allow the demurrer to be filed, and it is no cause for reversing the judgment. Binns *v.* Waddill, 32 Gratt. 588.

Where Plaintiff Has Special Property.—A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property; but if he bring detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator, etc., being surplusage. Boyle *v.* Townes, 9 Leigh 158.

c. Description of Property.

Certainty.—An action of detinue may be maintained for an infant negro child of such a mother, without any other description. Bass *v.* Bass, 4 Hen. & M. 478.

In detinue, if a negro woman, by name, and her issue be demanded in the declaration, without naming them, and the jury find the names of the issue, the defect, if any, is cured, and judgment should be entered according to the verdict. Holladay *v.* Littlepage, 2 Munf. 539.

It seems, that if a declaration in detinue demand a negro woman, by name, and three children, without mentioning their names, and a case be agreed, submitting that if the law be for the plaintiff upon certain other points, judgment may be entered in his favor, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment. Royall *v.* Eppes, 2 Munf. 479.

d. Value.

In detinue the plaintiff must aver and prove the value of the property claimed

by him. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Failure to Lay Value in Declaration.—If in detinue, the jury find for the plaintiff the slaves, if to be had, or £250 for each slave, and damages 1 d.; the court may render judgment for the slaves, if to be had, and if not, the price found by the jury, with the damages and costs, though no price or value be laid in the declaration. Bates *v.* Gordon, 3 Call 556.

Cure by Verdict.—Moreover, the failing to lay a separate value, as to each slave demanded, is an error which would be fatal on demurrer, but is cured by a verdict severing the values. Pearpoint *v.* Henry, 2 Wash. 192; Holladay *v.* Littlepage, 2 Munf. 539.

e. Demand.

It is not necessary, in the declaration in detinue, to state a special demand and refusal; but the general charge, that the defendant, "although often requested," etc., is sufficient. Mortimer *v.* Brumfield, 3 Munf. 122.

Arrest of Judgment.—But if the declaration in detinue does not contain a demand "that the defendant render to the plaintiff," the property sued for; yet, after verdict on the plea of non detinet, judgment ought not to be arrested. Boggess *v.* Boggess, 6 Munf. 486.

f. Nature of the Property.

In order for the plaintiff to recover in an action of detinue for fixtures, it is not only necessary that he should show that he is entitled to the possession of the property claimed in the declaration, but also that the property is personalty, or goods and chattels, as therein described. McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408.

2. The Plea.

a. Non Detinet.

(1) In General.

"A formal action of detinue asserts that the defendant unlawfully detains the property, and the general issue is non detinet, denying the unlawful detention." White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761. See also, Boggess *v.* Boggess, 6 Munf. 486; Garland *v.* Bugg, 1 Hen. & M. 374; Walthal *v.* Johnston, 2 Call 275.

(2) Defenses Admissible Thereunder.

In General.—The plea of non detinet shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defense than such denial shall be admissible under that plea. 2 Chit. Pl. (16th Ed.) 727; Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872.

Deed Void.—In detinue for slaves, parol evidence to prove that a deed was executed for the purpose of defrauding creditors, and therefore void, is admissible upon the plea of non detinet. Stratton *v.* Minnis, 2 Munf. 329.

Adverse Possession.—See ante, "Defenses," I, D.

The defendant in detinue may protect himself, on the plea of non detinet (without pleading the act of limitations) by proving that he, and those under whom he claims, had possession of the property in controversy, more than five years before the emanation of the writ. And such evidence can not be rebutted by the plaintiffs proving that, before the five years had elapsed, he brought a suit in chancery to recover the same property (which suit was dismissed on the ground that his claim was exclusively cognizable at law), and that, within one year after such dismission, he took out the writ in detinue. Elam *v.* Bass, 4 Munf. 301.

b. Puis Darrein Continuance.

See the title PLEADING.

Death of Property after Suit Brought.—Where, in an action of detinue, the sole plea interposed in non detinet, and the property sued for dies during the pendency of the suit without fault of the defendant, the plaintiff may recover the alternate value of the property, unless the matter is brought to the attention of the court by plea puis darrein continuance. Arthur *v.*

Ingels, 34 W. Va. 639, 12 S. E. 872; Austin *v.* Jones, Gilmer 341.

Judge Tucker, in the second volume of his commentaries (p. 83) in discussing the case of Austin *v.* Jones, Gilmer 341, says: "From the consideration urged by Judge Coalter, it seems to me that the proper course in such case is to plead the death of the slave since the last continuance in bar of the recovery of the slave or her value."

3. The Replication.

See the title REPLICATION.

Sufficiency.—Where the defendant, in an action of detinue, pleads the statute of limitations, and the defendant replies that within five years, etc., the defendant acknowledged the article detained to be the plaintiff's property, such replication is insufficient for not averring also a promise in writing to deliver the possession, because the gist of the action is an unjust detention by the defendant of the plaintiff's property. Morris *v.* Lyon, 1 Va. Dec. 615.

Amendment.—See the title AMENDMENTS, vol. 1, p. 349.

In an action of detinue, the replication to the defendant's plea of the statute of limitations being insufficient, a demurrer thereto was sustained, and the action dismissed. The declaration contained the averments for the lack of which the replication was defective. Held, that the judgment dismissing the action was erroneous; that plaintiff should have had leave to amend his replication. Morris *v.* Lyon, 1 Va. Dec. 615.

F. JOINDER OF ACTIONS.

See the title ACTIONS, vol. 1, p. 135.

Where one of the two counts in a declaration in detinue counts on a right of property in the plaintiff and the other on a right of possession in him as bailee, there is no misjoinder of actions. Boyle *v.* Townes, 9 Leigh 158.

G. ELECTION OF REMEDIES.

See the title ELECTION OF REMEDIES.

"If the chattel withheld is of exceptional specific value, as by having attached to it a pretium affectionis, so that the claimant is specially desirous to recover it in kind, or if it is of a character likely to appreciate in value these are considerations which point to the use of the action of detinue rather than of trover and conversion; whilst if the chattel has no specific and peculiar value, nor is likely to appreciate in value, and especially if it is likely to depreciate, and most especially if it is perishable, these considerations decidedly recommend trover and conversion, rather than detinue. In detinue the plaintiff recovers the specific chattel, if to be had, or if not, its alternative value at the time of the verdict; whilst in trover and conversion the value at the time of the conversion, which is before suit brought, is recovered. Hence, the expediency of one or the other action, according as the property is appreciating or depreciating in value." 4 Min. Inst. (3d Ed.) 450.

H. AMOUNT OF RECOVERY.

1. In General.

In detinue the jury may exceed the prices of the slaves laid in the declaration. Biggers *v.* Alderson, 1 Hen & M. 54.

2. In Detinue for Slaves.

See the title SLAVES.

Recovery of Increase of Slaves.—In an action of detinue for a female slave, the recovery may be, not only for the slave named in the writ, but for her children born since the commencement of the action. Morris *v.* Peregoy, 7 Gratt. 373; Martin *v.* Martin, 12 Leigh 495. In this latter case it was left undecided whether in detinue for a female slave, her increase born pending the action can be recovered, but the dictum of the judge showed that, if the question had been before him for decision, he would have decided that the increase could be recovered.

Hires and Profits.—Where a plaintiff,

claiming as trustee in a deed of trust to secure a debt, brings an action of detinue to recover slaves, he is entitled to recover the hires or profits from the time they were held adversely. Nichols *v.* Campbell, 10 Gratt. 560.

Equity Jurisdiction.—But if, in detinue for slaves, the judgment of the superior court, reversing that of the county court (which was in the plaintiff's favor), be reversed by the court of appeals, and that of the county court affirmed, no action lies to recover the profits of the slaves, accruing between the date of the judgment of the county court, and that of its final affirmance by the court of appeals. Alderson *v.* Bigger, 4 Munf. 528; S. C., 4 Hen. & M. 470.

3. In Detinue against Administrators.

Where a defendant in detinue dies, and the action is revived against his administrator with the will annexed, the plaintiff is entitled to demand from the administrator, not only the property sued for, but damages for its detention, and the cost incurred in prosecuting the original action against the testator in his lifetime. Hunt *v.* Martin, 8 Gratt. 578.

4. Measure of Damages.

Conditional Transfer of Property.—In an action of detinue to recover personal property transferred conditionally to a vendee, which condition is broken, whereupon the vendor demands possession of the property, which the vendee refuses to surrender, the measure of damages for the unlawful detention of such property would be ordinarily the value of the use of the property from the time it was illegally refused to be surrendered to the vendor till the rendition of the verdict of the jury, excluding any compensation for the use of the property while the vendee held it legally, and abating nothing from the damages because of payments, in works or otherwise, made by the vendee to the vendor for the property under the contract. McGinnis *v.* Savage, 29 W. Va. 362, 1 S. E. 746.

Mortgagee of Property Conveyed under Chattel Mortgage.—R. executes a deed of trust on two mules to H., trustee, to secure Y. in the sum of $165. The deed is recorded in R. county November 23, 1895, the day of its execution. The property is removed to C. county, and the deed recorded there December 5, 1895. The property is removed to F. county, and the deed recorded there November 28, 1896. On November 30, 1896, action is brought by H., trustee, in detinue for the mules, before a justice, in F. county, against C., who is in possession. At the trial the deed of trust is given in evidence, mules identified, possession is proven with C., and that $100 on the trust lien is still due and unpaid. In such case, if plaintiff establish his right to recover, the measure of his damages would be the amount proved to be due and unpaid on his trust lien, for which he should have alternate judgment against the purchaser. Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

I. VERDICT.

See generally, the title VERDICT.

1. Erroneous Recitals.

If the jury find for the plaintiff the slaves in the declaration mentioned, and proceeding to state their names, and several values, recites the name of one of them erroneously, such error should be corrected by reference to the declaration. Boatright *v.* Meggs, 4 Munf. 145, citing Royall *v.* Eppes, 2 Munf. 479; Holladay *v.* Littlepage, 2 Munf. 539.

2. Responsiveness.

Issues being joined on the pleas of non detinet, and the act of limitations, a verdict that the defendant doth detain the slaves, in manner and form, etc., is sufficiently responsive to both issues. Boatright *v.* Meggs, 4 Munf. 145.

Where the defendant in detinue pleads non detinet, and a special plea in

bar, to which pleas there is a general replication, denying the truth of both, and issues are joined, a general verdict for the plaintiff is sufficiently responsive to both issues. Garland *v.* Bugg, 1 Hen. & M. 375.

3. Assessing Value.

The evidence in the case must furnish a basis for the ascertainment of value. A jury or court can not guess value. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

A verdict in an action for the recovery of personal property before a justice or on its appeal, must find the value of the property, and of each article sued for, as in the action of detinue, and the judgment must do so. White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761.

When the plaintiff has only a special property in the thing sued for, as a pledgee, and not the absolute property, and it is shown on the trial what is the exact amount of his lien against the property, a verdict for that amount as alternate value would not be error. Nor would a verdict for the possession of the property without ascertaining the value be error, under the statute. Hundley *v.* Calloway, 45 W. Va. 516, 31 S. E. 937.

Verdict Finding Joint Values.—If in a declaration for several slaves laying separate values, the jury find a joint value, it is error, and as to that, a venire facias de novo, will be awarded, in order to ascertain the separate values. Higgenbotham *v.* Rucker, 2 Call 313.

Severing Values.—It is not error that the jury find general damages for detaining several slaves, but the alternative value of each slave ought to be separately found. Holladay *v.* Littlepage, 2 Munf. 539.

Writ of Inquiry.—See the title INQUESTS AND INQUIRIES.

But in detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered, but a writ of inquiry to ascertain their respective values should be awarded. Cornwell *v.* Truss, 2 Munf. 195.

4. Venire Facias DeNovo.

Determination of All Issues.—In detinue for five slaves, if the jury find for the plaintiff as to four of them without also finding for the plaintiff or defendant, as to the fifth, the verdict will be set aside, and a venire facias de novo awarded. Butler *v.* Parks, 1 Wash. 76.

Omission of Material Finding.—If the jury, in an action of detinue for slaves, finds a special verdict, and, as to some of the slaves, omits to state a circumstance which is necessary to ascertain whether the plaintiff is entitled to them or not, the verdict is insufficient, and a venire de novo ought to be awarded. Robinson *v.* Brock, 1 Hen. & M. 213.

J. JUDGMENT.

See the title JUDGMENTS AND DECREES.

1. Form.

a. In General.

The judgment in detinue is in the alternative, that the plaintiff recover the property sued for, or its value, if the specific chattel can not be returned. Sinclair *v.* Young, 100 Va. 284, 40 S. E. 907; Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872; Bates *v.* Gordon, 3 Call 556.

In detinue, the plaintiff claims the goods in specie. The judgment is, in effect, that he recover the goods if they can be obtained from the defendant by the sheriff, and a certain sum assessed by the jury for damages for the detention, and if the goods can not be had, then a certain sum assessed by the jury as their value, besides the damages for detention, with costs. 2 Chit. Pl. (16th Ed.) 622; Arthur *v.* Ingels, 34 W. Va. 639, 12 S. E. 872; White *v.* Emblem, 43 W. Va. 819, 28 S. E. 761.

In detinue, if the jury find for the

plaintiff, the slaves, if to be had, or £250, for each slave, and damages 1d; and the court render judgment for the slaves, if to be had, and if not, the price found by the jury, with the damages and costs, it is not error, (though no price or value be laid in the declaration). Bates *v.* Gordon, 3 Call 556.

b. Against Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS.

Judgment in detinue against an executor as such, should be given against him personally, for the goods by him detained, or the alternative value; but for all damages for detention, both in the testator's time and in his own, it should be against him de bonis testatoris. Allen *v.* Harlan, 6 Leigh 42, 29 Am. Dec. 205; Greenlee *v.* Bailey, 9 Leigh 526.

In Catlett *v.* Russell, 6 Leigh 344, it was held, that the judgment in detinue against an executor as such, should be for the goods or the alternative value against the executor de bonis propriis, and for the damages for detention, both in the testator's and executor's own time, de bonis testatoris. Cabell, J., and Brockenbrough, J., dissented, however, holding, in accordance with the decision in Allen *v.* Harlan, 6 Leigh 42, that the judgment should be against the executor for the goods, if to be had, if not, for the alternative value, the damages for detention, and the costs, all to be levied de bonis testatoris.

Where an action of detinue is revived against an administrator with the will annexed, and a judgment is recovered, the judgment for the damages for detention of the property and the costs, should not be against the administrator personally, but against him as administrator, to be levied of the goods, etc., of his testator, in his hands to be administered. Hunt *v.* Martin, 8 Gratt. 578.

Termination of Life Estate.—An executor or administrator, holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death, may be charged in detinue, personally, and not as executor or administrator. Royall *v.* Eppes, 2 Munf. 479.

2. Conclusiveness and Effect.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Former Adjudication or Res Adjudicata.—After a judgment in detinue, a new action of detinue against the same defendant for the same thing, in which the former judgment is not declared upon, but is only relied on as evidence of title, can not be maintained. Withers *v.* Withers, 6 Munf. 10.

A slave the property of A. is sold by B. (without authority) to C., and by C. delivered to D. A. brings an action of detinue, and obtains judgment against C. He can not afterwards bring an action for the same slave against D., notwithstanding his judgment against C. is unsatisfied. Murrell *v.* Johnson, 1 Hen. & M. 450.

Relief in Equity.—If the plaintiff obtains a judgment in detinue for slaves and their profits to the rendition of the judgment, he can not come into equity for the profits which afterwards accrued pending an appeal, nor to recover their increase not included in such judgment, nor to compel the delivery of them by purchasers from the defendant. Alderson *v.* Biggars, 4 Hen. & M. 470; S. C., 4 Munf. 528.

3. Scire Facias.

See the title JUDGMENTS AND DECREES.

Quære, whether any action other than a scire facias, can be maintained upon a judgment in detinue? Withers *v.* Withers, 6 Munf. 10.

K. WRIT OF DISTRINGAS.

See the title DISTRINGAS.

The statutes provide that no writ of distringas shall be issued, except on a judgment for specific personal prop-

erty. Va. Code, 1904, § 3581; W. Va. Code, 1899, ch. 140, § 2.

After a distringas upon a judgment in detinue has been returned executed, but without satisfaction, if the court on the plaintiff's motion, directs the distringas to be superseded, so far as it relates to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems the plaintiff may have a new distringas to be executed as to such value. Garland *v.* Bugg, 5 Munf. 166. See Cloud *v.* Catlett, 4 Leigh 462.

Notice of Motion to Supersede Distringas.—Notice of a motion to supersede a distringas or for a ca. sa. or fi. fa. in lieu thereof, need not be given by the plaintiff to the defendant. Garland *v.* Bugg, 5 Munf. 166.

Issue.—It seems that, according to the common law, still in force in Virginia, the plaintiff in detinue is not entitled to the issue of the defendant's lands or other property, received by the sheriff upon the distringas. Garland *v.* Bugg, 5 Munf. 166.

L. THE BOND.

See the title BAIL AND RECOGNIZANCE, vol. 2, p. 206.

In General.—In this state, the action of replevin having been abolished, a replevy bond and counter forthcoming bond have been made a part of the proceedings in the action of detinue, and the scope of this action as a remedy has been enlarged and advanced by ch. 102, W. Va. Code. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602.

Action on Detinue Bond.

Allegations.—In an action on a bond given by a plaintiff in detinue to obtain immediate possession of the property, it is unnecessary to allege or prove that there was a judgment in favor of the defendant in the action settling his right to the property, and fixing its value, where the action has been dismissed or nonsuit suffered by the plaintiff. But it is indispensable to allege and prove that the property was seized from the plaintiff under process in the case, and delivered to the plaintiff in detinue. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

Possession after Execution of the Bond.—And a declaration upon a detinue bond executed under § 1, ch. 102, W. Va. Code, which does not allege that the plaintiff in the action of detinue, had possession of the property after the bond was executed, is fatally defective. Bratt *v.* Marum, 24 W. Va. 652, cited with approval in Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

The Condition.—The bond is not vitiated because, by mistake, an unauthorized condition is inserted in it, or some condition prescribed is omitted, unless the statute, by express words or necessary implication, makes it wholly void; and the bond may be sued on, so far as the conditions are good, as a statutory bond. Jackson *v.* Hopkins, 92 Va. 601, 24 S. E. 234.

Assignment of Breaches.—In an action on a bond with collateral condition the breach of the condition is the gist of the action, for without a breach there is no cause of action. But the breach assigned must be of the condition set forth in the bond, and, if the condition of the bond is to pay costs and damages sustained by any one by reason of suing out an action of detinue, and the breach assigned is a failure to pay damages sustained by reason of the seizure and sale of the plaintiff's property taken in the action of detinue, the declaration is bad on demurrer. Jackson *v.* Hopkins, 92 Va. 601, 24 S. E. 234.

The Plea.—R. brings an action of detinue against two, and gives bond under the statute in order to take possession of the property; in order to retain it they give bond with security to have the property forthcoming to answer the judgment. In an action upon the bond the defendant pleads in bar, that judgment was against one only, and that he was thereby discharged. A

demurrer to this plea was properly sustained. Reynolds *v.* Hurst, 18 W. Va. 648.

A plea of "conditions performed" in an action on a detinue bond with collateral conditions, controverts and calls for proof by the plaintiff of all the facts alleged by him essential to sustain his action, except that it admits the bond. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

Where in an action upon a detinue bond, the plea of the defendant is conditions performed, the introduction of the bond is unnecessary, as the plea admits its execution. Bratt *v.* Marum, 24 W. Va. 652, citing Riddle *v.* Core, 21 W. Va. 530.

Bond as Evidence.—In an action of debt on a detinue bond, an objection to the introduction of the bond in evidence, because it ought to have been filed with the justice, and that he should have only a certified copy of it, will not be sustained. If he procure the bond from the justice in any manner, even if he obtain it improperly, that would not make it illegal evidence. Bratt *v.* Marum, 24 W. Va. 652.

M. EQUITY JURISDICTION.

See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 161.

Adequate Remedy at Law.—Where the plaintiffs have a plain and adequate remedy at law as by an action of detinue, they can not come into equity for relief. Armstrong *v.* Huntons, 1 Rob. 323; Summers *v.* Bean, 13 Gratt. 419; Childress *v.* Morris, 23 Gratt. 805.

The jurisdiction of a court of equity to decree the specific delivery of title papers to heirs at law, devisees and other persons properly entitled to the custody and possession of the same, when they are wrongfully detained, or withheld from them, is not affected by the fact that a statute (Va. Code, ch. 138), gives the complainants a complete and adequate remedy by an action of detinue. In the absence of prohibitory or restrictive words in the statute, courts of equity still retain their jurisdiction in such cases. Kelly *v.* Lehigh, etc., Co., 98 Va. 405, 36 S. E. 511.

If the proceedings under an execution are wholly void, no title passes by the sale to the purchaser, and the defendant may have redress in an action of detinue, and a court of equity has no jurisdiction. Hamilton *v.* Shrewsbury, 4 Rand. 427.

Insolvency of Defendant—Injunction.—The insolvency of a defendant in detinue is no ground for an injunction to prevent the removal or disposition of the subject of litigation. An ample remedy is afforded the plaintiff by Va. Code, § 2907. Langford *v.* Taylor, 99 Va. 577, 39 S. E. 223.

Relief in Equity against Judgment at Law.—If the plaintiff obtain a judgment in detinue for slaves, and their profits to the rendition of the judgment, he can not come into equity for the profits, which afterwards accrued pending an appeal; nor to recover their increase not included in such judgment; nor to compel the delivery of them by purchasers from the defendant. Alderson *v.* Biggars, 4 Hen. & M. 470; S. C., 4 Munf. 528.

N. EVIDENCE.

1. Weight and Sufficiency.

Although the plaintiff in detinue for a slave, proves that the defendant (whose wife was entitled to the slave in question, as part of her dower of the estate of a former husband) gave the slave to the plaintiff's wife, when a feme sole, upon condition that her brothers, who held the reversionary interest, would join in a deed conveying to her the absolute title, and that they promised and agreed to execute such deed, but never did, and one of them afterwards refused to do so, still this evidence is insufficient to entitle the plaintiff to recover. Fitzhugh *v.* Beale, 4 Munf. 186.

Proof of Gift by Defendant.—In detinue for slaves, proof on the part of

the defendant that the plaintiff brought to his house one of the slaves who had run away, and then said he had given them to the defendant's wife, is not conclusive in his favor; but the court may instruct the jury, that, if, from the evidence, they believe the plaintiff had given the slaves to the defendant, they should find for him. Boatright *v.* Meggs, 4 Munf. 145.

Evidence as to Possession.—The plaintiff who had negotiations with the defendant for the purchase of land, payment to be made with notes of a third person, called at the defendant's office in regard to the transaction, and the defendant asked her to let him see the notes. He took them and started to leave the office, when she demanded them, but the defendant retained them, and took them to the maker to inquire about their verity. And the plaintiff again asked for the notes, but the defendant would not give them up, so subsequently the plaintiff left the office without any arrangements in regard to the sale having been made, and it was held that there was no evidence that the notes were given in pursuance of an agreement to purchase the land. Brown *v.* Pollard, 89 Va. 696, 17 S. E. 6.

2 Burden of Proof.

In his defense the defendant may prove a want of sufficient title to the property in the plaintiff, or he may prove a want of possession in himself. If the plaintiff shall have proved an anterior possession in the defendant, the burden is shifted, and it devolves upon the latter to prove that he has been legally dispossessed. Burns *v.* Morrison, 36 W. Va. 423, 15 S. E. 62; Burnley *v.* Lambert, 1 Wash. 308.

O. SURVIVAL OF ACTION.

See generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Executors and Administrators.—Detinue brought against a testator and pending at his death, may be revived by scire facias, against the executor, under statute, 1 Rev. Va. Code, ch. 128, § 38, if the chattel demanded actually came to the executor's possession. Catlett *v.* Russell, 6 Leigh 344; Allen *v.* Harlan, 6 Leigh 42; Greenlee *v.* Bailey, 9 Leigh 526. See Rose *v.* Burgess, 10 Leigh 186.

Suggestion in Declaration.—Therefore, it must be suggested in the scire facias or alleged in the declaration thereupon, that the goods came to the executor's or administrator's possession, for if the executor's possession be nowise alleged, there can be no recovery against him. Allen *v.* Harlan, 6 Leigh 42, 29 Am. Dec. 205; Catlett *v.* Russell, 6 Leigh 344; Hunt *v.* Martin, 8 Gratt. 578.

Revival by Consent.—Upon the death of a defendant in detinue, if his administrator consents that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a scire facias against the administrator, alleging that the property had come to his possession and was detained by him. Greenlee *v.* Bailey, 9 Leigh 526.

Arrest of Judgment.—In such a case, if the administrator, instead of pleading de novo, goes to trial upon the plea put in by his intestate, he can not, after verdict against him, arrest the judgment because of his own failure to plead anew. Greenlee *v.* Bailey, 9 Leigh 526.

Joint Trustees.—Where two trustees bring an action of detinue to recover the trust property, and one of them dies, the right of action survives to the other, and he may carry on the suit. Nichols *v.* Campbell, 10 Gratt. 560.

II. Replevin.

A. DETINUE AND REPLEVIN CONTRASTED.

The writ of replevin was a more beneficial remedy than the action of detinue; for, besides that in the latter action, the plaintiff must at all events be

deprived of the possession of his property until it can be recovered by suit, the action may fail to have the effect of restoring the specific property, although the plaintiff may be found to be entitled to it. Whereas, the replevin immediately restored the possession of the property to him from whom it was taken, upon the legal presumption that, the property belonged to the person in possession, and discouraged parties from redressing themselves by their own act, or invading the rights of others. Vaiden *v.* Bell, 3 Rand. 448.

B. STATUS OF THE REMEDY.

In the early cases, the writ of replevin seems to have been a not uncommon remedy. See Nicolson *v.* Hancock, 4 Hen. & M. 491, opinion of the chancellor.

Abolished in Virginia.—The action of replevin has not existed in Virginia since 1850. The statutory substitutes for it are, in favor of the tenant, in the case of a distress for rent, deliverey or forthcoming bond; in all other cases, the process of interpleader. 4 Min. Inst. (2d Ed.) 483-86-87; 3 Rob. Pr. (2d Ed.) 482-3; Va. Code, 1904, § 2899.

Abolished in West Virginia.—No action for replevin exists in West Virginia. The person injured has his remedy by action; presumably by action for damages. W. Va. Code, 1891, p. 725; W. Va. Code, 1899, ch. 103, § 4.

Remedies Substituted Therefor.—In West Virginia, the action of replevin having been abolished, a replevy bond and counter forthcoming bond have been made a part of the proceedings in the action of detinue, and the scope of this action as a remedy has been enlarged and advanced by ch. 102, of the Code. Robinson *v.* Woodford, 37 W. Va. 377, 16 S. E. 602. See also, W. Va. Code, 1899, ch. 106, pp. 794, 795.

C. RIGHT TO MAINTAIN THE ACTION.

1. In General.

By the old common law, the writ of replevin was resorted to, for the redelivery and recovery of the specific chattel, a remedy, in some respects, more effectual than the action of detinue. The gist of the action was the tortious taking. Martin *v.* Martin, 12 Leigh 495; Vaiden *v.* Bell, 3 Rand. 448.

2. Unlawful Detainer.

"The action of replevin, it will be remembered, was not even at common law available for unlawful detainer, but only where the taking is unlawful." 4 Min. Inst. (2d Ed.) 491; Vaiden *v.* Bell, 3 Rand. 448.

3. Distress for Rent.

In General.—A writ of replevin lay at common law, for all goods unlawfully taken; and this was the law of Virginia, until the act of 1823, which abolished that writ in all cases, except those of distresses for rent. Vaiden *v.* Bell, 3 Rand. 448.

Construction of Statute.—It was held that the act of 1823, which abolished the writ in all cases except those of distress for rent, was not retrospective, and did not affect a case where the action was brought and the judgment rendered before its passage. Vaiden *v.* Bell, 3 Rand. 448.

Adequate Remedy at Law.—A tenant complaining of a distress for rent, made for more rent than was in arrears and due, not having resorted to an action of replevin for redress, nor showing any reason for failing to resort to his remedy at law, is not entitled to relief in equity. Mayo *v.* Winfree, 2 Leigh 370.

Reception of Evidence after Verdict.—The court may hear evidence after verdict, in case of a replevin, in order to show that the landlord distrained for more rent than was due; on showing which, the judgment will be for the rent merely, and not the double value. Maxwell *v.* Light, 1 Call 117.

But this practice was declared to be anomalous and inconvenient in Bargamin *v.* Poitiaux, 4 Leigh 419.

D. RETORNO HABENDO.

Quære. If the defendant prays a retorno habendo in replevin, he can claim judgment for double rent? Blincoe *v.* Berkley, 1 Call 405.

E. THE PLEADINGS.

1. The Declaration.

Under the statute of jeofails, of 1819, the omission to allege property in the plaintiff, in the declaration, is cured after verdict. Vaiden *v.* Bell, 3 Rand. 448.

2. Avowry.

The common-law rules respecting the pleadings in replevin, and particularly in regard to the nicety and precision required in the avowry, are in force in Virginia, unaffected by any statutory provision; therefore an avowry, faulty according to the common-law rules applicable to that pleading, is bad on general demurrer. Southall *v.* Garner, 2 Leigh 372.

Sufficiency of Issue.—If, in replevin the avowry alleges that a sum of money was arrear for rent, and the plaintiff replies that he did not owe it at the time of the distress, it is a sufficient issue. Turberville *v.* Self, 4 Call 580.

Writ of Inquiry.—See the title INQUESTS AND INQUIRIES.

Where the defendant in replevin makes an avowry for rent due him from the plaintiff, and then the plaintiff, failing to appear and plead, is nonsuited, it is proper to award a writ of inquiry to ascertain the avowant's damages, under the twenty-third section of the general statute of rent, 1 Rev. Va. Code, ch. 113. The avowry is to be considered as only a suggestion, and though it be faulty as an avowry, in not showing the landlord's title, yet as a suggestion it is good and sufficient. Moreover the statute of jeofails would be applicable, in such a case, to cure all defects in the avowry. Bargamin *v.* Poitiaux, 4 Leigh 412.

3. The Plea.

Under the act of 1792 (Rev. Va. Code, vol. 1, ch. 66, § 40), the plaintiff in replevin and the defendant in all other actions may plead as many several matters whether of law or fact, as he shall think necessary for his defense, notwithstanding such several matters be inconsistent with each other. Waller *v.* Ellis, 2 Munf. 88; Nicolson *v.* Hancock, 4 Hen. & M. 491.

Errors Cured by Verdict.—The defendant can not plead several pleas in replevin by our statute; but the error will be cured by the verdict. Vaiden *v.* Bell, 3 Rand. 448.

F. SET-OFF.

See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

In Virginia, set-off was a good defense to an avowry for rent in an action of replevin. Tuberville *v.* Self, 4 Call 580, is cited to support this proposition, in Allen *v.* Hart, 18 Gratt. 722; Nicolson *v.* Hancock, 4 Hen. & M. 498; Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833.

The plaintiff in replevin may avail himself of a set-off, on the same principle that a defendant may prove discounts in any other suit. Nicholson *v.* Hancock, 4 Hen. & M. 498.

Failure of Lessor to Make Repairs.—Where a lessor covenants to put certain repairs upon the demised premises, which he fails to do, in an action of replevin upon a distress for rent, the tenant may set off the damages accrued by the failure of the lessor to make the repairs. Murray Caldwell & Co. *v.* Pennington, 3 Gratt. 91.

Awards.—To an avowry for rent in an action of replevin, it was held, that an award, of date posterior to the distress, finding a balance due to the plaintiff, may be discounted at the trial against the rent. But the avowant can not oppose the discount, by a claim of which the plaintiff had no notice; for

the act of assembly confines the right of discount to defendants, and does not extend to any other plaintiff, than a plaintiff in replevin, who in fact is a defendant to the avowry. Turberville *v.* Self, 4 Call 580.

G. THE BOND.

The omission to give bond and security before the issuing of the writ of replevin, does not invalidate the writ, but only subjects the sheriff to an action by the defendant. Vaiden *v.* Bell, 3 Rand. 448.

A bond taken upon replevying property distrained for rent, is good if executed by the original lessee, though he be not the tenant in actual possession, nor the owner of the property distrained, if he has assigned his lease to a third person, without the privity or assent of the lessor. Ferguson *v.* Moore, 2 Wash. 54.

Return of Bond.—A bond taken upon replevying property distrained for rent must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies. Ferguson *v.* Moore, 2 Wash. 54.

H. APPEAL—AMOUNT IN CONTROVERSY.

See the title APPEAL AND ERROR, vol. 1, p. 475.

Where an action of replevin is brought to try the title to personal property, valued in the declaration at more than $100, and judgment is rendered for the plaintiff, and $20 damages, an appeal lies to the court of appeals. Vaiden *v.* Bell, 3 Rand. 448.

Devastavit.

See the titles EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD.

Deviation in Marine Insurance.

See the title MARINE INSURANCE.

Devisavit Vel Non.

See the title WILLS.

DEVISE.—See the title WILLS.

The act, Va. Code, ch. 77, § 8, p. 362, does not authorize a **devise** of land for the use of a religious congregation, but only a conveyance by deed. The court said: "There can be no doubt but that the word 'conveyance,' in its comprehensive, and perhaps in its technical sense, embraces a **devise**; and if it had been the only word used by the legislature in the provision in question to express the mode of transfer, it might, reasonably, have been construed in that sense; especially as it is used in that sense in other parts of the Code, as in ch. 116, §§ 1, 11. But we know that in common parlance, the word is often used in a more restricted sense, as contradistinguished from **devise**; and that it has often been so used in our most important acts of legislation; as for example, in the act concerning conveyances, 1 Rev. Code, 1819, ch. 99." Seaburn *v.* Seaburn, 15 Gratt. 423, 427.

Devisees.

See the titles MARSHALING ASSETS AND SECURITIES; WILLS.

Devolution of Property.

See the title DESCENT AND DISTRIBUTION, ante, p. 588.

Diagrams.

See the title DOCUMENTARY EVIDENCE.

Dicta.

See the title STARE DECISIS.

Dies Non Juridicus.

See the title SUNDAYS AND HOLIDAYS.

Die without Issue.

See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Dignity of Debts.

See the title EXECUTORS AND ADMINISTRATORS.

Dilatory Pleas.

See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Diligence.

See the titles ASSIGNMENTS, vol. 1, p. 779; BILLS, NOTES AND CHECKS vol. 2, p. 459; NEGLIGENCE.

Direct Contempt

See the title CONTEMPT, vol. 3, p. 238.

Direct Examination.

See the title WITNESSES.

Directing Verdict.

See the title VERDICT.

Directors.

See the titles BANKS AND BANKING, vol. 2, p. 294; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Dirks.

See the title WEAPONS.

DISABILITY.—The nondeclaration of the result of the election is not a **disability** of the governor within the provision of the West Virginia Constitution, which reads as follows: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other **disability** of the governor, the president of the senate shall act as governor until the vacancy is filled or the **disability** removed." The court said: "It is not like insanity, conviction of the officer for crime, continued absence, or other **disability** connected with the person of the governor. Death, conviction on impeachment, failure to qualify,

or resignation would produce a vacancy, and it would seem that the language 'or other **disability**' means something of a different character from those cases named—something attaching to the person of the governor, and disabling him; and this construction seems confirmed by the after language of the section, providing that 'the president of the senate shall act as governor until the vacancy is filled or the **disability** is removed,'—thus using the words 'vacancy' and **disability** as meaning different things; 'vacancy' referring to death, conviction, failing to qualify, and resignation, but **disability** referring to something relating to the person, and for the time being disabling him, notwithstanding the use of the word 'other.'" Carr *v.* Wilson, 32 W. Va. 419, 9 S. E. 33, 35. See also, the titles PUBLIC OFFICERS; GOVERNOR.

DISABLED.—The statute provides that "If any person holding or expecting to hold any office under the laws of this state, sell the same, or let it to farm, either in whole or in part, or contract to do so, such person and the person who may buy, take to farm, or contract to do so, shall be thereby **disabled** from holding said office." In construing this provision, the court said: "That, also, has been eliminated from our statute which says only that they 'shall be thereby **disabled** from holding said office,' which language has been construed by this court in Dryden *v.* Swinburne, 20 W. Va. 89, to mean that they shall be **disabled** only from holding the particular term of the office in respect to which the illegal contract was made." White *v.* Cook, 51 W. Va. 210, 212, 41 S. E. 410. See also, the title PUBLIC OFFICERS.

DISALLOWED.—See Prince George Co. *v.* Atlantic, etc., R. Co., 87 Va. 286, 12 S. E. 667.

Disbarment and Suspension of Attorneys.

See the title ATTORNEY AND CLIENT, vol. 2, p. 170.

Disclaimers.

See the titles DEEDS, ante, p. 364; EJECTMENT; PLEADING.

Discontinuance.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

DISCONTINUOUS EASEMENTS.—See the title EASEMENTS. And see APPARENT EASEMENTS, vol. 1, p. 417.

DISCOUNT.—Wells gave to Foster his writing obligatory; Foster indorsed and assigned the same to Shriver, and Shriver indorsed and assigned the same to the plaintiff; Wells being notoriously insolvent, the plaintiff brought suit against Foster. The court said: "Section 14, ch. 99, of the Code (1869 and 1891), provides that 'the assignee of any bond, note, account, or writing not negotiable may maintain thereupon any action in his own name, without the addition of "assignee," which the original obligee or payee might have brought; but shall allow all just **discounts**, not only against himself but against the assignor, before the defendant had notice of the assignment;' and the term **discount**, as here used, embraces any right which Foster has to an abatement of the demands against him, as against his assignee, Shriver, for there is no privity of contract by assignment between defendant, Foster, and the plaintiff, the remote assignee." Morgantown Bank *v.* Foster, 35 W. Va. 357, 13 S. E. 996, 998.

Discounts.

See the title BANKS AND BANKING, vol. 2, p. 272.

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I. Bill of Discovery.

A. DEFINITIONS AND DISTINCTIONS.

Definition.—"Every bill is in reality a bill of discovery; but the species of bill usually distinguished by that title, is a bill for discovery of facts resting in the knowledge of the defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery. The bill is commonly used

in aid of the jurisdiction of some other court; as to enable the plaintiff to prosecute or defend an action at law, a proceeding before the king in council, or any other legal proceeding of a nature merely civil, before a jurisdiction which can not compel a discovery on oath." M'Farland *v.* Hunter, 8 Leigh 489, 492; Fant *v.* Miller, 17 Gratt. 187, opinion of Moncure, J.

Pure Bills Distinguished from Bills of Relief.—If any exercise of the jurisdiction of a court is prayed, which involves a necessity of a hearing, and a decree on those rights, the suit is thereby rendered a suit for relief, and is liable to all the incidents of that proceeding. On the other hand if the assistance which is prayed in addition to the discovery be such as the court will give without a hearing of the cause, and no decree or decretal order be necessary on any rights as no judgment upon any right is required, the suit is not a suit for relief. A pure bill of discovery will not become a bill of relief, merely because it prays that a temporary injunction be awarded against the defendant restraining him from prosecuting his action at law, until he answers the bill, though in one sense this is a prayer for relief. Russell *v.* Dickeschied, 24 W. Va. 61.

In a late West Virginia case it was said that Russell *v.* Dickeschied, 24 W. Va. 61, is the only case of a pure bill of discovery found in the West Virginia reports. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

B. JURISDICTION AND RIGHT TO MAINTAIN.

1. Jurisdiction.

a. In General.

Discovery is one of the familiar grounds of equitable jurisdiction. Neff *v.* Baker, 82 Va. 401, 4 S. E. 620.

Whenever a bill of discovery is presented, and contains the proper averments as to the necessity for discovery, and it appears that there is no attempt to foist a jurisdiction upon equity courts, which does not belong to them, then the jurisdiction of a court of equity is too well established to be open to argument or inquiry. Hall *v.* Smith, 25 Gratt. 70; Skinner *v.* Dodge, 4 Hen. & M. 432; Gregory *v.* Marks, 1 Rand. 362 (a case for discovery of the increase of female slaves after a considerable lapse of time and an account); Rankin *v.* Bradford, 1 Leigh 163 (a case for the discovery of slaves and their names); Hale *v.* Clarkson, 23 Gratt. 42; Hunter *v.* Spotswood, 1 Wash. 145 a long and ferent persons); Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423 (matters of account); Hickman *v.* Stout, 2 Leigh 6 (mutual accounts between the parties running through a series of years); Hardin *v.* Hardin, 2 Leigh 572; Simmons *v.* Simmons, 33 Gratt. 451 (bill for discovey, account and settlement of transactions of the defendant for several years); Pryor *v.* Adams, 1 Call 383.

Where a party's right depends upon a discovery, a court of equity has jurisdiction; but wherever a discovery is sought for, without which it is apparent upon the bill itself that the plaintiff may proceed at law, it shall not entitle him to relief in equity, though there be no demurrer. But wherever a discovery is sought, which from the face of the bill gives to the court of equity jurisdiction, there it will be sustained, unless it be taken away by a plea. Bass *v.* Bass, 4 Hen. & M. 478.

Prayer for Discovery.—Although a prayer for discovery may confer jurisdiction, yet if the plaintiff does not see fit to resort to it, and there is no other ground for the jurisdiction of equity, the bill will be dismissed. Kane *v.* Virginia, etc., Co., 97 Va. 329, 33 S. E. 627.

b. Adequate Remedy at Law.

Where the averments in bill of discovery, taken as a whole, are color-

able only to sustain equity jurisdiction, and as a matter of fact the remedy at law is adequate, equity will refuse jurisdiction. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795. See also, Laidley *v.* Laidley, 25 W. Va. 525.

Bill in equity by claimant of legal title to a female slave, against an adverse claimant, charges that the slave, with her increase if any, is in possession of defendant, who refuses to surrender the same to plaintiff; and prays that defendant may be decreed to give up the slave, that he may set forth the names of her increase if any, and say if the same be not in his possession, and that he may account for the hires and profits thereof since the plaintiff's title accrued. Held, equity has no jurrisdiction of the case. Armstrong *v.* Huntons, 1 Rob. 323.

A, B and C are the heirs of W, and also heirs of M, and D and E are heirs of M. They all appoint S an agent to collect and sell land scrip due to W, and also scrip due to M. The scrip is obtained and sold, but the agent does not pay over the proceeds. All the heirs unite in a suit for the recovery, and call for a discovery. The bill is not demurrable, because the plaintiffs have a complete remedy at law. Segar *v.* Parrish, 20 Gratt. 672.

Dissolution of Injunction.—In a bill of discovery, if the defendant makes no discovery, but on the contrary, negatives the allegations of the bill, the injunction awarded on the bill should be dissolved. Webster *v.* Couch, 6 Rand. 519.

When there is nothing charged in a bill of discovery to entitle the complainants to file it, and no ground to sustain the injunction also prayed for in the same bill to a judgment at law, the injunction may be dissolved without the answer of the party from whom discovery is sought. Zoll *v.* Campbell, 3 W. Va. 226.

c. Retaining Jurisdiction for Complete Relief.

Contrary to the established English practice, the general rule with us is that a court of equity will retain the cause after the discovery has been obtained, and proceed to give the proper relief founded upon it, unless the discovery was sought and obtained in order to be used in a pending common-law action between the parties, and will not turn the parties around to a common-law tribunal, in order that the answer may be used as evidence there. Lyons *v.* Miller, 6 Gratt. 427, 438; Smith *v.* Smith, 92 Va. 696, 24 S. E. 280; Roanoke St. Ry. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295; Fant *v.* Miller, 17 Gratt. 187, 200.

It is a settled principle of law now, that even though the matter be proper for a law court, yet, where a proper case for discovery is presented, the bill asking both discovery and relief is maintainable, and the court, having jurisdiction for one purpose—discovery—will not tell the party, after getting it, to go into a court of law, but will go on to give relief. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Chichester *v.* Vass, 1 Munf. 98; Lyons *v.* Miller, 6 Gratt. 427. See also, Hotchkiss *v.* Fitzgerald, etc., Plaster Co., 41 W. Va. 357, 23 S. E. 576; Chinn *v.* Heale, 1 Munf. 75; Skinner *v.* Dodge, 4 Hen. & M. 432.

Thus when the bill is not a technical bill of discovery, that is, a pure bill of discovery, brought for the sole purpose of obtaining discovery in aid of an action at law, the cause does not necessarily terminate with the failure to obtain the discovery, but where the bill calls for an account as well as discovery, the court will go on and decide the whole controversy, if an account was needed for a proper decision of the case. Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449.

Hence where a court of equity has taken jurisdiction for the purpose of discovery, it will go on and adjudicate the whole merits of the cause. Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423.

Gifts.—Thus when equity assumes

jurisdiction to enforce the discovery of certain facts relating to an alleged gift mortis causa from an intestate, it will retain jurisdiction to determine its validity. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

Multiplicity of Suits.—See the title MULTIPLICITY OF SUITS.

Moreover, where jurisdiction has been taken for discovery, suitable relief will be administered to avoid a multiplicity of suits. Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423; Lafever *v.* Billmyer, 5 W. Va. 33.

d. Dismissal of Bill.

Where the ground of equitable jurisdiction stated in a bill, is want of discovery from the defendant, and it appears from the evidence that as to some material facts alleged the plaintiff has full proof, and as to others they are merely pretences, the bill will be dismissed at the hearing for want of jurisdiction. Jones *v.* Bradshaw, 16 Gratt. 355.

2. Right to Maintain.

a. In General.

"A bill of discovery lies here, in aid of some proceedings in this court, in order to deliver the party from the necessity of procuring evidence, or to aid the proceeding in some suit relating to a civil right in a court of common law, as an action; but not to aid the prosecution of an indictment or information, or to aid the defense of it." Montague *v.* Dudman, 2 Ves. sen. 398, cited with approval in McFarland *v* Hunter, 8 Leigh 489.

b. Accounts and Accounting.

See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

In General.—The jurisdiction of courts of equity in matters of account, is among the most comprehensive they have assumed. Matters of account are per se within the scope of their jurisdiction. They have concurrent jurisdiction therein with courts of law; but the difficulty of proceeding in the latter, and the convenience of proceeding in the former, where a discovery may be had on the defendant's oath, where a multiplicity of suits will be avoided, and where fraud, accident, or mistake is connected with the subject, causes them to be most commonly resorted to. Tillar *v.* Cook, 77 Va. 477.

Courts of equity have jurisdiction of matters of account: First, where there are mutual demands, and a fortiori when complicated; Second, when the accounts are on one side, and a discovery is sought that is material to the relief; Third, equity having taken jurisdiction for discovery will, to avoid multiplicity of suits, administer suitable relief. Petty *v.* Fogle, 16 W. Va. 497.

Courts of equity decline jurisdiction in matters of account: First, where the demands are all on one side, and no discovery is claimed or is necessary; Second, where on one side there are demands, and on the other mere payments or set-off, and no discovery is sought or required. Lafever *v.* Billmyer, 5 W. Va. 33; Petty *v.* Fogle, 16 W. Va. 497.

Illustrative Cases.—S., a master carpenter, having been employed to build a house for G., and the terms of the contract being expressed in two agreements between the parties, which were left in the hands of G., the employer, brings action at law against G. on the agreements; and his counsel, finding it necessary, and it being in fact necessary, to have copies of the agreements in order to frame his declaration, requires G. to furnish copies thereof; G. refuses to furnish them; whereupon, S. dismisses his action at law, and files a bill in equity praying an account and a decree for the balance due for the work done. Held, the case is properly relievable in equity. Sturtevant *v.* Goode, 5 Leigh 83.

Trustees and Agents.—Courts of equity have jurisdiction in matters of account involving the transactions and dealings of trustees and agents, where-

ever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty. Coffman *v.* Sangston, 21 Gratt. 263; Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449. See also, Segar *v.* Parrish, 20 Gratt. 672.

Fiduciaries.—In Simmons *v.* Simmons, 33 Gratt. 451, the court said: "The bill was filed to have a discovery, account and settlement of the transactions of the defendant as general agent for several years. It is not the case of a single money demand, which might conveniently and should be enforced in a court of law, nor of mutual demands merely, of which equity would take cognizance, but it is a case involving a trust, where the fiduciary character of the employment imposed upon the person employed the duty of keeping accounts and preserving vouchers. It is well settled that equity has jurisdiction in such a case. Zetelle *v.* Myers, 19 Gratt. 62." See also, Ranklin *v.* Bradford, 1 Leigh 163.

A bill in equity which seeks no discovery, but merely alleges that a party who has acted as trustee for plaintiff has executed his trust, and the only complaint is that said trustee has with plaintiff's consent delivered money which he has collected to a third party to indemnify him as plaintiff's surety, which third party retains the money after he has been relieved from his liability as surety, and refuses to account for or pay over the same, does not present such a case as will entitle the plaintiff to be heard in a court of equity, and such bill will be dismissed upon demurrer. Hoke *v.* Davis, 33 W. Va. 485, 10 S. E. 820.

Jurisdiction Concurrent. — Courts of equity have jurisdiction concurrent with courts of law in matters of account where the accounts are mutual and complicated, and also where they are all on one side, if discovery is sought and is material to relief; but when the mutual accounts are not complicated, or the accounts are all on one side, and no discovery is required, courts of equity will decline jurisdiction. Grafton *v.* Reed, 26 W. Va. 437; Lafever *v.* Billmyer, 5 W. Va. 33; both cited in Van Dorn *v.* Lewis County Court, 38 W. Va. 267, 18 S. E. 579; Hale *v.* White, 47 W. Va. 700, 35 S. E. 884; Sturtevant *v.* Goode, 5 Leigh 83, 27 Am. Dec. 586.

c. Collection of Money Due on Bond.

Where a party is entitled to the amount of a particular bond, when collected, he may sue in chancery to discover whether, and at what time, the money due on the bond was collected. Scott *v.* Osborne, 2 Munf. 413.

d. Facts Relating to Plaintiff's Case.

As a party is not entitled to a discovery of facts whereby his adversary's case rests, but only of facts necessary to his own, an injunction should not be awarded to restrain a telegraph company from going on to a plaintiff's land with a view of condemning a right of way, until a discovery be had of the company's incorporation and proceedings authorizing the condemnation. Norfolk, etc., R. Co. *v.* Postal Tel. Cable Co., 88 Va. 932, 14 S. E. 689; Norfolk, etc., R. Co. *v.* Postal Tel. Cable Co., 88 Va. 936, 14 S. E. 690.

e. Lost Instruments.

See the title LOST INSTRUMENTS AND RECORDS.

Set Up a Lost Instrument. — It is well established that equity has jurisdiction where a lost instrument is to be set up, especially where discovery is necessary, notwithstanding courts of law now exercise jurisdiction in the same cases. Yates *v.* Stuart, 39 W. Va. 124, 19 S. E. 423; Hickman *v.* Painter, 11 W. Va. 386; Mitchell *v.* Chancellor, 14 W. Va. 22.

f. New Promise under Statute of Limitations.

See generally, the title LIMITATION OF ACTIONS.

Though the rule was otherwise

formerly, it is now well settled that a bill of discovery will lie to compel the defendant in an action at law, who had pleaded the statute of limitations, to answer whether he had not made a new promise. Baker *v.* Morris, 10 Leigh 285.

g. Notice to Purchaser of Real Estate.

H. purchased of B. a London estate, thereby hindering L. from enjoying a right and exercising a lawful power derived to him from an agreement and letter of attorney from B. to L. Equity will also grant him relief in a suit for discovery whether H. had such notice, and though H.'s answer deny such notice, the bill is still sustainable in order that plaintiff may endeavor to prove the purchase such an one as ought not to avail him who pleaded it. Love *v.* Braxton, Wythe 144.

h. Presumption of Payment.

See the title PAYMENT.

In a suit in equity to enforce payment of a bond debt twenty-eight years after the right to demand it accrued, there being no remedy under the circumstances of the case but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, calls on the defendant to answer, whether the debt has been paid or not. Held, the defendant was properly compelled to answer to that point. Baker *v.* Morris, 10 Leigh 285; cited in Kyle *v.* Kyle, 1 Gratt. 526.

i. Purchaser of Slaves.

J. C. bequeathed to his son, F. C., sundry slaves with limitation over upon F. C.'s death without issue. F. C. sold some of these slaves, one to an unknown purchaser, and then died without issue. The parties entitled under the limitation over file a bill against the curatrix of F. C. and the purchaser of one of the slaves, to recover the slaves, or the value of those sold, and seek a discovery as to the unknown purchaser. It was held, that all the parties being before the court, the plaintiffs may elect to proceed for the recovery of the slaves specifically, or for the value of those sold, from the curatrix of F. C. And to avoid multiplicity of suits, and because the bill seeks a discovery in relation to one of the slaves sold to some person unknown, a court of equity has jurisdiction of the case. Cross *v.* Cross, 4 Gratt. 257.

j. Separate Estate of Married Women.

In a bill to subject the separate estate of a married woman to the payment of claims against her, the plaintiffs have the right to a discovery by answer in aid of the ascertainment of the wife's personal estate, no matter what other independent means and method of proof there may be. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

k. Settlement of Decedents' Estates.

See the title EXECUTORS AND ADMINISTRATORS.

Proceedings for Discovery of Assets.—A creditor may file a bill of discovery against the personal or real representative of the estate of a decedent, to discover the assets liable to the payment of his debt. Poling *v.* Huffman, 39 W. Va. 320, 324, 19 S. E. 422, 423, citing White *v.* Bannister, 1 Wash. 168; Duval *v.* Trent, 6 Munf. 29; Clarke *v.* Webb, 2 Hen. & M. 8. White *v.* Bannister, 1 Wash. 166, is also cited for this proposition in Gordon *v.* Justices of Frederick, 1 Munf. 1.

Where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative, to the injury of the plaintiff. Hale *v.* White, 47 W. Va. 700, 35 S. E. 884.

Bill by Administrator.—A bill of discovery is the proper remedy to be pursued by the administrator of an estate against a defendant who has in his

possession chose in action and other personal estate of the decedent, the amounts, dates, and character of which are unknown to the complainant, and which the defendant refuses to disclose. There is no adequate remedy at law. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

Choses in Action.—A court of equity has jurisdiction to compel disclosure by a person who has possession of choses in action, which he claims as a gift mortis causa from an intestate, so as to enable the administrator to recover the same. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

Estoppel.—A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, files a bill in equity against the administrator for a discovery and account, and upon taking the account it appears, that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the endorser or assignor thereof. Held, under such circumstances, the technical estoppel will avail in equity as a defense against the creditor's claim. Dupuy *v.* Southgates, 11 Leigh 92.

Parties.—See post, "Parties," I, D.

The distributees of the estate are neither necessary nor proper parties to the bill. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

l. Usury.

See the title USURY.

A borrower may exhibit his bill in equity against the lender, and compel a discovery on oath of the money really lent, and the interest thereon or consideration therefor; and if the debt is secured by a deed of trust, an injunction may issue to prevent a sale thereunder during the pendency of the suit. Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810. See also, Davis *v.* Demming, 12 W. Va. 246; Ryan *v.* Krise, 89 Va. 728, 17 S. E. 128; Jones *v.* Cunningham, 7 W. Va. 707; W. Va. Code, 1899, ch. 96, § 7; Va. Code, 1904, §§ 2822, 2824.

The obligor in a bond secured by a deed of trust files a bill in equity against the obligee and the trustee, alleging that the bond was given for money borrowed at usurious interest, and that such interest (some of it compounded) was included therein; calling for a discovery of the amount of money advanced, and the rate of interest reserved; and praying an injunction to stay all proceedings on the trust deed, and the collection of the debt, until the matter can be fully heard in equity; that all compound, illegal and usurious interest may be expunged; that the plaintiff may have such further relief as his case may require and justice dictates; and that all persons be released from all penalties of the statute against usury. Held, the bill is not within the third section of the statute against usury, 1 Rev. Va. Code, ch. 102, and the plaintiff is only entitled to relief upon the terms of paying the principal money borrowed, with legal interest thereon. Whether the third section of the statute against usury, 1 Rev. Code, ch. 102, applies to the case of a bill not filed against the lender himself in his lifetime, but against his personal representative after his death? And per Tucker, P., it seems that it does not. Campbells *v.* Patterson, 11 Leigh 113.

Issues to Jury.—The Virginia Code of 1873, ch. 137, § 12, directing the court to cause an issue to be made and tried at its bar by a jury, to ascertain whether or not the transaction be usurious, did not apply, under any circumstances, where a discovery was sought. Keagy *v.* Trout, 85 Va. 390, 7 S. E. 329.

Where the bill charges that the debt was usurious and prays that the sale of land whereon it is secured, be enjoined, and that the usury be passed

on by a jury, and the amount actually due ascertained by the court, and no discovery is asked for, it is the duty of the court to direct the issues to be made up and tried by the jury. Va. Code, 1873, ch. 1371, § 12. Meem *v.* Dulaney, 88 Va. 674, 14 S. E. 363.

Continuance. — See the title CONTINUANCES, vol. 3, p. 297.

A continuance ought not to be granted at law, on the ground that the party, a few days before that appointed for the trial, filed a bill in equity for a discovery of usury, as auxiliary to his defense at law; unless he make affidavit, that the usury therein charged, had recently come to his knowledge. Ross *v.* Norvell, 3 Munf. 170.

m. To Ascertain Proper Parties.

Although as a general rule, a bill of discovery does not lie for the purpose of determining whom the plaintiff may sue at law, if the bill alleges that the defendants have been sued at law as late partners and sets out enough to show that a good cause of action has been alleged against the defendants as such copartners, and the defendants have filed a plea in abatement denying that the firm or company whose name is signed to the agreement sued on was, at the time the contract was made or at any time, a partnership composed of the defendants, they may be required to discover whether they were such partners to aid the plaintiff in maintaining his side of the issue thereby tendered. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

n. Witnesses.

A bill of discovery will not lie against a mere witness. Nobody can be compelled to answer such a bill except a person interested. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

C. FORM AND SUFFICIENCY OF THE PLEADINGS.

1. The Bill.

a. In General.

Bills for relief, may also contain prayers for the discovery of facts, which are essential to the relief prayed in the bill. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

b. Certainty.

The plaintiff, a banking company, go into equity for discovery and relief; and charge in their bill, that they lost from their banking house a large sum of money of their own property; that a considerable portion of this money had come into the hands of the defendant, who gave no value therefor; and though he knows it is the property of the plaintiffs, he refuses to surrender it to them, but retains and applies it to his own use; that the plaintiffs do not know the exact amount or description of money so received by the defendant, and can not ascertain these facts without a discovery from him; that he refuses to give any information on the subject, alleging that the money was delivered to him by J. M. P., his client, in the confidence which exists between the client and attorney; and that he is not at liberty to disclose any matter connected with the delivery. They charge that this is a mere evasion, for that M. P. had in his lifetime absolved the defendant from all obligation of confidence, and directed him to pay over the money to the plaintiffs; that M. P. had never since set up any claim to the money, but is dead insolvent, and without any personal representative. The bill then prays for a discovery and relief. Upon demurrer to the bill; held, bill is not too uncertain. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

Inconsistency. — Because the allegations in a bill for discovery are of different natures, and perhaps inconsistent, this does not make the bill inconsistent, when these facts do not go to make out the plaintiff's case as a foundation for the relief, but are merely ancillary to the main purpose of the bill. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611.

c. Time of Filing.

While Case Is Pending at Law.—If it is necessary for a defendant to file a bill of discovery in order that he may get justice in his case at law, such bill must be filed while the case at law is pending, or some very good reason must be shown why it was not done. Zoll *v.* Campbell, 3 W. Va. 226; Faulkner *v.* Harwood, 6 Rand. 125.

In Faulkner *v.* Harwood, 6 Rand. 125, it was decided that a bill of discovery to obtain evidence which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time. Judge Carr said that the bill must be filed as soon as the party discovers the necessity of appealing to the conscience of his adversary. In Green *v.* Massie, 21 Gratt. 356, it is said that Judge Green, in Norris *v.* Hume, 2 Leigh 334, expressed his entire concurrence with the views of Judge Carr.

To the point that a bill of discovery to obtain evidence which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time. Faulkner *v.* Harwood, 6 Rand. 125, was cited in George *v.* Strange, 10 Gratt. 499; Haseltine *v.* Brickey, 16 Gratt. 116; Green *v.* Massie, 21 Gratt. 356; Zoll *v.* Campbell, 3 W. Va. 226.

If it be necessary, to enable a defendant in a suit at law to get at the justice of his case, to file a bill of discovery, such bill must be filed while the case at law is pending, or some very good reason should be assigned, in a subsequent bill of discovery asking the judgment at law in the case to be enjoined, why the bill was not filed pending the suit at law. Zoll *v.* Campbell, 3 W. Va. 226, citing Faulkner *v.* Harwood, 6 Rand. 125.

After verdict and judgment, it is too late to file a bill of discovery, except perhaps where circumstances of fraud, accident, mistake or other circumstance are suggested. Norris *v.* Hume, 2 Leigh 334, 21 Am. Dec. 631, citing Faulkner *v.* Harwood, 6 Rand. 125.

The general rule is that after a judgment at law, a party comes too late with a bill of discovery of facts to sustain his defense in an action at law. After judgment is rendered, he must show a clear case of accident, or surprise, to entitle him to discovery and relief against it. Green *v.* Massie, 21 Gratt. 356; Norris *v.* Hume, 2 Leigh 334, 21 Am. Dec. 631.

Thus an injunction to a judgment at law will not be sustained to allow a defendant at law to set up payments or offsets, which he might have pleaded at law; and if a discovery is necessary to enable him to prove them, he must file his bill of discovery in aid of his defense at law, or he must file interrogatories to the plaintiff under the statute. George *v.* Strange, 10 Gratt. 499. See also, White *v.* Washington, 5 Gratt. 645.

d. Allegations.

(1) In General.

It is necessary that a mixed bill for discovery and relief should show that the plaintiff has a good case for recovery or defense, in order to obtain discovery. Munson *v.* German Ins. Co., 55 W. Va. 423, 47 S. E. 160.

(2) Materiality and Necessity.

(a) Pure Bills of Discovery.

Although it is necessary in a pure bill of discovery to show that the discovery sought is material to the support of the party's claim and how it is material, it is not necessary to aver that the discovery is absolutely essential or indispensable for that purpose. It is sufficient to show that it is material evidence, moreover it need not be alleged that the plaintiff has no other evidence or witnesses to establish the facts about which discovery is sought, but he is entitled to the discovery if it be merely cumulative evidence of material facts. Russell *v.*

Dickeschied, 24 W. Va. 70; M'Farland *v.* Hunter, 8 Leigh 492, 493; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Grafton *v.* Reed, 26 W. Va. 437; Norris *v.* Hume, 2 Leigh 334, 21 Am. Dec. 631.

Thus where an attempt is made to enforce a legal demand in a court of equity, and the need of a discovery is the alleged ground of equity, there must be an averment that the discovery is material and necessary. Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415; Childress *v.* Morris, 23 Gratt. 802.

(b) Bills for Discovery and Relief.

But in a bill for discovery and relief on a demand not cognizable in equity, the only ground of jurisdiction being the necessity of discovery, he must state that the evidence is indispensable for want of other evidence; and, if it appears from the bill or on proof that the plaintiff has other adequate evidence, the bill will be dismissed on demurrer. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905.

"It is perfectly clear as a general rule, that in a bill to substitute an equitable for a legal forum, a prayer for a discovery, without any averment showing its materiality or necessity, is naught. If this court has tolerated a departure from this rule, in regard to slave property (Gregory *v.* Marks, 1 Rand. 355), it has been where the necessity for a discovery was supposed to be incidental, at least prima facie, to the nature of the demand; as where the suit is to recover a stock of slaves, after a considerable lapse of time, and there has been such an increase as would raise a fair presumption that the plaintiff is ignorant of their names, ages and residence. But even under such circumstances, if it may be inferred from the statements in the bill, or the evidence in the cause, that no such difficulty in point of fact exists, a court of equity will not take cognizance of the case, unless there be some other ground for the exercise of its equitable jurisdiction. Hardin *v.* Hardin, 2 Leigh 572." Armstrong *v.* Huntons, 1 Rob. 323.

Where a party seeks to be heard in a court of equity on the ground that he is entitled to a discovery, and his bill and exhibits show that he already has information he pretends to seek by his prayer for discovery, such prayer will not entitle him to relief in equity. Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905.

Allegations that certain facts are known to the defendant and ought to be disclosed by them, is not sufficient to give a court of equity jurisdiction on the ground of discovery. It must be further alleged that the plaintiff can not prove those facts by other testimony. Duvals *v.* Ross, 2 Munf. 290.

Extent of Rule. — It must be observed, however, that the principle of averring that discovery is indispensable to enable the plaintiff to sustain his demand applies only where his demand is one cognizable at law, not where his demand is of a nature itself entitling him to go into equity. Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

Examples.—As a bill for discovery lies only in cases where the plaintiff's rights can not be established without the discovery sought for, it does not lie to discover the name of a negro child, whose mother is known, nor the profits of slaves, of which a jury are the best judges. Bass *v.* Bass, 4 Hen. & M. 478.

Inspection of Corporate Books. — See the title CORPORATIONS, vol. 3, p. 510.

"The first question presented is, did the court err in overruling the demurrers for want of equity in the bills? The bills allege the want of discovery. But this is a mere pretense, as the defendant is a public corporation, required to keep records of all its doings

open to the inspection of the public, so that, if plaintiff really wanted to know as to the expenditures of the court, he could find this out by an examination at the clerk's office." Van Dorn *v.* Lewis County Court, 38 W. Va. 267, 18 S. E. 579.

Papers Taken from Possession of Testator.—Nor are allegations in a complaint by an executor that his testator in his lifetime owned certain approved bonds, which were in his possession a few days before his death, and that after his death they were found in the possession of the defendant and under his control, and were not assigned to him, sufficient to make out a case against the defendant so as to entitle the plaintiff to discovery. Morrison *v.* Grubb, 23 Gratt. 342.

Plats and Deeds.—A bill of discovery which charges that the defendant has in his possession a deed and plat which will show the true boundaries of land claimed by the complainant, and which prays for the production of the deed, but does not aver that the deed is necessary for the purpose, but admits that the courses and distances are well known to the complainants, is bad on demurrer. The complainant has an adequate remedy at law. Collins *v.* Sutton, 94 Va. 127, 26 S. E. 415.

(c) Dismissal of Bill.

Where it appears from the evidence, or from the bill and answer, that as to the material facts alleged in the bill the plaintiff had full proof, and that discovery is not indispensable, the bill will be dismissed at the hearing, for want of jurisdiction. Jones *v.* Bradshaw, 16 Gratt. 355; Childress *v.* Morris, 23 Gratt. 802; Hall *v.* Smith, 25 Gratt. 70; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

Costs.—Where the bill calls for a discovery of facts which the evidence shows were known to the plaintiff at the time, or which he had the means of knowing, and this call for discovery is the only ground for equity jurisdiction, the bill will be dismissed, with costs. Hale *v.* Clarkson, 23 Gratt. 42.

(3) Interest of Defendant.

The interest of the defendant must be clearly set out in the bill. If suit has been brought the bill must set forth its nature with certainty to a common intent so that the court may judge whether facts alleged are such as will support an action. Unless the facts set forth in the bill admitting their truth would enable the plaintiff to maintain an action he has no title to the assistance of a court of equity to obtain evidence of the truth of the case. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

"It is also requisite that the party seeking discovery should show that he has a legal claim upon the defendant. The court does not compel discovery for the mere gratification of curiosity, but in aid of some other proceeding. * * * With regard to the qualifications of the parties, then, it seems that if the plaintiff can show a title to the subject matter in himself, and also an interest in the defendant, and an apparent legal right against the latter concerning it, this court will give discovery in aid of an action at law, but not otherwise." Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

e. Prayer for Injunction.

See the title INJUNCTIONS.

In General.—It is a natural, if not a necessary incident, to the usefulness of a bill of discovery, that in the meantime, and until the discovery is obtained, the proceedings in the suit at law should be stayed, for otherwise the discovery might be wholly fruitless. Hence bills of discovery usually contain a prayer for an injunction until the discovery is obtained. In one sense this is a prayer for relief. But it being relief which is granted upon motion, without any hearing of the rights or merits involved in the cause, it does

not fall within the scope of this rule. Russell *v.* Dickeschied, 24 W. Va. 61.

Dissolution of Injunction without Answer. — A temporary injunction awarded upon a pure bill of discovery to restrain the defendant from prosecuting her action of detinue, until she answered the bill, was on motion of the defendant dissolved without any answer thereto being tendered or filed. Held, the court erred in dissolving said injunction. Russell *v.* Dickeschied, 24 W. Va. 61.

Where there is nothing charged in a bill of discovery, which also asks an injunction to a judgment at law, to entitle the complainant to an injunction, there is no error in dissolving the injunction without the answer of the party from whom the discovery is sought. Zoll *v.* Campbell, 3 W. Va. 226.

Adequate Remedy at Law.—See the title ADEQUATE REMEDY AT LAW, vol. 1, p. 161.

In a bill of discovery, if the defendant makes no discovery, but on the contrary, negatives the allegations of the bill, the injunction awarded on the bill should be dissolved. Webster *v.* Couch, 6 Rand. 519.

f. Verification.

See generally, the title PLEADING.

A pure bill of discovery need not be on oath. McFarland *v.* Hunter, 8 Leigh 489.

g. Multifariousness.

See the title MULTIFARIOUSNESS.

Where an agent, appointed by certain heirs to sell land, does so, but fails to pay over the proceeds, and all the heirs unite in a suit for the recovery, and call for a discovery, the bill is not multifarious. Segar *v.* Parrish, 20 Gratt. 672.

h. Supplemental Bill.

See generally, the title SUPPLEMENTAL PLEADINGS

It is a long and well-settled rule of equity, that in a reference to a master, the court may direct the examination of the parties on oath, and such examination will have the effect of an answer. The reference, with the order for examining the defendant, has the effect of a supplemental bill of discovery, and the examination the effect of an answer to that bill. Templeman *v.* Fauntleroy, 3 Rand. 434.

i. Cross Bill.

See the title CROSS BILLS, ante, p. 100.

In General.—The cross bill is usually brought to obtain a necessary discovery of facts in aid of the defense to the original bill. Higginbotham *v.* May, 90 Va. 233, 17 S. E. 941; West Virginia, etc., Co. *v.* Vinal, 14 W. Va 637.

Nature of Cross Bill for Discovery.—A cross bill is usually brought either to obtain a necessary discovery of facts in aid of the defense to the original bill, or to obtain full relief to all, in reference to the matters of the original bill. It is brought by the defendant against plaintiff or others in a former bill depending, concerning some matter in the former bill, and it is a mere auxiliary suit, and must confine itself to matters embraced in the original suit. But where a cross bill seeks relief as well as discovery, then the relief prayed for in the cross bill must be equitable relief, for, to the extent that the cross bill prays relief, it is in the nature of an original bill, and must come under some head of equitable relief, or else it is demurrable. West Virginia, etc., Land Co. *v.* Vinal, 14 W. Va. 637; Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297; McMullan *v.* Eagan, 21 W. Va. 233.

Where, in a bill for specific performance, the defense is based on a deed alleged to be in the possession of the plaintiff, and which is a muniment of title, the defendant may maintain a cross bill for the discovery and pro-

duction of the deed. Norfolk, etc., R. Co. *v.* McGarry, 42 W. Va. 395, 26 S. E. 297.

Answers as Cross Bill.—If the defendant file an answer which seeks no discovery, and makes no defense not equally available by way of answer under the former practice, such an answer can not be regarded as a cross bill filed under § 35, ch. 125, W. Va. Code, and no special replication should be required or permitted to such answer. Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21.

Dismissal.—A cross bill which seeks no discovery, and makes no defense not equally available by way of answer, should be dismissed as improperly filed. Story, Eq. Pl. (8th Ed.), § 389; Kilbreth *v.* Root, 33 W. Va. 600, 11 S. E. 21; Chalfants *v.* Martin, 25 W. Va. 394-396; Enoch *v.* Petroleum Co., 23 W. Va. 314.

j. Dismissal of Bill.

Where to a bill calling for discovery and alleging fraud, there is a responsive answer positively denying the allegations, and they are unsustained by evidence at the hearing, the bill must, of course, be dismissed with costs. Saunders *v.* James, 85 Va. 936, 9 S. E. 147.

Dismissal as Bar to Another Suit.—Defendant files an answer to a bill of discovery, in which, without responding to the allegations and interrogatories of the bill, he states that the same plaintiffs had heretofore filed a bill against him for the same subject matter, and that upon a demurrer thereto the same had been dismissed by a decree of the court, which decree remained in full force and unreversed; and he sets up that decree in bar to the last suit. Quære: If bill dismissed upon demurrer is a bar to another suit upon the same subject matter? Northwestern Bank *v.* Nelson, 1 Gratt. 108.

k. Bill as Evidence.

The plaintiffs, a banking company, go into equity for discovery and relief; and charge in their bill, that they lost from their banking house a large sum of money of their own property; that a considerable portion of this money had come into the hands of the defendant, who gave no value therefor; and though he knows it is the property of the plaintiffs, he refuses to surrender it to them, but retains and applies it to his own use; that the plaintiffs do not know the exact amount or description of money so received by the defendant, and can not ascertain these facts without a discovery from him; that he refuses to give any information on the subject, alleging that the money was delivered to him by J. Defendant states in his answer, that the former bill, which was sworn to by the cashier of the bank, and which he exhibits with his answer, and makes a part thereof, charges that the money, of which a discovery is now asked from the defendant, was taken from the banking house of the plaintiffs by robbery; that the same was shortly thereafter received by the defendant from one or more of the robbers, and had been withheld by him from the plaintiffs, with a knowledge of the fact that it was their property, and that they had been robbed thereof as aforesaid; but disclaims imputing to the defendant a knowledge of these facts at the time he received the money. Held, the facts if proved are sufficient to protect the defendant from making the discovery asked. The bill sworn to by the cashier of the plaintiffs, is legal, and sufficient evidence for the defendant, to prove the facts therein stated. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

2. Demurrer.

In General.—When a discovery is sought by bill in chancery, for the purpose of being used in an action at law, any objection to the discovery must be made by demurrer, plea or answer to the bill; and if the defendant sub-

mits to make the discovery, or objects, and his objection is overruled, he can not afterwards exclude the evidence on the common-law trial. But the rule is otherwise as to interrogatories propounded under the authority of the statute in a common-law action. Poindexter *v.* Davis, 6 Gratt. 492.

Exposure to Pains, Penalties and Forfeitures.—See post, "Privilege from Discovery," I, E.

If the objection, that an answer will expose the defendant to pains, penalties, or punishment, appears upon the face of the bill, the defendant may demur. Northwestern Bank *v.* Nelson, 1 Gratt. 108. See Poindexter *v.* Davis, 6 Gratt. 492.

But when a bill states a case for equitable relief, independent of the discovery sought, which will incriminate him, it is not demurrable simply because it calls for such discovery. The defendant has the right to refuse the discovery, if he so elects. Dulany *v.* Smith, 97 Va. 130, 33 S. E. 532.

3. The Plea.

Plea.—If the objection to the discovery does not appear upon the face of the bill, the defendant must claim his protection by a plea, the averments of which, if traversed by replication, must be proved. Northwestern Bank *v.* Nelson, 1 Gratt. 108. See Poindexter *v.* Davis, 6 Gratt. 492, opinion of Baldwin, J.

Plea to Jurisdiction.—A court of chancery has jurisdiction in all cases where a discovery is wanting, and where this ground of jurisdiction is denied by plea, the question must be tried like any other question of fact. Pryor *v.* Adams, 1 Call 383.

Plea in Abatement.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 12.

"It would seem to be well settled, that if the matter of the bill is not proper for the jurisdiction of any court of equity, the objection may be made by plea or demurrer, and it may be taken at the hearing. The plea in abatement is only necessary where it appears that some other court of equity has jurisdiction rather than that in which the suit is brought. Jones *v.* Bradshaw, 16 Gratt. 355." Green *v.* Massie, 21 Gratt. 356.

4. The Answer.

a. Necessity.

See ante, "Prayer for Injunction," I, C, 1, e.

Where there is nothing charged in a bill of discovery, which also asks an injunction to a judgment at law, to entitle the complainant to an injunction, there is no error in dissolving the injunction without the answer of the party from whom the discovery is sought. Zoll *v.* Campbell, 3 W. Va. 226.

b. Sufficiency of Answer.

As a general rule the defendant must answer fully all the material allegations in the bill, but an answer to a bill of discovery is sufficient, when it shows that the defendant is protected from making the discovery sought for by the bill. Northwestern Bank *v.* Nelson, 1 Gratt. 108; Hogshead *v.* Baylor, 16 Gratt. 99.

c. Answer of Corporation.

The answer of a corporation should be signed by the president, with the seal of the corporation affixed. It is not necessary that it should be sworn to. If the plaintiff desires to have a sworn answer under the provisions of § 38, ch. 125, W. Va. Code, or otherwise, he should make such officers, members, or agents of the corporation, within whose knowledge the facts are supposed to be, codefendants in his bill, and require from them a discovery under oath. Teter *v.* West Virginia, etc., R. Co., 35 W. Va. 433, 14 S. E. 146.

Answer under Oath.—"Corporations can not answer under oath, but only under their common seal, and for this reason, in order to prevent a failure of justice, it has long been the settled

law in this country and in England, when a discovery is desired, to make such of the officers or individual corporators as are supposed to be personally cognizant of the facts wanted, parties defendant along with the company itself." Roanoke St. Ry. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295. See also, Baltimore, etc., R. Co. *v.* Wheeling, 13 Gratt. 40.

When discovery from a corporation is asked it is indispensable to make some proper officer of it a defendant, as a corporation can not answer under oath, and therefore the practice is to make such officer a party. Teter *v.* West Virginia, etc., R. Co., 35 W. Va. 433, 14 S. E. 146; Roanoke Street R. Co. *v.* Hicks, 96 Va. 510, 32 S. E. 295. In the latter case the Virginia court said: "A bill can not be maintained against a corporation alone, as one for discovery, it being unable to answer under oath." Munson *v.* German Ins. Co., 55 W. Va. 423, 47 S. E. 160.

d. Right to Answer under Oath.

It is a settled principle in equity, that when a bill is filed for relief, the complainant, according to the equity practice, can not, by disclaiming the benefit of discovery, deprive the defendant of the right to answer on oath and have the advantage of such answer as evidence in his favour, so far as it is responsive, even though the bill does not call for an answer, but, on the contrary, expressly waives it. Jones *v.* Abraham, 75 Va. 466; Fant *v.* Miller, 17 Gratt. 187, opinion of Moncure, J.; Thornton *v.* Gordon, 2 Rob. 719.

But see Va. Code, § 3281 (acts, 1883-84, p. 15), as to the effect of an answer as evidence, when the bill waives the answer under oath.

e. Answer as Evidence.

(1) In General.

Where a plaintiff comes into equity on the ground of discovery, the whole answer is to be read, if it is used at all, as the testimony of a witness; and no part of it, pertinent to the discovery, is to be rejected because it is affirmative matter in avoidance of that which is admitted to be true. But though the answer is to be read, it is subject to be discredited, in the same manner as the testimony of any other witness. Lyons *v.* Miller, 6 Gratt. 427; Fant *v.* Miller, 17 Gratt. 187; Thompson *v.* Clark, 81 Va. 422; Jones *v.* Abraham, 75 Va. 466; Powell *v.* Manson, 22 Gratt. 190; Miller *v.* Blose, 30 Gratt. 754.

(2) Responsive Answers.

When the plaintiff, by bill of discovery, seeks a discovery from the defendant as to any matter of fact, the answer is evidence for the defendant so far as it is responsive to such bill, as to the fact as to which discovery is sought; yet as to matter in respect of which the bill seeks no discovery, if the answer alleges anything affirmatively, it is not evidence for the defendant, but it is to be proved by him. Jones *v.* Cunningham, 7 W. Va. 707. See, in accord, Taylor *v.* Moore, 2 Rand. 575 and 576, opinion of Judge Green.

When the plaintiff in equity, by his bill, calls for a material disclosure from the defendant on oath, and the defendant in his answer on oath makes such disclosure fully and unequivocally, the answer to the extent of such disclosure, is said to be responsive to the bill, and the statement must be taken as true, unless overcome by the satisfactory testimony of at least two opposing witnesses, or of one witness with clear corroborating circumstances. Shurtz *v.* Johnson, 28 Gratt. 657; Jones *v.* Cunningham, 7 W. Va. 707.

An answer in chancery to a bill of discovery is evidence so far as it is responsive to its allegations, though the bill is not a pure bill of discovery; and according to the well-established rule, so far as it is responsive, it is to be taken as true, unless it be contradicted by two witnesses, or one witness and corroborating circumstances. Morrison *v.* Grubb, 23 Gratt. 342.

Where the complainants, in a bill, state that they have no means of proving the allegations therein except by a discovery from the defendant, and call for a discovery, they thereby make the answer evidence upon the matter in issue, and in so far as it is responsive to the interrogatories of the bill, the whole of it is to be taken as evidence for the defendants. Ward *v.* Cornett, 91 Va. 676, 22 S. E. 494.

Must Answer on Own Knowledge.—The answer of a defendant is not evidence in his behalf, when he does not profess to answer on his own knowledge, but it can be treated only as a plea of denial. Jones *v.* Abraham, 75 Va. 466.

Discovery of Usury.—Where the debtor calls on the creditor to answer under oath and discover usury, the answer of the creditor under oath, when responsive to the bill, must be accepted as true, in the absence of other evidence sufficient to overcome such answer. Ward *v.* Cornett, 91 Va. 676, 22 S. E. 494; Morrison *v.* Grubb, 23 Gratt. 342; Fant *v.* Miller, 17 Gratt. 187; Corbin *v.* Mills, 19 Gratt. 438; Shurtz *v.* Johnson, 28 Gratt. 657; Bell *v.* Moon, 79 Va. 341; Thompson *v.* Clark, 81 Va. 422.

Conclusiveness of Answer.—In every case the answer of a defendant to a bill filed against him upon any matter stated in the bill and responsive to it, is conclusive evidence in his favor, as to matters of fact of which the bill seeks a disclosure, unless overcome by testimony of two witnesses or of one witness and other corroborating circumstances and facts, which give it a greater weight than the answer. The above rule applies where a material disclosure is called for by the bill and made by the answer. Fant *v.* Miller, 17 Gratt. 187; Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

The answer to a bill of discovery, as to matters discovered by it in response to the prayer of the bill, is conclusive on the complainant, but as to the other matters responsive to the bill is only entitled to the same weight, as evidence, as if the bill had been for relief as well as discovery; that is, it can only be overcome by the evidence of two witnesses, or one witness and corroborating circumstances, or by circumstances alone equal to one witness and corroborating circumstances, or by documentary evidence alone. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

(3) Overcoming Answer.

By the established practice of equity, the answer can not be overturned by extrinsic evidence, since to falsify the allegation of a necessity for a discovery would defeat the jurisdiction of the court whose aid the plaintiff has invoked. Thompson *v.* Clark, 81 Va. 422.

"Where a cause is retained which is brought into equity on the sole ground of discovery, and of which jurisdiction is acquired on that ground alone, the plaintiff must be content to have it disposed of in accordance with the established practice of the equity forum; that is to say, in accordance with the rule which does not permit the answer in such a case to be overturned by extrinsic evidence, since to falsify the allegation of a necessity for a discovery would defeat the jurisdiction of the court whose aid the plaintiff has invoked. 2 Tucker's Comm. 503." This was the opinion in Thompson *v.* Clark, 81 Va. 427, following the important case of Fant *v.* Miller, 17 Gratt. 187, which overruled the doctrine of Lyons *v.* Miller, 6 Gratt. 427. See further, Chapman *v.* Turner, 1 Call 280; Smith *v.* Smith, 92 Va. 696, 24 S. E. 280. Where, however, the discovery sought by a technical bill of discovery, is required to be used in a trial at law, the general rule does not apply, since the plaintiff has his election to use the answer or not. Thornton *v.* Gordon, 2 Rob. 725; Powell *v.* Manson, 22 Gratt. 190; Jones *v.* Cunningham, 7 W. Va. 707.

Though the general rule is that written evidence of indebtedness can not be contradicted or altered by evidence of any verbal contemporaneous agreement between the parties, still where a bill calls on a defendant for a discovery as to transactions between the parties, the answer must be treated not only as evidence, but as evidence introduced by the plaintiff. Thompson *v.* Clarke, 81 Va. 422.

f. Effect of Answer to Pure Bill of Discovery.

"All the authorities hold that where the bill seeks no relief and is merely a bill of discovery, the object of the suit is accomplished and the suit itself is ended as soon as the defendant puts in his answer. 1 Pom. Eq. Jur., § 191; Story's Eq. Jur., § 1483; Mit. Eq. Pl., by Jeremy, 16 Jer. Eq. Jur., 257, 258; Spens. Eq. Jur., 677, 678; Adam's Eq., 6 Ed., 20." Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

g. Appeals.

The Order Requiring an Answer.—An appeal lies from an order requiring an answer to a bill of discovery, when the amount involved in the action is of greater value or amount than one hundred dollars exclusive of costs, although it is not an order for the payment of money nor one directly involving freedom. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

D. PARTIES.

1. In General.

In a bill in chancery brought for discovery and for a conveyance of land or other estate, all persons interested in such land, or other estate, ought to be made parties. Keys *v.* Lambert, 1 Hen. & M. 330.

"The practice of joining as defendants other persons than the real parties in interest, for the purpose of discovery and costs, seems to be now limited both to cases of fraud and to persons who are strictly agents, including in that term solicitors and attorneys, who are arbitrators." Alexander *v.* Davis, 42 W. Va. 465, 26 S. E. 291.

2. In Proceedings for Settlement of Decedents' Estates.

Distributees.—The distributees of a decedent are neither necessary nor proper parties to a bill of discovery, brought to discover facts from a person who has possession of a chose which he claims as a gift mortis causa, from an intestate, and which the administrator wishes to get possession and control of. Smith *v.* Smith, 92 Va. 696, 24 S. E. 280.

Securities of Executor.—After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for discovery of the assets, to which suit the securities of the executor and all other persons (however remotely concerned in interest), against whom a decree can be rendered, ought to be made parties. Clarke *v.* Webb, 2 Hen. & M. 8.

Parties Plaintiff.—Quære, whether a creditor at large can maintain a bill in chancery against the executor of the debtor, for a discovery and account of assets, and satisfaction? Poindexter *v.* Green, 6 Leigh 504.

But the statutes in Virginia and West Virginia now authorize suits by creditors at large. Va. Code, 1887, § 2460; W. Va. Code, ch. 133, § 2. See Wallace *v.* Treakle, 27 Gratt. 479 (followed in Johnston *v.* Straus, 26 Fed. Rep. 68, 69); Tuft *v.* Pickering, 28 W. Va. 330; Watkins *v.* Wortman, 19 W. Va. 82; Poindexter *v.* Green, 6 Leigh 504.

3. Officers and Agents of Private Corporations.

See ante, "Answer of Corporation," I, C, 4, c.

A bill can not be maintained against a corporation for discovery without making a proper officer of it a party. Munson *v.* German American Ins. Co., 55 W. Va. 423, 47 S. E. 160.

4. Personal Representative.

The plaintiffs, a banking company, go into equity for discovery and relief; and charge in their bill, that they lost from their banking house a large sum of money of their own property; that a considerable portion of this money had come into the hands of the defendant, who gave no value therefor; and though he knows it is the property of the plaintiffs, he refuses to surrender it to them, but retains and applies it to his own use; that the plaintiffs do not know the exact amount or description of money so received by the defendant, and can not ascertain these facts without a discovery from him; that he refuses to give any information on the subject, alleging that the money was delivered to him by J. M. P., his client, in the confidence which exists between the client and attorney; and that he is not at liberty to disclose any matter connected with the delivery. They charge that this is a mere evasion, for that M. P. had in his lifetime absolved the defendant from all obligation of confidence, and directed him to pay over the money to the plaintiffs; that M. P. had never since set up any claim to the money, but is dead insolvent, and without any personal representative. The bill then prays for a discovery and relief. Upon demurrer to the bill, held, M. P.'s representative not a necessary party. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

E. PRIVILEGE FROM DISCOVERY.

See post, "Interrogatories," II.

1. In General.

It is a well-settled rule of equity, that a defendant is not bound to disclose or answer matters which will expose him to pains, penalties or punishment, or to a criminal prosecution; and it is not necessary that it should be made to appear that the defendant will certainly be exposed to peril by making the discovery sought, but it is enough if it appears that by answering the interrogatories of the bill he will thereby probably be subjected to danger. Northwestern Bank *v.* Nelson, 1 Gratt. 108; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Dulaney *v.* Smith, 97 Va. 130, 33 S. E. 533; Young *v.* Scott, 4 Rand. 416, opinion of Carr, J.

Moreover, the rule that a party is not bound to answer interrogatories, which may subject him to a penalty or forfeiture, is not confined to cases where the purpose of the action is to enforce a penalty or forfeiture; but extends to those where the discovery itself would expose the party to some action or suit, or any criminal or penal prosecution, tending to the like result. Poindexter *v.* Davis, 6 Gratt. 481.

Demurrer.—See ante, "Demurrer," I, C, 2.

A defendant is not bound to answer interrogatories which will expose him to pains, penalties, or punishment or to a criminal prosecution, or which will probably subject him to that danger, as no man can be required to criminate himself. But a bill which states a case for equitable relief, independent of such equitable relief, independent of such discovery, is not demurrable simply because it calls for such discovery. The defendant has the right to refuse the discovery, if he so elect. Dulaney *v.* Smith, 97 Va. 130, 33 S. E. 533.

2. Usury.

In the absence of legislative immunity, a bill calling for the discovery of usury, may be demurred to on the ground that it would subject the defendant to the particular penalties and forfeitures denounced by the act of usury, unless the plaintiff could show that he alone was entitled to those penalties and offered by his bill to waive them. And the legislature in Virginia, has provided such immunity by releasing the forfeitures which enured to the benefit of, and were vested in others, and adjusted the terms on which the requisite discovery

should be made. McPherrin *v.* King, 1 Rand. 172.

3. Prosecution Barred by Statute of Limitations.

If plaintiffs would rely upon the fact that the prosecution against the defendants is barred by the statute of limitations, and thus compel a discovery from them, this fact must be made to appear from the statements in the bill, or it can not be insisted on at the hearing of the cause. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

4. Persons Privileged.

See the title ATTORNEY AND CLIENT, vol. 2, p. 156.

a. Attorneys.

It is a settled rule of law, that counsels and attorneys ought not to be permitted, nor can they be compelled, to give evidence of facts imparted to them by clients, when acting in their professional character. Hence a bill of discovery will not lie to compel them to disclose communications to them by clients. Parker *v.* Carter, 4 Munf. 273; Clay *v.* Williams, 2 Munf. 105, 122.

The plaintiffs, a banking company, go into equity for discovery and relief; and charge in their bill, that they lost from their banking house a large sum of money of their own property; that a considerable portion of this money had come into the hands of the defendant, who gave no value therefor; and though he knows it is the property of the plaintiffs, he refuses to surrender it to them, but retains and applies it to his own use; that the plaintiffs do not know the exact amount or description of money so received by the defendant, and can not ascertain these facts without a discovery from him; that he refuses to give any information on the subject, alleging that the money was delivered to him by J. M P. his client, in the confidence which exists between the client and attorney; and that he is not at liberty to disclose any matter connected with the delivery. They charge that this is a mere evasion, for that M. P. had in his lifetime absolved the defendant from all obligation of confidence, and directed him to pay over the money to the plaintiffs; that M. P. had never since set up any claim to the money, but is dead insolvent, and without any personal representative. The bill then prays for a discovery and relief. Upon demurrer to the bill, held, equity has jurisdiction of the case to grant both the discovery and relief. There is nothing on the face of the bill which shows the defendant should be protected from answering it. Northwestern Bank *v.* Nelson, 1 Gratt. 108.

Pendency—Injunction of Secrecy Unnecessary.—The above restriction is not confined to facts disclosed in relation to a suit actually pending, but extends to all cases in which a counsel or attorney is applied to in the line of his profession, whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise; unless, indeed, the client should seem to vaunt his disclosures, and, as it were, challenge the bystanders to hear them. Parker *v.* Carter, 4 Munf. 273.

For example, where a lawyer was employed to execute a deed in trust for a daughter and her issue, even though the client was dead and the suit was between the parties claiming under such deed and the creditors of the son-in-law of the grantor, the lawyer was not permitted to give evidence as to the conversations of the grantor in relation to the object and the subject matter of the deed, to show that the deed was given to defraud creditors of the daughter's husband. Parker *v.* Carter, 4 Munf. 273.

b. Interpreters.

The rule protecting an attorney from disclosing a professional secret, applies to interpreters acting as organs of communication between the client and attorney. Parker *v.* Carter, 4 Munf.

273. See also, Clay *v.* Williams, 2 Munf. 105, 122, opinion of Judge Roane.

F. PRESENT STATUS OF REMEDY.

1. In Virginia.

It seems that, in Virginia, "bills of discovery are now entirely superseded in practice by two statutory provisions, one allowing a court of law to compel a discovery upon oath, in answer to interrogatories filed, wherever it would be compelled upon a bill for discovery, if the interrogatories have not been unreasonably delayed (Va. Code, ch. 164, §§ 3370-3372); and the other declaring parties to suits, with some important qualifications, to be competent to give evidence on their own behalf, and to be competent and compellable to attend and give evidence on behalf of any other party to the proceeding (Va. Code, 1887, ch. 164, §§ 3343-3351)." 4 Min. Inst. (3d Ed.) 1375; 1 Barton's Ch. Pr. (2d Ed.) § 323.

But Mr. Minor does not pretend that by these statutes or either of them, bills of discovery are abolished in Virginia. Before the passage of these statutes, courts of law had no authority to compel the parties in an action at law to disclose any facts within their knowledge for the benefit of the opposite party, and being interested in the result or the subject matter of the action they were incompetent to testify in their own behalf. The only means the party had under such circumstances of compelling a discovery from his adversary was by resorting to his bill of discovery in a court of chancery; and the necessity of compelling a discovery has always been recognized as one of the sources of the jurisdiction of a court of equity whether the same was exercised for the purpose of affording complete relief at its own bar, or of aiding other courts in the exercise of their legitimate jurisdiction. Russell *v.* Dickeschied, 24 W. Va. 61.

In Virginia the statute expressly provides that the section allowing interrogatories to adverse parties, shall not preclude a person from exhibiting his bill in chancery for a discovery, as he might have done if the section referred to had not been enacted. Va. Code, 1904, § 3372.

2. In West Virginia.

And in West Virginia, it has been held, that because recent statutes made adverse parties witnesses at the bidding of their adversaries, this does not take away the jurisdiction of equity to compel discovery. W. Va. Code, ch. 130, § 25; Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Russell *v.* Dickeschied, 24 W. Va. 61.

A bill of discovery may be filed by a party to an action at law to compel discovery in aid of the action or of the defense thereto, although by §§ 22, 23, ch. 130, W. Va. Code, the party filing such bill may compel the other party to attend and be examined as a witness for him in relation to the same matters. Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

Since all parties are competent witnesses, discovery is less needed, and therefore less frequently asked by technical bills of discovery, which have in large measure been superseded in practice by other methods of ascertaining facts from parties. Still, interrogatories more or less formal are common enough parts of bills for relief in aid of the ascertainment of material facts. Wick *v.* Dawson, 42 W. Va. 43, 24 S. E. 587.

"Bills merely for discovery are of much less frequent and extensive use now than formerly because of statutory provisions for the examinations of parties to actions at law as witnesses. Such provisions exist here. Code, ch. 130, §§ 22, 23. But these provisions have not taken away the jurisdiction in equity by bill of discovery. In Russell *v.* Dickeschied, cited, Judge Woods thoroughly discusses that question and it is there formally and deliberately settled. It is not denied in this case

that such jurisdiction exists." Hurricane Telephone Co. *v.* Mohler, 51 W. Va. 1, 41 S. E. 421.

II. Interrogatories.

A. STATUTORY PROVISIONS.

In any case at law a party may file in the clerk's office, and in a case or matter before a commissioner of a court, any person interested may file with such commissioner any interrogatories to any adverse party or claimant. Va. Code, 1904, § 3370. The provision in West Virginia is substantially the same as the above provision in Virginia. W. Va. Code, 1899, ch. 130, § 43.

The object of the legislature seems clear. They meant to give to either party in a suit at law, the benefit of a discovery from the other, without the expense and delay of a regular suit in chancery. To ascertain the amount of this benefit, we must look to the nature of the bill of discovery, and the weight which is given to the disclosures made by the defendant to such bill. M'Farland *v.* Hunter, 8 Leigh 491.

B. NATURE OF PROCEEDING.

The filing of interrogatories is a statutory substitute for a bill of discovery. Poindexter *v.* Davis, 6 Gratt. 481.

As to whether interrogatories are cumulative or exclusive of bills of discovery, see ante, "Present Status of Remedy," I, F.

The power of compelling a discovery in an action at law by propounding interrogatories, is derived altogether from our statute, Supp. Rev. Code, ch. 109, § 68, p. 161; and is confined in express terms to such interrogatories as the party would be bound to answer upon a bill of discovery in a court of chancery. Poindexter *v.* Davis, 6 Gratt. 481.

C. MATERIALITY OF INTERROGATORIES.

It is error, where a plea of payment is entered to an action on a bill of exchange, to require the plaintiff to answer interrogatories which tend to show that the bill was not made for a debt due from the defendant in his individual capacity, but as president of an incorporated company. Also to permit evidence to be heard which had a like tendency, the interrogatories and evidence being immaterial to the issue. Rand *v.* Hale, 3 W. Va. 495. See Campbell *v.* Campbell, 22 Gratt. 649.

Just before the death of C. he assigns all his bonds and notes to his brother, B., for himself and his brothers. The wife of B. survives him only two months. In a suit by her executors against the executors and legatees of C. for a settlement of the executorial accounts, the validity of the assignment by C. of his bonds and notes, as against his wife, is in question, and the court of appeals decides it is invalid, and sends the cause back for an account, with authority to the plaintiffs to propound to the defendants such interrogatories as may be pertinent and material to take the account according to the principles of the decree. The plaintiffs inquire what notes and bonds were assigned, and their amount, and when and how they had been distributed among the parties, which had and which had not, been collected, and the present condition of them. The defendants have no right to avail themselves of these questions for the purpose of making such answer as might tend to show the validity of such assignment; and then rely on these answers as ground for reversing the decree of the court of appeals. Such answers are impertinent and immaterial, and not according to the principles of the decree; and afford no ground for reversing it. Campbell *v.* Campbell, 22 Gratt. 649.

D. AWARDING THE COMMISSION.

A commission to examine one of the defendants in a suit as a witness, will be awarded as a matter of course, on

the motion of the plaintiff, saving all just exceptions. Plainville *v.* Brown, 4 Hen. & M. 482.

A commission can not issue at the instance of a defendant to examine the plaintiff as a witness in the cause. Ross *v.* Carter, 4 Hen. & M. 488.

E. THE ANSWER.

1. Rule to Compel Answer.

The party summoned to answer a suggestion, like a defendant summoned to answer a bill, is advised by the suggestion what he is to answer, and when and where; and upon his failure to do so the suggestor is entitled to his rule to compel an answer. O'Brien *v.* Camden, 3 W. Va. 20.

C. was summoned to answer a suggestion on the first day of a term. On the fifth day of the term the plaintiffs moved the court for a rule to compel C. to appear and answer, which the court refused upon the ground that the suggestion had not been docketed or the service of the summons proved, nor had it been in any way brought to the attention of the court, on the day to which it was returnable, and the case was discontinued. Held, that it was the duty of the clerk to put the case on the docket, and his failure to do so should not prejudice either party. O'Brien *v.* Camden, 3 W. Va. 20.

"There was an order in this case, at last September term, that the defendant should come into court to answer interrogatories, upon oath, as he had not answered. To this term he sent his answer, to which there was an objection, as being insufficient, and a motion was now made, to bring him in by a messenger. By the chancellor. The answer may be received, with liberty to except to it, since the order of the last term was not peremptory; in which case, the answer could only have been received with the leave of the court. For the future, the order will be to bring the party in, and a messenger will be sent for that express purpose in the first instance. Brown *v.* Wilson, 4 Hen. & M. 481.

2. Time Allowed to Answer.

"It was earnestly insisted in the argument here that the time prescribed in the summons within which Stringer & McKim were required to file their answers to the interrogatories before the commissioner, was not sufficient to give them reasonable notice of the filing of said interrogatories, and they were not, in fact, bound to return answers to them until the summons was duly served on them, according to § 5, ch. 188, of the Code of 1860; and also that it was competent for them to file their answers to said interrogatories (as they did) after the time fixed in the said summons, upon giving due notice to the defendants in error of their intention to do so. To this it may, I think be well replied, that the failure to serve the summons on them and their consequent want of notice of the filing the interrogatories, resulted entirely from their own default in not being in said county, as they had undertaken to do when the summons was issued, and they can not, therefore, be heard here to complain of alleged hardships which were occasioned altogether by their own laches." Trimble *v.* Shaffer, 3 W. Va. 614.

3. Sufficiency of Answer.

Section 36, ch. 125, W. Va. Code, which provides that every material allegation in a bill not controverted by the answer, shall, for the purpose of the suit, be taken as true, does not require a more special denial than was sufficient before its adoption. But, as formerly, the plaintiff, upon proper allegations, may interrogate the defendant, and then he will be required to answer each proper interrogatory. If the defendant does not answer properly, the plaintiff may except to the answer. When, however, he fails to do so, a general denial of the allegations of the bill, will make it necessary that the plaintiff shall prove the facts

alleged and so controverted, that are in their nature affirmative. Warren *v.* Syme, 7 W. Va. 474.

Responsiveness.—The answer to interrogatories propounded must be responsive. Hogshead *v.* Baylor, 16 Gratt. 99.

4. Privilege of Refusing to Answer.

See ante, "Privilege from Discovery," I, E.

In General.—"The Code, ch. 176, § 38, p. 667, authorizes the court to require answers to interrogatories such as the person to whom they are propounded would be bound to answer upon a bill of discovery. The bill of discovery referred to, means the pure bill of discovery as understood in equity practice; McFarland *v.* Hunter, 8 Leigh 489; and not a bill for discovery and relief. And the party to a cause is not bound to answer interrogatories which may subject him to a penalty or forfeiture. Under the general provisions of the law, a bill for the discovery of usury could not be maintained even if the plaintiff expressly waived any right to the penalty or forfeiture. For by the Code, p. 577, ch. 141, § 11, the penalties and forfeiture go to the commonwealth and informer, were not vested in the plaintiff seeking the discovery and could not be released by him. So no disclosure could be enforced. The third section of the act of 1819 compelled a discovery at the suit of a borrower; and if it appeared there was usury, obliged the creditor to accept his principal money without any interest, and pay costs; and discharged him from all other penalties of the act. The Code, p. 577, ch. 141, § 7, authorizes a similar bill, compels a discovery, and provides that the lender shall recover where there is more than lawful interest reserved, only his principal money without interest, and pay the costs; but does not like the act of 1819, in express words discharge him from the other penalties of said act. And it may be a question, in consequence of this omission, whether the party may not be compelled to answer notwithstanding the penalties are not released. Such construction would not conform to the spirit of the common law, which as Judge Baldwin remarked in Poindexter *v.* Davis, 6 Gratt. 481, 490, jealous of the liberty of the citizen protects him from being made his own accuser, or forced to give evidence against himself. In conformity with these principles I should be inclined to construe the act in the Code as not having changed the rule; and that where a discovery was made under the 7th section before referred to, the party would not be subjected thereby to the other penalties of the act." Hogshead *v.* Baylor, 16 Gratt. 99. See Va. Code, 1904, § 3370.

A party to a cause is not bound to answer interrogatories, which may subject him to a penalty or forfeiture. This rule is not confined to cases where the purpose of the action is to enforce the penalty or forfeiture; but extends to those where the discovery itself would expose the party to some action or suit, or any criminal or penal prosecution, tending to the like result. Poindexter *v.* Davis, 6 Gratt. 481.

For example, it embraces, on the one hand, a bill for discovery of waste committed by a tenant, unless the consequential penalty or forfeiture be waived, or of any matter which would subject the party to the loss of a franchise or office, or of a breach of commercial regulations exposing him to the forfeiture of a ship or cargo; and so, on the other hand, it reaches the case of the assignment of a lease by a lessee without license, or of a marriage without consent of a parent or other person designated, by which there is to be a forfeiture of a term, estate, portion or jointure. Poindexter *v.* Davis, 6 Gratt. 481.

Promissory Note.—Thus, in an action against the maker and endorsers of a

negotiable note they plead jointly nil debet and usury, and file interrogatories to the plaintiff. (1) From whom did you get the note in suit? (2) If from the defendant C., what did you pay him for it? He answers to the first: I received the note from C., who, so far as I know, was the owner of it. He declines to answer the second question. Defendants moved to strike out the last part of the first answer. Held, that the motion should be overruled, as the object of the interrogatory was to ascertain, not so much from what person the holder obtained the note, but in what character C. endorsed. If that was not the object then the answer was immaterial. Moreover, as long as the defendants insisted on their answer of usury, the plaintiff was not bound to answer the interrogatory, and so give evidence which on the plea of usury might invalidate the note. Hogshead *v.* Baylor, 16 Gratt. 99.

Removal of Slaves.—It was held, in an early case, that where the purpose of interrogatories was to obtain from the other party a discovery that they had violated the statute by removing a slave beyond the limits, the party would not be compelled to answer. Poindexter *v.* Davis, 6 Gratt. 481. Compare Johns *v.* Davis, 2 Rob. 729.

5. Time and Manner of Raising Objection.

"It is in vain to urge that the objection comes too late, after the interrogatories had been answered, and that instead of being taken to the admission of the answers in evidence, it ought to have been made to the propounding of the interrogatories. It is true that when a discovery is sought by a bill in chancery, for the purpose of being used in an action at law, any objection to the discovery must be made by demurrer, plea, or answer, to the bill; and that if the defendant submits to make the discovery, or objects, and his objection is overruled, he can not afterwards exclude the evidence on the common-law trial. The reason is, that it is not competent for the common-law court to reject the admission of the party voluntarily made, or to review the decision of the chancery court compelling the discovery. If that decision be wrong, it can only be reversed in an appellate forum. But in regard to interrogatories propounded under the authority of the statute in a common-law action, there is nothing to which the defendant can plead or demur, and nothing which he can answer but the interrogatories themselves. This he must do when required by the order of court. He can not appeal from that order, but must await the final judgment in the cause; and an appeal from that judgment brings up the question, whether the court erred in approving the interrogatories, and requiring them to be answered." Poindexter *v.* Davis, 6 Gratt. 481.

When the court permits improper interrogatories to be filed, and orders that they be answered, the party to whom they are propounded may answer them, and at the trial may object to their admission as evidence. Poindexter *v.* Davis, 6 Gratt. 481.

6. Answers as Evidence.

In General.—The answers to interrogatories, of one defendant, may be read to the jury on the trial of a cause, although a judgment has been had against him in the clerk's office and has become final by the rising of the succeeding term of the court, no issuable plea having been filed. Lazzell *v.* Mapel, 1 W. Va. 43.

Must Be Offered by Defendant.—Where a defendant in an action at law, wishes a discovery from the plaintiff, and files written interrogatories under the statute, to which answers are given, such answers cannot be given in evidence, at the trial, by the plaintiff, but are admissible only when offered by the defendant, and then the whole of the answers will go together to the jury, before whom they will not be con-

clusive, but will have such weight only as the jury think they are entitled to, and may be disproved by any other evidence which the defendant may introduce. M'Farland *v.* Hunter, 8 Leigh 489. See also, Vaughn *v.* Garland, 11 Leigh 251, in which case M'Farland *v.* Hunter was approved.

A plaintiff in an action at law, wishing a discovery from the defendant, files written interrogatories under the statute, which answers are given. At the trial, the defendant offers to read to the jury, as evidence, the interrogatories and answers, to which the plaintiff objects. Nevertheless the circuit court permits the same to be read, and a verdict and judgment are renderd for the defendant. The court of appeals, approving the decision of M'Farland *v.* Hunter, 8 Leigh 489, reverses the judgment of the circuit court, and awards a new trial, with direction that the answers to the interrogatories are not to be read, unless introduced on the part of the plaintiff. Vaughn *v.* Garland, 11 Leigh 251.

Instructions. — It was held in Lazzell *v.* Mapel, 1 W. Va. 43, that it was not error for the circuit court to refuse to instruct the jury to disregard the answers of one of the defendants to interrogatories filed by the plaintiff, as against any of the defendants, when the defendants have previously asked the court to permit the answer to be read as against that defendant only, which request had been granted.

7. Answers to Messengers.

The answers to interrogatories made to a messenger who had been sent to bring in the defendant into court, can be received only by leave of court. (Per Chanc. Taylor.) Brown *v.* Wilson (1810), 4 Hen. & M. 481.

F. THE ORDER.

An order directing defendant to be brought in to answer interrogatories should be discharged, upon permission being granted him to file his answer. (Per Carr, J.) Jackson *v.* Cutright (1817), 5 Munf. 308.

G. IN SPECIFIC INSTANCES.

1. To Execution Debtor.

The provisions in the Virginia and West Virginia Codes are substantially the same. Va. Code, 1904, § 3603; W. Va. Code, 1899, ch. 141, § 4.

Section 4, ch. 218, acts, W. Va., 1872-3, providing that: "To ascertain the estate, upon which a writ of fieri facias is a lien, and to ascertain any real estate in or out of this state, to which a debtor named in such fieri facias is entitled, the judgment creditor may file interrogatories to the debtor and a copy of the judgment with a commissioner of the court, wherein the judgment is in the circuit or county court of the county in which the defendant resides, who shall issue a summons directed to the sheriff of his county commanding him to summon the defendant to answer said interrogatories at a time and place within the county, to be therein specified, not exceeding sixty days, from the date of the summons," is a substitute for the capias ad satisfaciendum which existed up to 1850. Lewis *v.* Rosler, 19 W. Va. 61.

How Filed.—It is not necessary, under the language of the Code of West Virginia, ch. 141, § 4, that the interrogatories filed under that statute should be propounded to all the defendants at a time, but it is sufficient if they are filed to any intermediate number, that is one or more. Lewis *v.* Rosler, 19 W. Va. 61.

Constitutionality of Statute. — The power given by this act to the commissioner to attach a defendant, who refuses to answer the interrogatories propounded to him as provided therein, is constitutional. Lewis *v.* Rosler, 19 W. Va. 61.

2. To Persons in Custody under Ca. Sa.

See W. Va. Code, 1899, ch. 106, § 33; Va. Code, 1904, § 2995.

In Levy *v.* Arnsthall, 10 Gratt. 641,

it is held, that under act March 31, 1851 (Code, 1860, § 33), authorizing the plaintiff in an action to require security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety, and by act April 16, 1852 (Code, 1860, § 35, et seq.), which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court upon notice to the plaintiff, or his attorney, to discharge the defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail. This ruling is approved in Trimble *v.* Shaffer, 3 W. Va. 614; State *v.* Peck, 32 W. Va. 606, 9 S. E. 919. See the opinion of Judge Moncure for the provisions of these statutes.

Effect on Ca. Sa. Bond of Failure to Answer.—S. and M. were arrested on a writ of capias ad satisfaciendum, and in order to obtain their release executed their bond with T., who was a nonresident of the county, as their security, after judgment, interrogatories were filed before a commissioner of the court and summons issued to S. and M. to answer them on or before a certain day. At the time the summons issued they were not inhabitants of the state, and failed to answer until after the time specified in the summons. Held, that their failure to answer the interrogatories within the time specified in the summons is a breach of the undertaking of the parties to the bond. That the liability of each of the parties to the bond is fixed by the failure of S. and M. to comply with its conditions. That the absence of the parties from the county at the time the summons issued, will not avail them as an excuse for their failure to comply with the conditions of the bond. Trimble *v.* Shaffer, 3 W. Va. 614.

H. CURATIVE EFFECTS OF INTERROGATORIES.

The defect in the charging part of a bill can not be supplied by a subsequent interrogatory. Parker *v.* Carter (1814), 4 Munf. 273.

DISCRETION.—In Harris *v.* Harris, 31 Gratt. 16, it is said: "Discretio est discernere per legem quid sit justum, says my Lord Coke, 4 Ins. 41, and **discretion,** says Lord Mansfield, 'when applied to a court of justice, means sound **discretion** guided by law. It must be governed by rule; it must not be arbitrary, vague and fanciful, but legal and regular.' Rex *v.* Wilkes, 2 Burr. R. 25, 39. It is not an unlimited power, but in all cases, where by law, whether statute or common law, a subject is referred to the **discretion** of the court, that must be regarded as a sound **discretion,** to be exercised according to the circumstances of each particular case. Daniel, J., in Com. *v.* Wyatt, 6 Rand. 694, 700. And Judge Christian, speaking of the allotment of alimony, citing Bishop on Mar. & Div. and other authorities, says, 'that it is a matter within the **discretion** of the court. Yet it is not an arbitrary but a judicial **discretion,** to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case.' Bailey *v.* Bailey, 21 Gratt. 43, 57."

Discretion means sound legal **discretion.** Moon *v.* Wellford, 84 Va. 34, 4 S. E. 572; Rose *v.* Brown, 11 W. Va. 142; Abbott *v.* L'Hommedieu, 10 W. Va. 677; Welch *v.* County Court, 29 W. Va. 63, 1 S. E. 342, 343.

Separate Property of Married Women.—A man makes his will, by which he gives one-fifth part of his estate to his executors, for the benefit of a married daughter (who lived separate from her husband) at the **discretion** of his executors. He also desires his executors to bring suit against the husband of his said daughter, for £200, which, when recovered, he desired his executors to

dispose of the same, to his said daughter, to be disposed of at her **discretion.** Held, that this devise gave the daughter a separate estate in the property devised. The court said: "Suppose the clause had not directed a suit, but had stopped at that part of it, which directs a deduction of the £200 (as he had directed advances to his other children to be deducted), and had concluded 'to be disposed of at her **discretion;**' there could be no doubt that it would apply to the fifth part given her, although that is given to the executors for her benefit, at their **discretion.** This can not mean that they were at liberty to keep it to themselves, if, in their **discretion,** they did not think proper to give it to her; but this **discretion** was resorted to, in order to preserve it for her separate use, which, under all the circumstances, was clearly his intention." West *v.* West, 3 Rand. 373, 388.

Discrimination.

See the titles CARRIERS, vol. 2, p. 673; RAILROADS.

Disfigurement.

Of animals, see the title MALICIOUS MISCHIEF. Of persons, see the title MAYHEM.

Disfranchisement.

See the title CORPORATIONS, vol. 3, p. 510.

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DISMISSAL, DISCONTINUANCE AND NONSUIT.

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As to the dismissal of an action to foreclose a mortgage, see the title MORTGAGES AND DEEDS OF TRUST.

I. Definitions and Distinctions.

A. DISMISSAL.

It has been held, that the word dismissal in a statute providing that the suit may be dismissed by reason of failure to give security for costs, is limited to the case of dismissal for want of security for costs. Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925.

Where the plaintiff either intentionally abandoned his suit or neglected it, which operates in law to discontinue it, it was held, that this constitutes a voluntary dismissal or a discontinuance by reason of the plaintiff's coaction. Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925.

B. DISCONTINUANCE.

A discontinuance is the interruption of the proceedings, occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought. 3 Black. Com. 296; Bouvier's Law Dict., title "Discontinuance." Gillespie *v.* Bailey, 12 W. Va. 70. See also, Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925.

"The term 'discontinuance' is not applied in pleading merely to those cases in which the plaintiff leaves a chasm in the proceedings of his cause. The word is also frequently used to indicate that the 'plaintiff discontinues his action.' The judgment in such case is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party. * * * Coffman *v.* Russell, 4 Munf. 207, is a direct authority upon this point." Muse *v.* Farmers' Bank, 27 Gratt. 257.

"A discontinuance is somewhat similar to a nonsuit; for when the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist." Hoover *v.* Mitchell, 25 Gratt. 387.

C. NONSUIT.

"A nonsuit is not a final judgment, but the opposite. 4 Minor Inst., pp. 859, 229; Tucker *v.* Sandridge, 82 Va. 535. Mr. Minor says: 'In Virginia all employ the word "nonsuit" to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial or any other time. So that it includes not only the idea of a nonsuit proper, but also of a non prosequitur and of a nolle prosequi (non pros. and nol. pros., as they are respectively called). The effect of the nonsuit in this comprehensive sense is to put an end to the pending suit without precluding another for the same cause of action.'" Mallory *v.* Taylor, 90 Va. 348, 18 S. E. 438.

Where the dismission in a case was not in consequence of "the mere default and neglect of the plaintiff," but was by the agreement of the parties, it was held, it was not a nonsuit, nor a discontinuance. Hoover *v.* Mitchell, 25 Gratt. 387.

"Where the defendant files his defense, and the plaintiff fails to appear, the defendant ought to have the right to have his defense passed on by judgment, to give finality and rest to him, so that he may not be again harassed by a second suit; but the law contents itself with simply entering judgment of non prosequitur, commonly called in our practice 'nonsuit'—a term here covering judgment by non prosequitur, nolle prosequi, and technical nonsuits, as also judgments of nonsuit entered under the statute at rules. 4 Minor's Inst. 865." Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817.

D. RETRAXIT.

A retraxit is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. Tate *v.* Bank of New York, 96 Va. 771, 32 S. E. 476.

Retraxit and Nonsuit Distinguished.—"A retraxit differs from a nonsuit in that one is negative and the other positive. The nonsuit is a mere default and neglect of the plaintiff, and, therefore, he is allowed to begin his suit again upon the payment of costs; but a retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action." Wohlford *v.* Compton, 79 Va. 333. See also, Hoover *v.* Mitchell, 25 Gratt. 387; Tate *v.* Bank of New York, 96 Va. 771, 32 S. E. 476.

"There is a demurrer to a declaration and to each of the six counts thereof; the court sustains the demurrer as to four counts and overrules it as to two which set out a different cause of action. A subsequent order, which recites that the demurrer had been sustained as to four of the counts in the declaration, leaving and sustaining only the third and fourth counts, says as to them: 'On which the plaintiff is unwilling to risk his case alone,

he suffers a nonsuit as to them without fine, which the defendant waives,' and then proceeds: 'It is therefore considered by the court, that the plaintiff be nonsuited as to said counts, and that defendant recover against the plaintiff his costs herein expended.' It was held, it was not a nonsuit but a retraxit as to the said third and fourth counts, and a final judgment on the demurrer to the other four counts." South Branch R. Co. *v.* Long, 26 W. Va. 692.

A dismission of a presentment is not a retraxit, nor is a retraxit known to the criminal law, where the prosecution is carried on by the commonwealth. Wortham *v.* Com., 5 Rand. 669.

Dismissal Not a Retraxit.—In an action against the maker and accommodation endorser of a negotiable note by one who held the note as collateral for a debt, the plaintiff, having received satisfaction of his debt from his original debtor, dismissed the action at the defendants' costs, with the knowledge and acquiescence of the endorsers. The collateral notes had, at that time, been transferred by the owner to the defendant in error, who was not a party to the action on the notes, and had no notice or knowledge of the pendency of the action. It was held, this was not a retraxit. Tate *v.* Bank of New York, 96 Va. 765, 32 S. E. 476.

"In Muse *v.* Farmers' Bank, 27 Gratt. 252, the court held, that a dismissal of a case, or a discontinuance, is not a retraxit, saying: 'But clearly the order in question was not a retraxit, as that can only be entered by the plaintiff in open court;' and, in dealing with the question of discontinuance, says: 'The judgment in the same case is no more than an agreement not to proceed further in that suit against the particular defendant. Such judgment is not a bar to any future action against the same parties.'" Tate *v.* Bank of New York, 96 Va. 765, 32 S. E. 476.

Discontinuance Not a Retraxit.—B. brings an action of debt against F. & M., as late partners and makers of a negotiable note, and C. and G. as endorsers. The case stands on the office judgment docket at the next term of the court, when F. files his plea of nil debit, which is sworn to; and on the motion of B. by his counsel, the cause is discontinued as to F. The other parties not appearing, there is a judgment by default against them. The discontinuance as to F. is not a retraxit. Muse *v.* Farmers' Bank, 27 Gratt. 252.

E. NOLLE PROSEQUI.

As to what constitutes a nolle prosequi, see post, "What Constitutes," V, A.

II. Dismissal and Nonsuit.

A. VOLUNTARY.

1. Right of Plaintiff to Dismiss.

a. In General.

May Dismiss at Pleasure.—A plaintiff may elect to abandon his suit by neglecting to revive the same, so also he is at liberty to dismiss the same on his own motion, at his pleasure, so long as there is no defendant in the cause to contest his right to do so. When the sole defendant died, the plaintiff's action died with him. Stockton *v.* Copeland, 30 W. Va. 674, 5 S. E. 143.

Dismissal as a Matter of Course.—A plaintiff may, in general, obtain an order to dismiss his own bill, with costs, as a matter of course; and such dismissal on such motion of plaintiff having been entered, a motion by a defendant, made at the same term, to set aside such order, does not of itself have such effect, neither does it have the effect to suspend the operation of such order. It can not be rescinded or suspended by any such indirect method. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

Where Plaintiff Has Obtained Satisfaction.—In a creditor's suit, the origi-

nal plaintiff having obtained satisfaction of his debt, it is not error for him to have the fact entered of record, and have the suit dismissed as to him. Linsey *v.* McGannon, 9 W. Va. 154.

Dismissal as to Defendants Improperly Joined.—In a debt on a note signed with the partnership name, the declaration charged, that the defendants being partners made the notes and subscribed their partnership name thereto. Some of the defendants upon whom process had been served appeared and pleaded nil debit, and some filed affidavits denying such partnership. One of the defendants, upon whom process had been served, never appeared to plead to the action, and the office judgment was not set aside as to him. On two of the defendants process was never served. After the filing to said pleas and affidavits, the plaintiff on his own motion, discontinued his action as to several of the defendants, and other defendants who had pleaded withdrew their plea. It was held, that under the statutory provisions and the principles laid down in Snyder *v.* Snyder, 9 W. Va. 415, the plaintiff had the right, even without the consent of the defendants, to dismiss his action as to any of the defendants whom he thought had been improperly joined in his action. Carlon *v.* Ruffner, 12 W. Va. 297.

Dismissal as to Parties Not Named in the Bill.—At the first December rules, 1881, C. B. Maury, a creditor of the Piedmont and Arlington Life Insurance Company, filed a bill against the company, alleging its insolvency, asking that the creditors be convened, that amounts of debts and assets be taken, and that a receiver be appointed. At the second December rules J. C. M. and other creditors of the company filed their petition to be admitted as parties plaintiff to the suit. The company answered the bill, and prayed that its answer might be treated as a cross bill. The plaintiff replied generally, and the cause was set for hearing. At the January term, 1881, of the court, J. B. and other creditors of the company presented their petitions to be admitted as parties plaintiff to the suit. At that time, no order having been entered by the court, either admitting the petitioners as plaintiffs or referring the cause, C. M. B., the original plaintiff, dismissed his suit by leave of court. It was held, while such a bill may be filed as a matter of convenience, yet the creditors described, but not named in the bill, are not parties thereto in any sense; nor do they become so unless and until further action be had in the cause. Until such action, the suit is the suit of the plaintiff on the record, he is the sole dominus litis, and therefore may dismiss it at his will and pleasure. Piedmont, etc., Life Ins. Co. *v.* Maury, 75 Va. 508.

Dismissal as to One Joint Defendant.—Where in action against two who file joint plea of nonassumpsit, and plaintiff has the action dismissed as to one, and asks leave to amend his declaration as to the other, and there is nothing to show that the defense relied on was personal to the former; it was held, it was not error to refuse such leave, and Virginia Code, § 3395, had no application to the case at bar. Gibson *v.* Beveridge, 90 Va. 696, 19 S. E. 785.

Payment of Costs by Plaintiff.—Whether, after a verdict for the defendant, and a new trial granted to the plaintiff upon his paying costs, the court may permit the plaintiff to dismiss his suit; and may render judgment, upon such dismission, for the costs; or whether judgment ought to be entered upon the verdict, on the plaintiff's refusing to pay the costs of the trial; of which refusal such order to dismiss the suit may be considered sufficient evidence, does not seem to be settled. Coffman *v.* Russell, 4 Munf. 207.

b. As Dependent upon the Rights of Other Parties.

Before any decree for a general account is entered, a creditor may, in a proper case, be admitted a party on the record upon a special application for the purpose; and when that is done, he acquires such control of the suit as that it can not be dismissed without his consent. The original plaintiff may still dismiss the suit so far as he is concerned, but it may be prosecuted by the other party for his own benefit. Simmons *v.* Lyles, 27 Gratt. 922, 928; Piedmont, etc., Life Ins. Co. *v.* Maury, 75 Va. 508.

Appearance of Other Plaintiffs.—If the original plaintiff in an action for an account had suffered the petitions of creditors to be filed without objection, and the cause had been subsequently proceeded in as if the petitioners had been duly admitted as parties, though no order to that effect had been made, by acquiescence he might have lost his right to dismiss at a subsequent time. Piedmont, etc., Life Ins. Co. *v.* Maury, 75 Va. 508.

After Decree.—Thus, where a plaintiff sues on behalf of himself and all other persons of the same class, although he acts upon his own mere motion, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, yet, after a decree, he can not by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. Piedmont, etc., Life Ins. Co. *v.* Maury, 75 Va. 508.

2. Nature and Effect of Dismissal.

a. In General.

If attorneys who are copartners accept a retainer, the contract is joint, and continues to the termination of the suit; and neither can be released from the obligation, either by a dissolution of the firm, or by any other act or agreement among themselves. But the contract is terminated by the voluntary dismission of the suit by the plaintiff, and the rights of the parties to the contract are then fixed. Tomlinson *v.* Polsley, 31 W. Va. 108, 5 S. E. 457.

Should Be without Prejudice.—The dismissal of a suit in chancery brought by a legatee of a decedent against his personal representative and debtor of the estate, for the purpose of holding the debtor to account, while a separate suit is pending against the personal representative for the settlement of his account, should be without prejudice to the right of the legatee to have the personal representative charged in the other suit with any sum which it was his duty to collect, but which he had failed to collect of the debtor. Beaty *v.* Downing, 96 Va. 451, 31 S. E. 612.

The judgment of a court of competent jurisdiction dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination of the matters which were actually, or might have been litigated in that suit as against said parties and all claiming under them. It is virtually an acknowledgment by the plaintiff in open court, as in retraxit, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of the suit by the plaintiff, as a nonsuit; it is the concurrent action of both parties. Hoover *v.* Mitchell, 25 Gratt. 388; Siron *v.* Ruleman, 32 Gratt. 215; Wilcher *v.* Robertson, 78 Va. 602; Wohlford *v.* Compton, 79 Va. 333.

Implies Adjustment.—The cause was pending until the 13th day of April, 1872, when a final order was entered therein in these words: "This is dismissed agreed." There is nothing to show the nature of the agreement beyond what the order imports. It at least implies an adjustment of some sort. Hoover *v.* Mitchell, 25 Gratt. 387; Siron *v.* Ruleman, 32 Gratt. 215.

"In this case of Siron *v.* Ruleman, 32 Gratt. 223, Judge Burks, delivering the opinion of the court, said: 'A final

order was entered in the cause in these words: "This suit is dismissed agreed." There is nothing to show the nature of the agreement beyond what the order imports. It at least implies an adjustment of some sort.'" Wohlford *v.* Compton, 79 Va. 339.

A debtor executes a trust deed for securing the debt, and the trustee files a bill against him to enforce the deed; pending the suit, he engages a third person to defend it for him, and covenants, that if the suit be decided in his favor, or the bill be dismissed, he will give the covenantee a mortgage of the subject in controversy; the cause never comes to a hearing, but the bill is dismissed as to one of the trustees on his own motion, and as to the other by consent of his and defendant's counsel. It was held, this is a dismission within the terms and intent of the covenant, and the covenantee is entitled to his mortgage. Laidley *v.* Merrifield, 7 Leigh 346.

Good Consideration for Agreement to Pay Costs.—When a county court, in prosecuting a condemnation proceeding under ch. 42, 43, W. Va. Code, has made costs and upon the agreement of the landowner to pay the costs, dismisses the proceeding to take the particular parcel of land described and designated in its application, the relinquishment of its right to retain the advantages gained in such proceeding and the risk of future costs and trouble it incurs by dismissing, constitute a sufficient consideration for the promise to pay the costs and they may be recovered in an action of assumpsit. County Court *v.* Hall, 51 W. Va. 269, 41 S. E. 119.

Damages ought not to be given upon the affirmance of a decree dismissing a bill with costs; such decree not being rendered, "for any sum of money or quantity of tobacco," except the costs. Williamson *v.* Bowie, 6 Munf. 176.

The damages of five dollars, given by the act of assembly, in case of nonsuits, ought to be awarded in all cases of dismissions, and discontinuances, produced by voluntary abandonment of the cause by the plaintiff, after the defendant's appearance, whether in the office, or in court, and such dismissions ought to be entered up as nonsuits. Pinner *v.* Edwards, 6 Rand. 675.

b. Effect on Cross Bill.

See the title CROSS BILLS, ante, p. 120.

c. Effect as Bar to Commencement of Another Action.

See also, the title FORMER ADJUDICATION OR RES ADJUDICATA.

By Plaintiff's Order.—"In the case of Coffman *v.* Russell, 4 Munf. 207, it was held, that a dismission of a suit by the plaintiff's order is no bar to his bringing another suit for the same cause of action, even though there was a judgment by the court for the defendant against the plaintiff for costs." Tate *v.* Bank of New York, 96 Va. 770, 32 S. E. 476.

Without Prejudice.—"A dismissal of a suit 'without prejudice' is no decision of a controversy on its merits, but leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought." Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733; Mathews *v.* Glenn, 100 Va. 352, 41 S. E. 735.

Compromise by Administrator. — Where a party dies pendente lite, the suit may be compromised by his administrator, and a judgment entered dismissing the suit agreed, without there having been any revival thereof, is, unless reversed on appeal, final and a bar to further prosecution of that or any other suit for the same purpose. Wohlford *v.* Compton, 79 Va. 333.

Dismissal by Agent in Excess of Authority.—A special agent who is authorized to dismiss the suit of his principal only on special terms designated in writing trangresses his authority

in dismissing the suit on any other terms, without the knowledge of his principal, and the right of the principal to prosecute a new suit for the same debt, and to recover judgment therefor against principal and surety is unaffected by such dismissal. Winfree *v.* First Nat. Bank, 97 Va. 83, 33 S. E. 375.

"**A nominal plaintiff,** suing for the benefit of his assignee, can not, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action." Tate *v.* Bank of New York, 96 Va. 476, 32 S. E. 476.

Dismissal by Agreement.—An order dismissing a case agreed is a bar to another suit on the same cause of action. Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

3. Reinstatement of Suit.

See post, "Reinstatement of Suit," II, B, 1, d.

Code Provision.—Section 11, ch. 127, W. Va. Code, says: "Any circuit court may, on motion, reinstate on the trial docket of the court, any case dismissed, * * * within three terms after the order of dismissal may have been made." Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

Construction of Statutes.—In the absence of the statutory provision for the reinstatement of a dismissed case, a new suit would have to be instituted, and this statute is therefore an innovation upon the common law, and might be said to fall under the rule requiring a strict construction in such cases. But it is a remedial statute and clearly falls under the rule requiring a liberal construction. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

Reinstatement without Notice.—The reinstatement of the case without notice entitled the defendant to a continuance, if asked for, and not having asked it he was presumed to have waived his right to continuance. The general appearance of defendant in the case after reinstatement, is a waiver of the notice. Turk *v.* Shein, 55 W. Va. 466, 47 S. E. 253.

Quære: Whether a special appearance of defendant for the purpose, only, of moving the dismissal of the case because reinstated without the notice provided by statute would have required its dismissal? Turk *v.* Shein, 55 W. Va. 466, 47 S. E. 253.

A mistake of the clerk of supreme court in not entering the name of counsel on the argument docket, in consequence of which, the counsel was not heard (being absent, with leave of the court, when the cause was called), is not sufficient ground for reinstating the cause, after the decision has been regularly certified to the court below. Beatty *v.* Smith, 5 Munf. 39.

Reinstatement by Consent. — A county court makes an order opening a road through the land of a person who made himself a party, and opposed the opening of the road; but the court omits to direct the damages assessed to this party to be paid to him. At the next term, by the consent of the applicant for the road and the contestant, the order is set aside, and the cause reinstated on the docket. It was held, that the order reinstating the cause by the consent of the parties was proper. White *v.* Coleman, 6 Gratt. 139.

Reinstate as Well as Grant. — The court of chancery is always open to reinstate, as well as to grant an injunction. Radford *v.* Innes, 1 Hen. & M. 8.

Must Show Cause.—Where the plaintiff has dismissed an action he ought not to be allowed to reinstate the cause except during the term and not then except for cause shown. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1103.

4. Appeal and Error.

See also, post, "Dismissal in Appellate Court," II, B, 1, g.

By Consent.—If the appellant promise the appellee, that if the latter will agree to have the appeal dismissed the appellant will pay him the full amount of the debt, damages and costs then due upon the appeal, and the appellee consents thereto and the appeal is dismissed agreed, the appellee may maintain assumpsit on this promise. Spotswood *v.* Pendleton, 2 Call 209. See also, the title APPEAL AND ERROR, vol. 1, p. 418.

The fact, that the plaintiff in error is a corporation and is insolvent, and that on its application the court had directed the costs of such writ of error to be paid by its receiver out of funds in his hands arising from the renting of the land of such corporation, will not prevent the appellate court, before whom such writ of error is pending, from disregarding such injunction and dismissing the writ of error, if the plaintiff in error and the defendant in error have agreed, that it should be dismissed, and the court is asked to do so. Colman *v.* West Virginia Oil, etc., Co., 25 W. Va. 148.

B. INVOLUNTARY.

1. Dismissal.

a. When Proper.

(1) In General.

Power of Equity to Dismiss Legal Action.—A court of equity has no power, as such, to dismiss an action at law. When an injunction to a proceeding at law is dissolved and the bill dismissed the parties to the action may prosecute and defend at will. Henley *v.* Cottrell Real Estate, etc., Co., 101 Va. 70, 43 S. E. 191.

A bill for a rehearing is properly dismissed, that shows no error in law in the decree sought to be reheard nor after-discovered evidence, which could not have been discovered before the decree was rendered by use of reasonable diligence. Hill *v.* Maury, 21 W. Va. 162.

Bill of Review.—A bill of review alleging after-discovered evidence should be dismissed where due diligence would have put the party filing the bill in possession of all the facts. Sanders *v.* Burk, 2 Va. Dec. 175. See also, the title BILL OF REVIEW, vol. 2, p. 384.

Dismissed on Demurrer. — Plaintiff having no right of action at the time of suit brought, his suit must fail, and when this appears on face of bill, it will be dismissed on demurrer. Keyser *v.* Renner, 87 Va. 249, 12 S. E. 406.

Language Operating as Dismissal.—Although the language of a decree states that a demurrer to a bill is sustained, and nothing is said about amendment, this court will not hold such language to operate a dismissal of the bill, where it appears that it was not so intended by the trial court, which refused to dismiss the bill, and, in accordance with defendant's request, directed it to be consolidated with a prior suit brought by another person against the same defendant to accomplish the same result. Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554.

(2) Nonappearance of Plaintiff.

According to the practice in courts of record at common law, if the defendant appear and file his plea, and the plaintiff does not appear to reply to it, or do what is necessary to bring the cause to issue, there is judgment against him by non prosequitur. Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817.

In an action before a justice, where the plaintiff fails to appear and prosecute his action within one hour after the time for appearance mentioned in the summons or last order of continuance, and the defendant has filed no set-off or counterclaim, the proper judgment, if defendant ask it, is one dismissing the action, with costs to defendant, but without prejudice to a new action; and there can be no trial of the case on its merits by the justice or a jury, though defendant has filed a plea; and it is error for the justice to

try the case, or to allow a jury trial, and render final judgment for defendant. See p. 66, ch. 15, W. Va. Code, 1899. Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817. See also, the title JUSTICES OF THE PEACE.

Right to Contest Motion.—While it is the duty of a justice, under § 66, ch. 50, of the W. Va. Code, 1899, to dismiss the plaintiff's action "if he fail to appear and prosecute his action within one hour after the time for appearance mentioned in the summons or last order of continuance," yet the plaintiff has the right, under the sixth clause of the same section, to show cause why his action ought not to be dismissed, and has the right to contest the motion of the defendant to dismiss, after the hour is up, at any time before the order of dismission is made. White *v.* Christy, 47 W. Va. 16, 34 S. E. 756.

In other words, if the defendant demand a dismissal, the justice must enter it; and in such case he can do no more than dismiss it; it is the plaintiff's right that he shall do no more. Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817.

Failure to Reply to New Matter.—Where there is a plea of new matter, concluding with a verification, and the plaintiff fails to reply to it, there ought to be a judgment of non prosequitur against him, after a rule to reply, but such need not be served. Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

(3) Failure to Serve Process or Proceed with Diligence.

Dismissal by Clerk.—It is the duty of the clerk to dismiss a suit, when process is served and the bill is not filed in the time prescribed by statute. Buchanan *v.* King, 22 Gratt. 414.

It is the duty of the clerk to dismiss a suit, when the process is served, and the bill is not filed in the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection. Buchanan *v.* King, 22 Gratt. 414.

Must Mature Suit in Reasonable Time.—It is error for the court to abate an attachment suit in equity against a partnership and dismiss such suit when one of the partners has been served with summons because an order of publication has not been taken against the other, but the court should require the plaintiff to mature his suit within a reasonable time fixed as to such absent partner, or suffer the abatement of the attachment and dismissal of the suit. Brown *v.* Gorsuch, 50 W. Va. 514, 40 S. E. 376.

Suits to Enforce Mechanic's Lien.—In a suit to enforce a mechanic's lien, if it appears upon the face of the bill that the suit was not brought within six months from the time plaintiff filed his account with the clerk, as required by the statute, the bill should be dismissed upon demurrer thereto. Phillips *v.* Roberts, 26 W. Va. 783.

Service Less than Ten Days before Return Day.—When process to commence an action against a corporation is sued out and executed on an agent of the corporation, under § 3227 of the Code, less than ten days before the return day thereof, the proper course to be pursued is to quash the return of the officer and remand the case to rules, and not dismiss the action. Norfolk, etc., R. Co. *v.* Carter, 91 Va. 587, 22 S. E. 517.

A motion to dismiss for want of jurisdiction is the proper and only mode of procedure where the defendant has not been summoned, and has not waived the summons. One not before the court can not be required to plead. Hilton *v.* Consumers' Can Co., 103 Va. 255, 48 S. E. 899.

Appearance of Defendant.—On a motion for a judgment under § 3211 of the Virginia Code of 1904, after the defendant has appeared and pleaded to the action, he can not move to dismiss. Section 3260, Va. Code, 1904; Harvey *v.* Skipwith, 16 Gratt. 410; Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

Parties Who Have Not Answered.—It has been held, that it was error to dismiss a bill in chancery, as to parties who have not answered, and on whom a decree nisi has not been served or published according to law. Henderson *v.* Anderson, 4 Munf. 435.

(4) Failure of Writ to Show Nature of Action.

In an action of trover, the plaintiff omitted to indorse upon the writ, the true nature of the action. The court may, upon inspection of the writ, dismiss the suit, if the motion be made during the term next after an office judgment has been entered, but not afterwards. As to the sheriff. he was not bound to take bail, and, therefore, judgment could not be entered against him, either for want of a bail bond returned, or for insufficient bail. Williams *v.* Campbell, 1 Wash. 153.

(5) Misnomer of Defendants.

In an action by a partnership, the suit is brought in the partnership name of D. & Co. There are in fact two D.'s in the firm, and another partner named H., but no objection is taken to the mode of naming the plaintiffs, on the pleadings. It was held, this is no ground for defeating the action on the trial of the cause. Downer *v.* Morrison, 2 Gratt. 250.

Where a bill is brought in the firm name, and process is served upon the defendants, some of whom answer, but no demurrer is filed or no objection made because the individual members of the firm are not named, there is not sufficient ground for the court to dismiss the bill at its own instance. And such cause, where a dismissal is had, may be reinstated under § 1, ch. 132, acts 1868. Alderson *v.* Henderson, 5 W. Va. 182.

(6) Misjoinder of Parties.

See also, the title PARTIES.

Where there was a misjoinder of parties, plaintiff and defendant, and a bill wholly without equity, it was held, that it was properly dismissed on demurrer. Abernathy *v.* Phillips, 82 Va. 769, 1 S. E. 113.

Misjoinder to Give Court Jurisdiction.—If a plaintiff, in order to give jurisdiction to the court, in a case where defendants live in another county, unites in the action, a party who he knows is no party to the contract, the court will on motion dismiss the suit with costs. Bush *v.* Campbell, 26 Gratt. 403.

As to the dismissal of an election contest because of misjoinder of parties, see the title ELECTIONS.

Joining Surety without Principal.—On a notice to and motion against the treasurer of a county and his sureties for a fine for his failing to submit his bond to the commissioner of accounts within the time prescribed by the act of 1878-79, ch. 60, § 4; it was held, the motion will not be dismissed for the joining the sureties in it. Wimbish *v.* Com., 75 Va. 839.

The proceeding being in the nature of a criminal prosecution, the motion may be dismissed as to the sureties, and judgment rendered against the treasurer. Wimbish *v.* Com., 75 Va. 839.

Can Not Raise Question on Appeal.—P. obtained a rule against T. and others to show cause why a writ of possession should not be awarded against them, requiring them to deliver certain lands into his possession which has been decreed him in a suit, to which they were not parties. They answered that they were in possession as tenants under S., who had been a party to the suit of P., and that the decree in favor of the latter was erroneous, and

that S. had deceased since the rendition of the decree, and that the bill should have been dismissed as to S. It was held, that even if the bill should have been dismissed as to S., defendants to the rule had no right to avail themselves of that question in this appeal. Trimble *v.* Patton, 5 W. Va. 432.

(7) Multifariousness.

It has been held that if a bill is multifarious it is proper to dismiss it at the hearing. Hudson *v.* Kline, 9 Gratt. 379; Beckley *v.* Palmer, 11 Gratt. 625; Green *v.* Massie, 21 Gratt. 356; Trout *v.* Trout, 86 Va. 295, 9 S. E. 1121.

A bill setting up two or more equitable causes of action, between the same parties, is multifarious and fatally bad. Zell Guano Co. *v.* Heatherly, 38 W. Va. 409, 18 S. E. 611; Petty *v.* Fogle, 16 W. Va. 497; Crickard *v.* Crouch, 41 W. Va. 503, 23 S. E. 727; Sprinkle *v.* Duty, 54 W. Va. 559, 46 S. E. 557.

If the property is owned by several different parties, not jointly but severally, each owing a separate part of the property by titles derived from different parties, the owners in such case can not unite in a bill to enjoin the sale. Such a bill should be dismissed on demurrer as multifarious. Baker *v.* Rinehard, 11 W. Va. 238.

(8) Want of Jurisdiction.

See also, ante, "Failure to Serve Process or Proceed with Diligence," II, B, 1, a, (3).

Absence Demurrer.—If the court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer to the bill. Cresap *v.* Kemble, 26 W. Va. 603.

Time of Dismissal.—When the cause of action is not within the jurisdiction granted by law to the tribunal, the court will dismiss the suit at any time when the fact is brought to its notice. Western Union Tel. Co. *v.* Pettyjohn, 88 Va. 296, 13 S. E. 431.

Failure of Bill to Show Grounds of Relief.—If a bill does not state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleadings. Hudson *v.* Kline, 9 Gratt. 379; Berkley *v.* Palmer, 11 Gratt. 625; Green *v.* Massie, 21 Gratt. 356; Salamone *v.* Keiley, 80 Va. 86; Graveley *v.* Graveley, 84 Va. 145, 4 S. E. 218; Buffalo *v.* Pocahontas, 85 Va. 222, 7 S. E. 238; Cresap *v.* Kemble, 26 W. Va. 603; Pollar *v.* Patterson, 3 Hen. & M. 67; Ambler *v.* Warwick, 1 Leigh 196; Morgan *v.* Carson, 7 Leigh 238; Hudson *v.* Cline, 9 Gratt. 379; Armstrong *v.* Pitts, 13 Gratt. 235; Hale *v.* Clarkson, 23 Gratt. 42; Goolsby *v.* St. John, 25 Gratt. 146; Tapp *v.* Rankin, 9 Leigh 478; Lewis *v.* Cocks, 23 Wall. 466; Garnett *v.* Loven, 80 Va. 456; Poindexter *v.* Burwell, 82 Va. 507; Vanbibber *v.* Beirne, 6 W. Va. 168; Morehead *v.* DeFord, 6 W. Va. 316; Slack *v.* Jacob, 8 W. Va. 612; Surber *v.* McClintic, 10 W. Va. 236; Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451; Rollins *v.* National, etc., Co., 40 W. Va. 590, 21 S. E. 722; Willis *v.* Willis, 42 W. Va. 522, 26 S. E. 515; Cox *v.* Horner, 43 W. Va. 786, 28 S. E. 780; Harr *v.* Shaffer, 45 W. Va. 709, 31 S. E. 905; Shay *v.* Nolan, 46 W. Va. 299, 33 S. E. 225.

And in such a case, an appellate court will reverse a decree in favor of the plaintiff, and dismiss the bill, though no objection to the jurisdiction was taken in the court below. Green *v.* Massie, 21 Gratt. 356; Slack *v.* Jacob, 8 W. Va. 655; Boston, etc., Co. *v.* Carman, etc., Co., 94 Va. 100, 26 S. E. 390.

Where a plaintiff in equity has shown no right to relief, an appellate court will not reverse a decree dismissing his bill, to enable him to introduce new parties, and thereby make a new case upon the merits. Jameson *v.* Deshields, 3 Gratt. 13.

Although a decree dismissing a bill for want of equity shows that leave was asked to amend the bill and was

refused, the appellate court will not reverse the decree when the record fails to disclose in what respect the complainant proposed to amend. Reid *v.* Norfolk R. Co., 94 Va. 117, 26 S. E. 428.

S. files a bill in chancery, alleging that to induce M. & T. to become his sureties in an injunction bond, he assigned them certain personal property, including a deed to him for two thousand acres of land, to be held by them until they were relieved from their liability as his sureties, when the property should revert to him; that they were released as such sureties, and charged that M. had converted the brandy, which was a part of the property, to his own use; had collected the money on the bonds assigned, and had refused to deliver up the deed; did not pray a discovery, but prayed that T. should be required to pay to him the value of the brandy and the money collected, and deliver up the deed. It was held, as the whole record shows that the plaintiff could not so amend his bill as to give a court of equity jurisdiction of the case, the bill should be dismissed. Surber *v.* McClintic, 10 W. Va. 236.

If the court had no jurisdiction when the bill was filed, it could not be conferred by an amended bill. Livey *v.* Winton, 30 W. Va. 554, 4 S. E. 451.

Irrespective of Defendant's Appearance.—Where a bill in equity does not state a case proper for relief in that forum, the court should dismiss it upon the hearing, whether there be any appearance by the defendant or not. Salamone *v.* Keiley, 80 Va. 86; Graveley *v.* Graveley, 84 Va. 145, 4 S. E. 218.

Defects Cured in Progress of Cause.—If the bill do not present a case for the jurisdiction of the court, and other matter appear in the progress of the cause, which supplies the defect, the defendant, not having demurred to the bill, can not object to the jurisdiction at the hearing; as, if the bill was for an account, without showing that the accounts were of such a character as to give jurisdiction, and that appeared from the answer or proof. Ambler *v.* Warwick, 1 Leigh 211.

False Allegations.—Where a bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie) if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged; and the bill should be dismissed for want of jurisdiction. Jones *v.* Bradshaw, 16 Gratt. 355.

Prayer for Discovery.—The ground of equitable jurisdiction stated in the bill, being the want of a discovery from the defendant; and it appearing from the evidence that as to some material facts alleged the plaintiff had full proof, and as to the others they were merely pretences; the bill will be dismissed at the hearing for want of jurisdiction. Jones *v.* Bradshaw, 16 Gratt. 355.

Where the attempt is to enforce a legal demand in a court of equity, and the need of a discovery is the alleged ground of equity jurisdiction, and there is no averment in the bill that the discovery is material or necessary, the bill is demurrable. Where it appears at the hearing that the discovery was not necessary, the bill will be dismissed. Childress *v.* Morris, 23 Gratt. 802.

Bill to recover a female slave and her children. The only allegation in the bill as ground of jurisdiction is that plaintiffs did not know the names of the children; though a further discovery is asked of names, number, etc. It being apparent from the bill and answer that the plaintiffs did not need a discovery, the bill should be dismissed. Hall *v.* Smith, 25 Gratt. 70.

Suit Based on Attachment.—Where a suit in equity, on a debt not mature when begun, rests for jurisdiction only

on attachment, and if that fails, the suit should be dismissed. Miller *v.* Zeigler, 44 W. Va. 484, 29 S. E. 981.

Where the only ground of jurisdiction is an attachment of the effects of a nonresident, and the attachment is abated, the action founded thereon should be dismissed on motion for that purpose. Hilton *v.* Consumers' Can Co., 103 Va. 256, 48 S. E. 899.

To give a court in which a homestead deed, claiming goods as exempt, is attacked as in fraud of creditors, jurisdiction over the goods, there must be a valid attachment thereof, and, the attachment being dismissed, the suit should also be dismissed. Simon *v.* Ellison, 2 Va. Dec. 203.

Statement as to Cause of Dismissal.—Where a court of equity dismisses a bill merely because there is adequate remedy at law, and no jurisdiction in equity, it should so state, or insert a clause of "without prejudice to the plaintiff to sue at law," or equivalent provision. It is error not to do so. Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694.

A decree, upon a full hearing upon the merits, dismissing a bill in which two distinct causes of action between the same parties are united, one purely legal and the other purely equitable, containing no clause saving to the complainant her remedies as to the former cause of action, and failing to state, or in any way make it appear, that, as to it, the dismissal was for want of jurisdiction, is erroneous. Sprinkle *v.* Duty, 54 W. Va. 559, 46 S. E. 557.

Should Reserve Legal Rights.—It is improper to dismiss a bill in chancery, involving questions of title, for want of equity, without reserving the legal rights of the parties. Christian *v.* Vance, 41 W. Va. 754, 24 S. E. 596.

In a warrant of unlawful entry and detainer issued by a justice to recover the possession of land, if it appear to the justice by the answer of the defendant, or upon trial of the defendant, or upon the trial of the warrant, that the title to the land in controversy will come or is properly in question between the parties, and the relation of landlord and tenant does not exist between them, the justice has not jurisdiction to try the merits of the cause and it was his duty to dismiss the warrant at the plaintiff's costs. Hughes *v.* Mount, 23 W. Va. 130.

If in such a case the justice has so dismissed such warrant, and an appeal be taken from his judgment to the circuit court, and the same state of facts appear to the satisfaction of such court either by the defendant's answer or upon the trial of such warrant upon such appeal, it is the duty of such court to dismiss the said warrant for want of such jurisdiction without prejudice to the plaintiff's right to institute any other action at law or suit in equity, which may be necessary or proper to determine his right to the land in the warrant mentioned. Hughes *v.* Mount, 23 W. Va. 130.

Where a court acts under special powers, it has only the jurisdiction expressly delegated, and it must appear from the record that its acts are within its jurisdiction; and the court will dismiss the case at any time when the fact is brought to its notice. Western Union Tel. Co. *v.* Bright, 90 Va. 778, 20 S. E. 146; Western Union Tel. Co. *v.* Pettyjohn, 88 Va. 296, 12 S. E. 431.

Appearance to Move Dismissal.—The appearance of a defendant by attorney merely to move the court to dismiss an action for want of service of process, can not and does not give the court jurisdiction to proceed to judgment. Hilton *v.* Consumers' Can Co., 103 Va. 255, 48 S. E. 899.

Dismissal as to All Parties.—In a suit against the guardian who had given a defective bond, the surviving justices, and the representative of a deceased justice, the surviving justices answer, but the bill is taken for con-

fessed against the representative of the deceased justice. It was held, the court not having jurisdiction of the cause as against the justices, and their representatives, the bill should be dismissed as against the representative of the deceased justice, as well as the surviving justices. Austin *v.* Richardson, 1 Gratt. 310.

Process Sent to Other County.—W. sues S. in assumpsit in the county of J., and sends the process to the city of R., where S. resides, and it is served upon S. by the sheriff of R. S. files a plea in abatement stating these facts, but does not say where the cause of action arose. W. having demurred to the plea, and the court having sustained the demurrer, then the cause is called for trial, S. moves to dismiss the cause from the docket. It was held, the motion should have been sustained and the suit dismissed, the statute expressly providing that when the suit is brought where the cause of action arose, process shall not be directed to an officer of any other county or corporation than that wherein the action is brought. Warren *v.* Saunders, 27 Gratt. 259.

(9) Suit Brought in Wrong County.

See also, ante, "Want of Jurisdiction," II, B, 1, a, (8).

The pleadings in justices' courts are prescribed by statute, and no provision is made for pleas in abatement. Such plea, therefore, to the jurisdiction of the justice, can not be properly filed, either before the justice, or the circuit court to which the action may be appealed. As a substitute for such pleas, § 66, ch. 50, W. Va. Code, provides that "the action shall be dismissed at plaintiff's cost whenever it appears that it has been brought in the wrong county, or that for any other reason the justice has not jurisdiction thereof." Mountain City Mill Co. *v.* Southern, 46 W. Va. 754, 34 S. E. 782.

What Constitutes Detention.—Where a person having persons of color in his custody, claiming them as slaves, resides in one county and holds them in that county, and brings them into another county in obedience to a writ of habeas corpus sued out by them, this is not such a detention of them in this last county, as will give the courts thereof jurisdiction of a suit instituted by them there, for their freedom; and this especially if the resort to the writ of habeas corpus was a contrivance to give jurisdiction of the case to the courts of the county to which they are so brought. In such a case the court should dismiss the suit, upon the motion of the defendant. Ratcliff *v.* Polly, 12 Gratt 528.

Dismissal as to All Parties.—Though the petition of the paupers and the warrant of the justice are returned into court at one term, when one of the claimants enters himself a party, and the cause is then continued; and though depositions are taken by consent to be reaa on the trial, before the next term, yet no summons having been served on the person in whose custody the paupers were, he having entered himself a party at the next term, may then have the suit dismissed for want of jurisdiction; and it will be dismissed as to both defendants. Moncure, J., dissenting. Ratcliff *v.* Polly, 12 Gratt. 528.

(10) Defective Declaration, Bill or Petion.

See ante, "Want of Jurisdiction," II, B, 1, a, (8). See also, the title PLEADING.

Imperfect Statement.—Where a bill states the cause of action too imperfectly to bring the merits of the case before the court, it will be dismissed at the costs of the plaintiff. Fowler *v.* Saunders, 4 Call 363.

Dismissal without Prejudice.—Where a bill in chancery is defective, not only for want of proper parties, but in other respects, so that no decree for the plaintiff can be entered, a decree dismissing the bill altogether, ought to be affirmed; but, if it appear

probable that something might be recovered upon a new bill properly drawn, such affirmance should be without prejudice to any other suit the plaintiff may be advised to bring. Stott *v.* Baskerville, 6 Munf. 20.

Omission of Name.—Where goods are sold by a factor in Virginia for merchants in Britain, it is necessary to state the name of the factor in the declaration. And a suit of this kind will be dismissed after issue joined upon the merits, if the fact appear on the trial of the cause. And it will not prevent the dismission, that there are money counts in the declaration. Ozwald *v.* Dickinson, 2 Call 16.

If all the pleadings, including the declaration, be faulty, the court will dismiss the suit, and will not award a repleader. Smith *v.* Walker, 1 Wash. 135.

Must State Claim with Reasonable Certainty.—Where an executor has a claim against the estate of his testator, depending on a quantum meruit only, he may exhibit a bill in equity against his coexecutors and legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his serivces; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. Baker *v.* Baker, 3 Munf. 222.

Mistake as to Estate of Infants.—The applicant to take the property under the right of eminent domain in preparing its petition (or rather attorney) filed in the proceedings, misstates under a misconception, the estate of the three infants in the reversion of the land, and after the commissioners were appointed, and had adopted such misconception in ascertaining the damages, and who were entitled thereto, and acted upon it and signed their report, and before it was formally filed in court the applicant asked leave of the court to discontinue the proceeding. It was held, that the court should have dismissed the proceedings under the circumstances and at the costs of the applicant. Chesapeake, etc., R. Co. *v.* Bradford, 6 W. Va. 220.

Failure to Assert Valid Claim.—B. deeded his real estate to trustee for benefit of his wife during her life, and, after her decease, for benefit of his own son and her two sons by former husband. After wife's decease, while B. was still alive and sound in mind, his son filed a bill to annul the deed on the ground that it had been procured by the wife's undue influence. It was held, the bill asserts no valid claim, and was rightly dismissed on demurrer. Lefew *v.* Hooper, 82 Va. 946, 1 S. E. 208.

Failure to Show Performance of Contract.—W. was insolvent, and E., his wife, owned a separate estate, part of it under her father's will, which was given in trust for her. In August, 1860, W. and E. purchase a crop of tobacco from S., and they execute a paper by which they bind themselves to convey to S. a sufficient interest in Peatross estate to secure him for the tobacco. In October, 1860, E. directs her agent, L., to give to S. an order from her on the Peatross estate for $4,153.22, to be drawn on whoever the court may appoint to distribute the estate. In 1872 S.'s administratrix files her bill to sell E.'s separate estate for the payment of this debt, and claims that E.'s whole separate estate is liable. E. and her present husband do not answer, but her trustee does, and denies her estate is liable. And without directing any inquiry as to the Peatross estate, or what had been done with E.'s interest in it, there is a decree for the sale of E.'s land for the payment of the debt. It was held, the plaintiff having failed to furnish the neoessary evidence as to S.'s prosecution of his claim as assignee of E.'s interest in the Peatross fund, ordinarily the bill should be dismissed. But as it is apparent that the case has not been investigated upon its merits, a result attributable to the conduct of

the defendants in a very great measure, the cause will be remanded for further proceedings in conformity to the views expressed by this court. Darnall *v.* Smith, 26 Gratt. 879.

(11) Variance between Allegations and Proof.

See the title VARIANCE.

(12) Attachment.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 119.

R. files a bill for an attachment in 1860, against P., alleging the latter to be a nonresident; no process is served upon him, and no order of publication is had. In 1861 R. files an affidavit that P. is a nonresident, but no attachment was issued. P. answered the bill objecting to the jurisdiction of the court, upon the ground of want of service of process, and also containing a full answer to the bill. The bill was dismissed. It was held, that the allegation of the bill that P. was a nonresident, and the affidavit of R. to the same effect, is equivalent to a return of the officer that he was a nonresident. An attachment might have sued out, but it was not done, and the cause might have been treated as discontinued from that time, and there was not sufficient reason to have justified the court for remanding the cause to rules for further proceedings. The bill was, therefore, properly dismissed. Price *v.* Pinnell, 4 W. Va. 296.

(13) Failure to Give Security for Costs.

See the title COSTS, vol. 3, p. 634.

(14) Another Suit Pending in the Same Court for the Same Cause.

See also, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 15.

When the defense is duly made and established, that another suit is pending in the same court for the same cause of action, the court will dismiss the bill; or if the prior suit be in his court and defective, he may order a dismissal of that and permit the plaintiff to proceed on his new bill. Anderson *v.* Piercy, 20 W. Va. 282.

An objection to the proceedings in a chancery cause, that another chancery suit is pending in the same court for the same cause of action, should be presented by a motion to dismiss as a preliminary question and as an incident among other matters in an answer on the merits, it will not avail. Anderson *v.* Piercy, 20 W. Va. 282.

(15) Failure to Make Suitor's Test Oath.

See the title OATH.

Preliminary Affidavit.—It was sufficient if any one of a number of defendants make the preliminary affidavit required by the act of February 28th, 1865, in relation to oaths by suitors; and the making of any such affidavit will warrant the dismissal of the suit upon the failure of the plaintiffs, or some one of them, to take and file the oaths required by that act. Nadenbousch *v.* Sharer, 2 W. Va. 285.

Can Not Work Continuance.—A party obtaining a rule or order nisi for the opposite party to file his affidavit under the statute of February 28th, 1865 (in relation to dismissal of suits by rebels), can not thereby work a continuance, by delaying the motion until the time limited for the response of the opposite party would be subsequent to the time of hearing the cause on its merits. Nadenbousch *v.* Sharer, 2 W. Va. 285.

Suit by Firm.—S. R. & Co., as a firm, instituted suit against H., who tendered an affidavit under the "suitor's test oath" act, averring that "S. & R." were plaintiffs and he was defendant, and that S. & R. had aided in the rebellion, etc. The court below refused to permit the affidavit to be filed and to make an order requiring the plaintiff to take the "suitor's test oath." Held, that there was no error in the refusal of the court to permit the affidavit to be filed, as it does not appear to be in the suit of "S. R. & Co." Even if S. & R. were

the same parties mentioned in the suit in which the affidavit is sought to be filed, still there is no affidavit that the other members of the firm of S. R. & Co. ever aided in the rebellion, etc., and without that the suit could not be dismissed, as it is sufficient if "any one" of the plaintiffs shall take oath of expurgation. See Nadenbousch *v.* Sharer, 2 W. Va. 285; Harrison *v.* Smith, 4 W. Va. 97.

Power of Codefendants.—If a complainant in a bill in equity filed to enforce a vendor's lien against real estate, make subpurchasers parties to the suit, although they may not have been necessary parties, they are proper parties, and having been made parties by the complainant and he not asking to dismiss the bill as to them, must take the consequences of joining them, and an affidavit made and filed by them, or one of them, in pursuance with the act of the 28th of February, 1865, known as the "suitor's test oath" act, is sufficient to authorize the dismissal of the bill of the complainant, he being required by order of the court to do so, and failing to take the oath required by said act. Beirne *v.* Brown, 4 W. Va. 72.

(16) Laches and Limitations.

See also, the title LIMITATION OF ACTIONS.

"A court of equity, which is never active in relief against conscience or public convenience," said Lord Camden, in a celebrated case, "has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." Terry *v.* Fontaine, 83 Va. 455, 2 S. E. 743; Doggett *v.* Helm, 17 Gratt. 96.

The rule laid down by Lord Camden in Smith *v.* Clay, Ambler R. 645, has been approved by many decisions in Virginia and West Virginia, several cases citing the principal case also as authorizing it. See Carr *v.* Chapman, 5 Leigh 164, 171; Hayes *v.* Goode, 7 Leigh 452; Atkinson *v.* Robinson, 9 Leigh 393; Caruthers *v.* Trustees of Lexington, 12 Leigh 610; Foster *v.* Rison, 17 Gratt. 321; Bargamin *v.* Clarke, 20 Gratt. 554; Trader *v.* Jarvis, 23 W. Va. 100; Walker *v.* Ruffner, 32 W. Va. 247, 9 S. E. 215; Duffield *v.* Butler, 34 W. Va. 624, 12 S. E. 776; Bill *v.* Schilling, 39 W. Va. 108, 19 S. E. 514; Swann *v.* Young, 36 W. Va. 57, 14 S. E. 426; Kelly *v.* McQuinn, 42 W. Va. 774, 26 S. E. 517.

"As to laches in prosecuting the suit for seven years and three months. All the parties still living and able to show their defense, under the cases bearing on the question when a suit will or will not be dismissed for failure to prosecute with diligence after it is brought, I do not think we would be warranted in dismissing the suit for this cause. It takes longer delay and death of parties or loss of evidence to call for such a dismissal. Crawford *v.* Patterson, 11 Gratt. 364; Hayes *v.* Goode, 7 Leigh 452; Mayo *v.* Carrington, 19 Gratt. 74; Buster *v.* Holland, 27 W. Va. 510; Tapp *v.* Rankin, 9 Leigh 478; James River, etc., Co. *v.* Littlejohn, 18 Gratt. 53." Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

Bill for Land Warrants.—A bill was filed in 1858 in relatoin to land warrants issued for services in the revolutionary war. It was dismissed on the ground of laches and lapse of time. Doggett *v.* Helm, 17 Gratt. 96.

Lapse of Twenty-Eight Years.—On debt contracted by F. in 1865, T. got judgment in 1873. In 1870, F. bought lands which were conveyed to his sister. In 1883, after death of F. and sister, the lands were sold in suit to settle sister's estate. Then T. brought his bill to apply proceeds to pay F.'s

debts, on ground that the lands were conveyed to sister without consideration, to defraud F.'s creditors, and failed to explain delay to sue sooner. It was held, the bill should be dismissed for laches. Terry *v.* Fontaine, 83 Va. 451, 2 S. E. 743.

Delay of Thirty-Seven Years.—L. qualified as executor of his father in 1841. Suit for settlement was instituted thirty-seven years afterwards. Both plaintiff and defendant were old and died within a few months. Estate was large. Much money had been paid out to legatees. L. had actually donated to plaintiff a farm worth double her claims. Witnesses were dead, vouchers destroyed by public enemy during civil war, and a correct account had become impossible; whilst the delay to demand settlement sooner, was unexplained—it was held, the court will leave the parties where they contentedly rested so long, and dismiss the bill. Turner *v.* Dillard, 82 Va. 536.

Bill for profits of dower filed in 1829, and pending in 1859, was not prosecuted until 1881, with no excuse on record for such failure. The evidence showing that any decision must be conjectural, and the danger of injustice being almost certain, the original transactions being obscured by time, and evidence having been probably lost; it was held, the bill should be dismissed. Dismal Swamp Land Co. *v.* McCauley, 85 Va. 16, 6 S. E. 697.

A bill for specific execution of a contract between parceners for keeping open a lane through their lands, filed near twenty years after the contract, against a purchaser claiming under one of the parties, without actual notice, and even doubtful constructive notice, the lane having been closed for a number of years, and the plaintiff having stood by without setting up any claim to the lane when the land was twice sold, and having little or no interest in it, dismissed. McCue *v.* Ralston, 9 Gratt. 430.

A supersedeas is allowed by this court, without requiring a supersedeas bond, when one ought to have been required, and the cause is docketed without objection; this is not good cause to dismiss the supersedeas, on motion made after lapse of six years from the time of awarding it. Pugh *v.* Jones, 6 Leigh 299.

Unreasonable Delay to File Cross Bill.—It is not error to dissolve an injunction on a cross bill restraining the carrying out of a decree in the cause and to dismiss said bill, where the matters of defense in the cross bill have been set up in an answer, and the cross bill is unreasonably delayed, and especially where the plaintiff in the cross bill fails to state any reason for such delay. Armstrong *v.* Wilson, 19 W. Va. 108.

A female slave is bequeathed by a father to his daughter, but the name of the slave having been altered after it was first written, it is doubtful whether the bequest is of Harriet or Helen. The executors, considering Harriet to have been the slave intended, deliver her to the daughter. She is of equal value with Helen, and indeed preferred by the daughter, who, though not of age, accepts her, and hires her out until Harriet dies. Helen is delivered to another legatee, and sold by him. After about twenty years from the time that the slaves were delivered to the legatees respectively, and more than five years from the time that the daughter attained full age, a bill in equity is brought by her husband and herself, to recover Helen and her children. It was held, the length of time, and the acquiescence of the daughter in the manner of executing the will, are sufficient grounds for dismissing the bill. Parsons *v.* M'Cracken, 9 Leigh 495.

Amount Uncertain.—A bill in equity will be dismissed, where the amount remaining due to complainant was uncertain, and could only be ascertained by a settlement of accounts in reference to transactions more than twenty-

seven years old at the commencement of the suit. Atkinson *v.* Robinson, 9 Leigh 393.

Administrator's Account.—Upon fi. fa. against M., administrator of L., a female slave of L.'s estate is taken and sold by sheriff in 1797, at which sale, M., the administrator, himself is purchaser; in 1801, the administrator settles his account of administration before county court commissioners, whereby it appears, that at a time of sheriff's sale in 1797, he had no funds of L.'s estate, besides this slave, to satisfy the execution, and he accounts for the price of the slave; L.'s daughter and sole distributee, while yet an infant, in 1810, marries T. who is soon after informed of every fact concerning the sale and purchase of the slave; the administrator, M., lives till 1822; and after his death T. and wife exhibit a bill against his representative, praying a settlement of M.'s administration account, in chancery, impeaching the sale and purchase of the slave in 1797, as irregular and illegal, and praying decree for the slave and her increase and for profits. It was held, this bill was rightly dismissed by the chancellor. Todd *v.* Moore, 1 Leigh 457.

Effort of Removal to Federal Court.—Where a removal to the federal courts is ordered upon the petition of the defendant, and the cause remains in the United States court for seventeen years, during which time active litigation is carried on between the parties, and then the cause is remanded to the state court for want of jurisdiction, the defendant can not, under the plea of laches, take advantage of the delay thus occasioned to dismiss the plaintiff's cause. Parker *v.* Clarkson, 39 W. Va. 184, 19 S. E. 431.

(17) Debt Not Due.

A suit to set aside a fraudulent conveyance under § 2, ch. 133, W. Va. Code, 1899, instituted for a legal demand by a creditor at large before the debt on which it is predicated becomes due and payable, can not be sustained. In such case, though the bill may be sufficient under § 1, ch. 106, Code, it is proper to dismiss it on demurrer, if an attachment has not been sued out under it, before such dismissal. Frye *v.* Miley, 54 W. Va. 324, 46 S. E. 135, disapproving Chrislip *v.* Teter, 43 W. Va. 356, 27 S. E. 288; Bank *v.* Prager, 50 W. Va. 660, 41 S. E. 363.

(18) Collusion.

In 1874 J. settled his property on his wife. In 1881 W. claimed to be a creditor of J. by notes made for money loaned before and after 1874, and sued J. and wife to annul the settlement as fraudulent, and replied to the plea of the statute of limitations a written promise of J. to pay the debt. The evidence showing that W. was without means to have loaned the money, and was living adulterously with J., and that the claim and suit was a collusive scheme between J. and W. to defraud the wife of the property, the circuit court dismissed W.'s bill. On appeal, it was held, no error in the decree appealed from. Waller *v.* Johnson, 82 Va. 966, 7 S. E. 382.

(19) Want of Necessary Parties.

See the title PARTIES.

The effect of an objection successfully taken for want of parties is not that the bill is dismissed, but that it stands over with leave to amend by adding the necessary parties; and if a defect of parties is apparent upon the record, the court will take the objection, though the defendant do not; and the court of appeal, if there be a defect of parties, will send the case back to the court below. Jameson *v.* Deshield, 3 Gratt. 14.

"If the plaintiff desires to make new parties he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable

party is not on the record, it refuses to proceed." McMullen *v.* Eagan, 21 W. Va. 250.

(20) Injunction.

As to when a bill containing a prayer for an injunction should be dismissed, see the title INJUNCTIONS.

b. Dismissal as Bar to Future Action or Defense.

See ante, "Nature and Effect of Dismissal," II, A, 2.

(1) General Rules.

An order simply dismissing the suit is not a determination on the merits, and so is not a bar to the maintenance of a second suit for the same cause of action. Haldeman *v.* The United States, 91 U. S. 584. And so it has been held, by this court, that an order dismissing a caveat, when not on the merits, is not conclusive of the controversy. Hunter *v.* Hall, 1 Call 206; Wilcher *v.* Robertson, 78 Va. 602. See also, McClung *v.* Hughes, 5 Rand. 483; Noland *v.* Cromwell, 4 Munf. 155; Hardman *v.* Boardman, 4 Leigh 392.

Bill in Equity.—A decree, on full hearing, dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of adequate remedy at law. Unless it otherwise appear from the decree, it will be taken that the dismissal was on a hearing of the merits. Carberry *v.* West Virginia, etc., R. Co., 44 W. Va. 260, 28 S. E. 694; Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939; Buskirk *v.* Chafin, 48 W. Va. 630, 37 S. E. 552. See also, Taylor *v.* Yarbrough, 13 Gratt. 183.

In Durant *v.* Essex Company, 7 Wall. 107, it was held that a decree, absolute in its terms, dismissing a bill in equity, is an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant had an adequate remedy at law, or upon some other ground which does not go to the merits. And, said the court, where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. See, however, what is said in Chrisman *v.* Harman, 29 Gratt. 494, 501. Seamster *v.* Blackstock, 83 Va. 236, 2 S. E. 36.

Dismissal without Prejudice.—Dismission of suit on its merits at the hearing, whether on plea in bar or demurrer for want of equity or cause of action, is a bar to another suit for the same subject matter between the same parties, unless the dismission be "without prejudice," etc. Durant *v.* Essex Co., 7 Wall. 107. Payne *v.* Grant, 81 Va. 164.

A dismissal of a suit "without prejudice" is no decision of a controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought. Mathews *v.* Glenn, 100 Va. 352, 41 S. E. 735; Newberry *v.* Ruffin, 102 Va. 73, 45 S. E. 733.

Bill Stating Additional Facts.—Where a bill in a suit does not present facts which call for relief, and it is dismissed, the decree will not bar a subsequent bill on the same cause of action, which states additional or other facts not in the first bill, which make the second bill good, for the same relief called for in the first suit. State *v.* McEldowney, 54 W. Va. 696, 47 S. E. 650.

If a material fact touching a matter of controversy is such that it must be stated in a bill, a decree dismissing a bill not stating it will not bar a second bill properly stating such fact. State *v.* McEldowney, 54 W. Va. 696, 47 S. E. 650.

Failure of Court to Go into Evidence.—Dismissal of a bill in equity upon the merits is a bar to further proceedings in the same court for the same purpose between the same parties; and this, too, though the court may not have gone into the evidence. Rogers *v.* Rogers, 37 W. Va. 407, 16 S. E. 633.

Suit Heard upon Merits.—In order that a suit between parties, which has been pending for a time, and been dismissed under the four years' rule, should bar a subsequent suit between the same parties for the same subject matter, the first suit must have been heard upon its merits. Cornell *v.* Hartley, 41 W. Va. 493, 23 S. E. 789.

That a judgment bar another suit, the point in controversy must be same in both cases; and in the first must have been determined on its merits. Order of dismissal is not a determination on its merits, and is no bar to second suit for same cause of action. Wilcher *v.* Robertson, 78 Va. 602.

Cause of Dismissal.—"Where the suit is dismissed upon a hearing upon the merits, it is ordinarily, unless the dismissal be without prejudice, a bar to another bill; whereas, if the bill is dismissed for defect of form or structure of it, not going to the merits, it is no bar to a future suit for the same subject matter. Hughes *v.* United States, 4 Wall. 237; Durant *v.* Essex Co., 7 Wall. 107." Payne *v.* Grant, 81 Va. 172.

When a court of competent jurisdiction has given judgment, that the defendant go without day, and that judgment remains unreversed, it is taken to have been rightly given, and the plaintiff can not have a second action for the same cause. Wohlford *v.* Compton, 79 Va. 333.

Failure to Secure Costs.—It has been held, that where the case is dismissed because of plaintiff's failure to give security for cost, such dismissal does not operate as a bar to another action for the same case. Lawrence *v.* Winifrede Coal Co., 48 W. Va. 141, 35 S. E. 925.

Relief between Codefendants.—See post "Decree of Dismissal," II, B, 1, e.

(2) Application of Rules in Particular Instances.

Suit for Freedom.—Where a party brought an action to secure his freedom and the case was dismissed for want of prosecution, the plaintiff failing to appear when the case was called, and plaintiff afterwards moved to reinstate the case, claiming that he was in jail at the time the case was called under an execution levied against him by the defendant in the case, which motion was dismissed by the lower court because it appeared that he owed a debt to the plaintiff, it was held, by the supreme court, that the decision of the lower court should be affirmed but without prejudice, the plaintiff beginning another suit for his freedom. See Ellis *v.* Baird, 6 Munf. 457.

Caveat.—After the dismission of a caveat upon the merits, the caveatee files in the land office a copy of the judgment, and obtains a patent. A supersedeas being awarded to the judgment, the patent is relied on as a bar. It was held, notwithstanding the emanation of the patent, the court may examine into the correctness of the judgment; but if the same be reversed, then admission of the caveat must ensue. In such case, the dismission will be without prejudice to any proceeding which may be instituted to vacate the patent. Wilson *v.* Daggs, 8 Leigh 681.

The only difficulty is with respect to the caveat. If it had been heard and determined on the merits, it would have been binding until reversed; but, it was not, and, therefore, the case is open on the merits. Hunter *v.* Hall, 1 Call 206.

The dismission of a caveat, unless it be on the merits, is not binding. Hunter *v.* Hall, 1 Call 206.

A judgment, on a caveat, that no grant shall issue to the caveatee on his

inclusive survey, where it appears that he has any other claim or survey, by which he may possibly hold a part of the land, ought to be so worded as not to affect his right under such claim or survey. Preston *v.* Harvey, 2 Hen. & M. 55.

Dismissal of Cross Bill.—In suit whereto county issuing the bonds in aid of a railroad company, and company executing the mortgage are parties, it was decreed that the bonds were valid and the mortgage the first lien, and the decree was, on appeal, affirmed. In such suit the county, by its cross bill, admits the validity of certain of its bonds, but asks to be relieved from paying same except as against purchasers for value without notice, because of the failure of the conditions of their issuance, and on demurrer the cross bill is dismissed for want of equity; such dismissal is, as between the same parties, res judicata. Washington, etc., R. Co. *v.* Cazenove, 83 Va. 744, 3 S. E. 433.

The dismissal of an original bill against a defendant because not a proper party, carries with it the dismissal of a cross bill against that defendant filed by a codefendant. Sulphur Mines Co. *v.* Boswell, 94 Va. 480, 27 S. E. 24.

Dismissal by Consent.—An action of ejectment was brought in 1848, on the demise of S., against C., to recover the possession of 2,300 acres of land. In 1870, S. died, and the cause was revived in the name of his heirs. In August, 1872, C. having died, his death was suggested on the record, and a scire facias was awarded to revive the cause against his "heirs," none of whom were named, but no scire facias ever issued, and the cause was never revived, nor were any of the heirs of C. ever made parties to the suit, nor did they ever appear therein. On the 19th of November, 1872, the court entered therein the following judgment, which was never reversed or set aside: "For reasons appearing to the court, and by consent of parties, this cause is dismissed agreed." In 1879 the heirs of S., to recover the same land, brought an action of ejectment against the heirs of C., who relied upon said judgment as a bar to the plaintiff's recovery in their new action; and, the circuit court having so instructed the jury, there was judgment for the defendants. It was held, that the said judgment operated as a simple dismissal of said action, and can not operate as a bar to a recovery in said new action for the recovery of the same land. Stockton *v.* Copeland, 30 W. Va. 674, 5 S. E. 143.

Effect on Statute of Limitation.—If a bill in chancery be dismissed, on the ground that the plaintiff's claim is exclusively cognizable at law; he can not plead the pendency of such suit in chancery, to prevent the act of limitations from being a bar to his subsequent recovery at law. Gray *v.* Berryman, 4 Munf. 181.

Dismissal by One Plaintiff.—A suit by one creditor to enforce a debt against land of his debtor fraudulently conveyed; another creditor files a petition in the cause setting up another distinct debt against the debtor and to subject the same land; the second creditor is not a party to the first suit, nor are his rights mentioned therein. An order under the title of the first suit dismissing the case agreed on the motion of the plaintiff does not dismiss the petition of the other creditors or bar its further prosecution. Pethtel *v.* McCullough, 49 W. Va. 520, 39 S. E. 199.

Suit by Heirs.—When a suit in equity is brought in the names of several heirs, all having the same interest, if one of them is dead at the time the suit is brought in his name, and his heirs, or their agent, is consonant of the fact that the suit is so brought, and make no objection, but intend to claim the benefit of the decree, they will be bound by the decree dismissing the bill. Doggett *v.* Helm, 17 Gratt. 96.

c. Dismissal as to Portion of Defendants.

Parties Jointly Interested.—"Where a bill is filed against two or more defendants jointly interested, and is taken for confessed against one or more of them for want of appearance, and one or more of the other defendants appear, make defense, and disprove the complainant's case, the bill should be dismissed as to all the defendants. This is well settled." Cartigne *v.* Raymond, 4 Leigh 579; Payne *v.* Graves, 5 Leigh 579; Ashby *v.* Bell, 80 Va. 811; Terry *v.* Fontaine, 83 Va. 451, 458, 2 S. E. 743; Aiken *v.* Connelley, 2 Va. Dec. 384.

Where suit is on joint obligation, the bill is taken for confessed, and one of several defendants appears and disproves plaintiff's case, unless it be on some matter of defense which is purely personal to himself, plaintiff is not entitled to a decree against the others, but the bill must be dismissed. Ashby *v.* Bell, 80 Va. 811.

Principal and Surety.—Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator has not duly accounted, and praying an account, the bill is taken pro confesso as to the administrator, but the surety answers, and proves, that the plaintiff, on a full and final settlement, has released the administrator, and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants. It was held, the bill was properly dismissed as to both defendants. Cartigne *v.* Raymond, 4 Leigh 579.

Cotrespassers.—A party injured by cotrespassers may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all; and although a plea of abatement is permitted in case of nonjoinder of debtors, the privilege is not extended to tort feasors, as all are regarded as principals, and neither the omission to sue at all, nor if all are sued the dismissal of one of them from the suit, can be pleaded by the others in bar. Bloss *v.* Plymale, 3 W. Va. 393.

Trustee and Administrator.—A party instituted a suit in chancery, for the purpose of compelling the execution to himself of a deed by trustee for land sold under a deed of trust, and to have a decree over against the administrator of the first assignor (there being two), of the bonds secured by said deed of trust, for the unpaid balance due on said bonds, and the bill makes defendants, the trustee, the administrator of the first assignor, and also the second assignor. The bill charged that the trustee had refused to execute the deed, without reason, and the trustee by his answer, while giving as a reason for not executing the deed, that he had been enjoined until shortly before filing his answer, from so doing, and that the plaintiff had never tendered him his commission, yet averred in his answer, that he had executed the deed and was ready to deliver it upon payment of his commission; and the court dismissed the bill as to all the parties. It was held, that so much of the decree as dismissed the bill as to all the defendants, except the trustee, be affirmed, with costs to the appellee, the administrator of the remote assignor, he being the party substantially prevailing; but so much of the decree as dismissed the bill as to the trustee is reversed, and the cause remanded, to have the deed executed by the trustee delivered to the plaintiff. Atherton *v.* Hull, 12 W. Va. 170.

Action on Contract.—"In an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." Va. Code, § 3395. Gibson *v.* Beveridge, 90 Va. 697, 19 S. E. 785.

Cause Not Matured.—On the hearing

of a suit in chancery, if it be discovered that the cause is not matured for hearing as to some of the defendants, against whom the plaintiff appears to have a claim in equity, the bill ought not to be dismissed upon the merits; but only as to those defendants against whom there is no equity; as to the other defendants, it should be sent back to the rules for farther proceedings; notwithstanding the plaintiff may have been negligent, and the cause was prematurely set for hearing on his motion. Key *v.* Hord, 4 Munf. 485.

d. Reinstatement of Suit.

Code Provision.—Section 11, ch. 127, W. Va. Code, 1899, provides that: "Any circuit court may, on motion, reinstate on the trial docket of the court any case dismissed, and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff within three terms after the order of dismissal may have been made or order of nonsuit entered." Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

When Deemed Continuation of Former Suit.—Where suit is brought and decided in 1858, but retained on docket till 1867, because there was no hand to receive the fund, when it is dismissed with leave to reinstate it on motion of any person interested, and it is reinstated in 1878, and a supplementary suit is brought, the latter is deemed a continuation of the former, quoad questions arising under the statute of limitations. Sharpe *v.* Rockwood, 78 Va. 24.

Case Dismissed by Clerk.—Even where a suit is properly dismissed by the clerk at rules, there is no inhibition, by statute on the court which has control of the proceedings in the office during the preceding vacation, from reinstating it, and for good cause shown, it is its duty to reinstate a cause properly dismissed by the clerk at rules. Alvis *v.* Johnson, 1 Va. Dec. 381. See also, Lipscomb *v.* Littlepage, 1 Hen. & M. 454.

At the May term, 1874, plaintiff had leave to amend the declaration, and the cause was remanded to rules for that purpose. No declaration was filed at June rules, when it should have been and no rule then given to declare. Indeed, there seems to have been no rule book kept by the clerk. The amended declaration was handed to the deputy clerk at the September rules, 1874. No rules were taken on it, but the cause was put on the office judgment docket at the October term, 1874, when, on the motion of the defendant, the court dismissed the case, because the amended declaration had not been filed within three months from the time the leave was given, and, at a subsequent day of the term, refused to reinstate the case on the docket, and to remand it to rules for regular proceedings. It was held, this was error. The court should have reinstated the cause, and have remanded it to rules, to be regularly matured there for the docket. Alvis *v.* Johnson, 1 Va. Dec. 381.

Case Tried by Disqualified Judge.—An order dismissing the cause or part of a cause, in which a judge is so interested as to disqualify him in respect thereto, entered or allowed by him, on motion of the parties by counsel, without special authority given to said counsel for that purpose, is voidable, and the party having the right to prosecute the cause so dismissed, in whole or in part, is entitled to an adjudication, in the same cause, by a qualified judge, upon the question of his right to have the cause, or so much thereof as has been so dismissed, reinstated under § 11, ch. 127, W. Va. Code, 1899. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

Right to Redocket Lost.—Where a case was dismissed for want of prosecution, and the fact showed that the attorney who was to conduct the case had not marked his name on the docket, and subsequently being elevated to the bench, had neglected to inform the attorneys who were to close up the busi-

ness that they should prosecute the suit, but the client made no effort to prosecute the case and did not employ counsel until after the case had been dismissed by the court, it was held, that there was not sufficient ground for redocketing the cause. Thornton *v.* Corbin, 3 Call 222.

Reinstatement by Consent.—Where the object of reinstating a cause, which has been stricken from the docket under five years' rule, is to settle the claims against two parties who are jointly liable, the consent of one is not sufficient to warrant the reinstatement, although it was not known at the time that the other person would be a necessary party. The cause can not proceed without the other party, and can not be revived against him without his consent. Nor can the cause proceed against the party who consented to the reinstatement. Courts of equity will not proceed with a cause, notwithstanding the agreement or silence of parties, where it is evidence that, for lack of proper issues, or proper parties, final results can not be accomplished, and injustice and future litigation are the probable consequences. Echols *v.* Brennan, 99 Va. 150, 37 S. E. 786.

All Parties Must Consent.—A decree striking a cause from the docket under the five years' rule is an adjudication that everything has been done in the cause which the court intended to do, and is final, and the cause can not be reinstated on the docket after the lapse of one year without the consent of all parties to be affected thereby. Echols *v.* Brennan, 99 Va. 150, 37 S. E. 786.

Can Not Summarily Reinstate It.—Where a court, by its order, however erroneous, has put a cause beyond its control, it can not upon discovery of the error recall it by the summary mode of directing "the cause to be reinstated on the docket." Battaile *v.* Maryland Hospital, 76 Va. 63.

Words "Final Decree" Do Not Bar Reinstatement.—Where there is nothing in a decree to show that the court meant to end the cause, the words "final decree" at the head of the decree and the unauthorized leaving by the clerk of the cause off of the docket, do not make it final so as to prevent the court from reinstating it. Ward *v.* Funsten, 86 Va. 359, 10 S. E. 415.

Motion to Reinstate Injunction.—Where injunction has been dissolved by court below upon the merits, the remedy is by appeal to the supreme court, or by motion to court below for its reinstatement, and appeal from its refusal to reinstate. Fredenheim *v.* Rohr, 87 Va. 764, 13 S. E. 193, 266.

Renewal of Supersedeas.—Petition to this court for a supersedeas was rejected, and an order was entered accordingly; afterwards, at the same term, a motion was made for its reconsideration, and the court agreed to reconsider, but by inadvertence no entry was made setting aside the order denying the supersedeas; more than three years afterwards the motion to reconsider was renewed. It was held, the motion can not now be entertained. Emory *v* Erskine, 7 Leigh 267.

Reopening of Decree.—A party against whom a decree has been rendered, without his appearance, may apply to the court to have the decree opened either by petition or by original bill. In either form it is an original proceeding, and may be commenced without previous leave of the court. Hill *v.* Bowyer, 18 Gratt. 364.

Rejection of Application for Reopening Decree.—If application is made to the court for leave to file a petition to open a decree, and the application is rejected, this is not a legal adjudication upon the case presented in the petition, as it would be in the case of the refusal to allow a bill of review to be filed, in which case the leave is necessary to entitle the plaintiff to file it; and the party may therefore file his original bill to have the decree opened. Hill *v.* Bowyer, 18 Gratt. 364.

Reinstatement Must Be within Statute of Limitations.—A decree in these words: "The plaintiff failing to prosecute his suit, it is ordered that the same be dismissed," is a final decree. It can only be set aside by appeal, or by bill of review, within the periods limited by statute. Battaile *v.* M. H. for Insane, 76 Va. 63. Such decree dismissing suit was entered July 13, 1874. Plaintiff made motion April 17, 1878, for leave to file petition to reinstate the case on the docket. It was held, the petition was too late, the limited period of three years having elapsed. Jones *v.* Turner, 81 Va. 709.

Destroyed Records.—A cause was on the docket of a circuit court at its last session before the war. All the records of that court were destroyed during the war except such as were in the attorney's hands. In 1881 the cause was not on docket, it not appearing that it has been legally removed. On motion it was reinstated. It was held, this was not error. Dismal Swamp Land Co. *v.* Macauley, 85 Va. 16, 6 S. E. 697.

Omitted Entry.—If the clerk of the court of appeals be directed by the court to set aside a judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause redocketed. Beasley *v.* Owen, 3 Hen. & M. 449.

Surprise, Accident or Mistake.—A case which has been dismissed by this court may at a subsequent term be reinstated, if the case was dismissed because of surprise, accident or mistake. But such equitable considerations can not be considered by this court in deciding, whether when a case has been previously dismissed once or oftener another writ of error or appeal can be granted. Perry *v.* Horn, 21 W. Va. 732.

Surprise.—If a suit be dismissed, by surprise of the appellant, it may be redocketed at a subsequent term. Thornton *v.* Corbin, 3 Call 232.

As to the reinstatement of an injunction, see the title INJUNCTIONS.

e. Decree of Dismissal.

By the provisions of both the Virginia and West Virginia Codes, a decree of dismissal after entry is a final judgment. See Hunter *v.* Snyder, 11 W. Va. 205. See also, the title JUDGMENTS AND DECREES.

Costs.—On dismissing a bill filed by the heir and the executor of vendee, to have a title made for the land purchased, and meanwhile to enjoin vendor from collecting the purchase money, decree for costs should not be against the plaintiffs jointly, nor against the executor de bonis propriis. Long *v.* Israel, 9 Leigh 556.

Failure to Give Leave to Amend.—It is not error to omit giving leave to amend upon dismissing a bill upon demurrer, where the record does not disclose that any amendment improving the bill can be made. Pickens *v.* Kniseley, 36 W. Va. 794, 15 S. E. 997.

Saving Clause.—But it is error to so dismiss such a bill without inserting in the decree a clause, saving to the plaintiff the right to prosecute any other proper suit in respect to the matter complained of in the bill, or showing that the cause had not been decided on its merits, as such decree, without such clause, would be a bar to a subsequent suit predicated upon the same facts. Frye *v.* Miley, 54 W. Va. 324, 46 S. E. 135.

Relief between Codefendants.—Where the relief sought in a bill fails for want of proof, no relief can be administered between codefendants on answer filed praying it, but such answer must be dismissed with the bill, without prejudice to the rights of the defendants as between themselves. Kennewig Co. *v.* Moore, 49 W. Va. 322, 38 S. E. 558.

Where the plaintiff fails to sustain his bills, the answer praying affirmative relief as between the defendants, goes with them as no relief can be administered between defendants when the bills are dismissed for want of equity, in the absence of statutory provision

to the contrary. 5 Ency. Plead. & Prac. 664. Kennewig Co. *v.* Moore, 49 W. Va. 323, 38 S. E. 558.

Provision for Payment.—L. files a bill in chancery on a written contract with H., and alleges that H. had not paid him the whole amount of 1000 dollars specified in the contract, but admits that 566 dollars of the same were paid. H. files his answer, and alleges that the whole 1000 dollars were paid, but only shows the payment of other sums than those admitted in the bill, reducing the amount of the 1000 dollars remaining unpaid to 104 dollars, which he fails to show were paid. It was held, that the allegation in the answer, that the whole amount was paid, is not conclusive of the payment of the same, where it appears by the vouchers filed with the answer that the whole amount was not paid. And where a cause is heard upon such bill and answer only, it is error in the court below to dismiss the bill without providing for the payment of the 104 dollars for which there were no vouchers. Low *v.* Heck, 3 W. Va. 680.

f. Proceedings Subsequent to Order of Dismissal.

(1) In General.

Coram Non Judice.—All proceedings subsequent to an order of dismissal are coram non judice, except the order quashing the execution issued in the cause subsequent to said order of dismissal, where said execution was issued without judgment. Farmers' Bank *v.* Montgomery, 11 W. Va. 169.

(2) Review of Order of Dismissal.

Must Be Taken in Time.—Where an order was issued dismissing a case because it was barred by the statute of limitations, it was held, that although the order was irregular and erroneous, it could not be reviewed and reserved where a writ of error thereto was not taken within the time prescribed by the statutes. Farmers' Bank *v.* Montgomery, 11 W. Va. 169.

Action Prematurely Dismissed.—When a circuit court prematurely dismisses an action, the judgment will be reversed, and the case remanded, to be tried in accordance with the rules of law and principles governing courts of justice. Junkins *v.* Hamilton Lumber Co., 44 W. Va. 641, 29 S. E. 1017.

Reformation of Decree.—Upon a bill against two persons, namely, the assignor and assignee of a debt, for which judgment has been recovered at law against the plaintiff in equity, praying an injunction, the assignee appears and answers, but the assignor is not brought before the court by regular process; it turns out, that the plaintiff has no just claim to relief against the assignee, but enough appears to show that he may have a just claim against the assignor, for the amount due on the judgment; and the court dissolves the injunction, and dismisses the bill, generally. It was held, the decree should have been without prejudice to any suit of the plaintiff against the assignor; and the decree being general, it shall be reversed for that cause, and a decree without prejudice, etc., entered; yet the appellee (the assignee) shall have his costs in this court. Lockridge *v.* Sharrot, 5 Leigh 376.

If, in a decree of a superior court of chancery, reversing that of a county court, there be no error but an omission to direct the bill to be dismissed, the court of appeals will affirm the decree, and add the proper direction. Heffner *v.* Miller, 2 Munf. 43.

Defendant May Appeal.—If a bill be erroneously dismissed as insufficient in law, a party aggrieved thereby, may, though a defendant in form, appeal from the decree of dismission. Atkinson *v.* McCormick, 76 Va. 791.

Notice of Intention to Appeal.—If the complainant wishes to appeal, he should carry on his suit, in the usual course of the court, to a final hearing, and it seems that his intention to appeal, declared by his counsel, would be

sufficient to prevent the dismission, and authorize his carrying on the suit. If he fails to do this at the time of the omission, he may move at the next term, upon notice to the adverse party, to set it aside, when it may be done, if it appear reasonable. Anderson *v.* Ellington, 2 Hen. & M. 16.

Objection to Parties' Own Act.—It is not competent to a complainant to dismiss his own bill, and then object, in an appellate court, that the prayer thereof has not been decreed in his favor. Pitts *v.* Tidwell, 3 Munf. 88.

(3) Publication of Order.

The provision in § 3312 of the Virginia Code of 1904, that the court making an order of dismissal under the five years' rule "may direct it to be published in a newspaper," is not mandatory. The public has no interest in such publication, and no party has a claim, as of right, to such a publication. Echols *v.* Brennan, 99 Va. 150, 37 S. E. 786.

g. Dismissal in Appellate Court.

See also, the title APPEAL AND ERROR, vol. 1, p. 532.

As to the dismissal of an appeal from a decree dismissing an injunction, see the title INJUNCTIONS.

As to the dismissal of a writ of error because it is allowed by the judge of a circuit court in vacation, see the title APPEAL AND ERROR, vol. 1, p. 504.

(1) Manner of Dismissal.

Statutory Mode.—A cause which has been brought into the appellate court can only be dismissed from thence in the mode prescribed by the statute. Williamson *v.* Gayle, 4 Gratt. 180.

Estoppel.—Although an appeal once allowed can not be regularly dismissed from the appellate court but in the mode prescribed by the statute; yet the party obtaining it may, by his express consent, or by acts indicating such consent, estop himself from objecting the pendency thereof, and may by such acts or consent with the concurrence of the adverse party, restore the jurisdiction of the court below. Fairfax *v.* Muse, 4 Munf. 124.

On Affidavit of Appellee.—The supreme court will not dismiss an appeal upon the exparte affidavit of the appellee taken without notice to the appellant stating that the appellant has assigned his interest in the suit, and that the appeal is prosecuted for the benefit and at the costs of the assignee. Ayers *v.* Blair, 26 W. Va. 558.

(2) Grounds of Dismissal.

(a) Want of Jurisdiction.

Trifling Amount.—Where an amount brought up on appeal is very small, the appellate court, acting upon the maxim de minimus non curet rex, will dismiss the appeal. Bond *v.* Davis, 48 W. Va. 27, 35 S. E. 889.

Creditor whose claim was less than $500 filed a bill to annul trust deed. Other creditors, whose separate claims exceeded that sum, subsequently filed in the clerk's office petitions, without leave of court and notice to grantor, asking to be made parties. Decree dismissed the bill without noticing petitions. It was held, that the petitioners were not parties below, and can not be so regarded here, and the appeal must be dismissed for want of jurisdiction. Walter *v.* Chichester, 84 Va. 723, 6 S. E. 1.

In Absence of Objection.—Whenever it appears that the supreme court has no jurisdiction of an appeal it will be dismissed, although no objection was made on that account at the hearing. Hobson *v.* Hobson, 100 Va. 216, 40 S. E. 899.

Decision of Disqualified Judge.—A circuit judge rendered a decision in a cause which had been removed from his circuit to that of another judge. The degree was unauthorized and void. It was held, that an appellate court will not dismiss the appeal but will reverse the degree and remand them to the lower court. Johnson *v.* Young, 11 W. Va. 673.

(b) Taken without Knowledge of Plaintiff.

An appeal taken in the name of a party without his knowledge or consent, may be dismissed as to him, on motion. Watson *v.* Watson, 4 Rand. 611.

An appeal will not be dismissed on the ground that it was improperly obtained because the attorney who applied for and obtained the appeal was not authorized to do so where no evidence was introduced to show that the attorney acted without authority. DeCamp *v.* Carnahan, 26 W. Va. 841.

(c) Want of Actual Controversy.

Whenever it appears from the record, or is shown by extrinsic evidence, that there is no controversy existing between the litigants, or, if it once existed, it has been settled or has ceased to exist, the writ of error or appeal will be dismissed. Courts do not sit to decide moot questions. Franklin *v.* Peers, 95 Va. 602, 29 S. E. 321.

When several defendants appeal, and the appeal of one of them brings up a particular question, it is immaterial whether the other defendants are interested in that question of appeal or not. Being a matter of no practical importance, this court will not consider a motion to dismiss the appeal of the other defendants on the ground that the decree against them was on a bill taken for confessed, and that their proper remedy was by motion under §§ 3451, 3452, of the Virginia Code. Flynn *v.* Jackson, 93 Va. 341, 25 S. E. 1.

In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal, the absent defendant may file his petition in the court below to be permitted to appear and file his answer in the cause, and may have the decree reheard and set aside, if it is erroneous as to him. If upon such rehearing the decree, or so much of it as is the subject of appeal, is wholly set aside, the appeal will generally be dismissed. But if an appeal is taken from the decree on the rehearing, before the dismissal of the first appeal, the appellate court may refuse to dismiss it. James River, etc., Co. *v.* Littlejohn, 18 Gratt. 53.

(d) Failure to Make Necessary Parties.

Where the plaintiff has shown a right to relief against parties before the court, but has omitted to make other necessary parties, there the bill will not be dismissed; but he will be permitted to amend his bill, and add the necessary parties. And in such a case, the appellate court, if there be a defect of parties, will send the case back to the court below. Jameson *v.* Deshields, 3 Gratt. 4. See also, the title PARTIES.

(e) Improvidently Awarded.

If an appeal from an interlocutory order or decree is allowed, and the court of appeals is of opinion that it should have been proceeded in further before the appeal was allowed, it will be dismissed as improvidently awarded. Hughes *v.* Johnston, 12 Gratt. 479. See also, Craft *v.* Mann, 46 W. Va. 478, 33 S. E. 260.

A bill is filed in 1836 by an executor and guardian, charging that the personal estate of his testator is not sufficient to pay his debts; and that it is for the interest of the infants to sell their land; and that he had made a contract for the sale of the land which he deemed highly beneficial to the infants. The bill is not sworn to; nor does it appear that the testimony was taken in the presence of the guardian ad litem, or upon interrogatories agreed to by him. In the same year a decree is made confirming the sale, and authorizing and directing the executor as commissioner to convey the land upon the payment or securing of the purchase money; and directing him to report to the court. The cause is continued regularly until 1845, when, on the motion of the plaintiff, an order is made for the settlement of the guard-

ian's accounts; and the cause is continued until January, 1853, when the death of one of the infants and the marriage of the other is suggested, and the husband and wife obtain an appeal from the decree of 1836. It was held, that the appeal was improvidently allowed, and should be dismissed. Hughes *v.* Johnston, 12 Gratt. 479.

(f) Failure to Prosecute Appeal or Error.

When the matter in controversy is the possession of an office, and the plaintiff in error fails to file a brief or prosecute his writ of error until after the expiration of the term of the office in question, the writ of error will be dismissed, at the costs of plaintiff in error. Taylor *v.* Maynor, 46 W. Va. 588, 33 S. E. 260.

The counsel for the appellee may move to dismiss the appeal, for want of an appearance being entered for the appellant, before he opens the record, but not afterwards. Collins *v.* Lowry, 2 Wash. 75. See also, the title APPEAL AND ERROR, vol. 1, p. 418.

(g) Misconduct of Plaintiff in Error.

Where the plaintiff in error himself has done some act, since the judgment complained of was rendered, that would in law prevent him from obtaining any fruits of a writ of error, and the matter is in such form, that the appellate court can act upon it, his writ of error will be dismissed. Bradley *v.* Ewart, 18 W. Va. 598.

But where the motion to dismiss is founded upon an alleged forfeiture of defendant's title after judgment in an ejectment case, the motion will be overruled. Bradley *v.* Ewart, 18 W. Va. 598.

(h) Failure to Have Record Printed.

If an appeal or a writ of error has been twice dismissed by this court because of the failure of the appellant or the plaintiff in error to have the record printed, or to deposit the requisite money with the clerk of this court to have the record printed within six months after the case has been docketed in this court, the appellant or the plaintiff in error can not have a third appeal or writ of error awarded to him. Perry *v.* Horn, 21 W. Va. 732.

(i) Lapse of Time.

Where two terms of this court have elapsed, since the appeal, and before the record is brought up, the administrator of the appellee may have the appeal dismissed, on motion, without resorting to a scire facias. Meek *v.* Baine, 1 Hen. & M. 339.

A petition for an appeal is in the nature of a pleading, and should state clearly and distinctly all the errors relied on for a reversal of the decree. Otherwise the appeal, if granted, should be dismissed. But a motion to dismiss for this cause will not be granted after the lapse of more than three years when the right of appeal has become barred by limitation. Orr *v.* Pennington, 93 Va. 268, 24 S. E. 928.

(j) Bond Given in Clerk's Office.

In this case, an appeal being taken from a judgment of the superior court of Monongalia county, it was granted by that court, "upon the appellant's entering into bond with good security conditioned as the law directs, in the clerk's office, within thirty days;" which bond was accordingly given; but the supreme court dismissed the appeal, on the ground that the bond, being given not in open court but in the clerk's office, was illegal. Thompson *v* Evans, 6 Munf. 397.

(3) Error Must Appear on Record.

On appeal from a justice, when a motion is made by the appellee to dismiss the appeal because improvidently awarded, and the motion is overruled, the appellate court can not review such ruling, unless it was objected to and exception taken when the ruling was made, or the point saved, and a bill of exceptions duly taken, showing the ruling complained of, or unless the error appears upon the record. Hines

v. Board of Education of Springfield, 49 W. Va. 426, 38 S. E. 550.

A writ of error to a judgment of the circuit court for alleged errors involving the evidence alone, which is not certified or in any manner made part of the record, will be dismissed, as improvidently awarded. Craft *v.* Mann, 46 W. Va. 488, 33 S. E. 260.

(4) Effect of Dismissal.

Same as Affirmance.—An order dismissing an appeal for failure to print the record, effects the same purpose as an affirmance. Cobbs *v.* Gilchrist, 80 Va. 503; Beecher *v.* Lewis, 84 Va. 630, 6 S. E. 367.

Not a Bar to Judgment.—In a writ of error in this court from a judgment an order is made reciting that it appeared from a writing filed that the "matters in difference herein" have been settled, and dismissing the writ of error "agreed" on motion of the plaintiff in error; such order is not a bar against the judgment, and does not discharge it. Fletcher *v.* Parker, 53 W. Va. 422, 44 S. E. 422.

Return of Money.—Where a bill of interpleader was filed in the circuit court, and demurrer thereto overruled, and $600 paid into the hands of the "receiver" of the court, and on appeal the demurrer to the bill was sustained, the appellate court on reversing the decree remanded the cause with instructions to order the money to be returned whence it came, and then to dismiss the bill with costs. Hechmer *v.* Gilligan, 28 W. Va. 750.

Determination of Rights on Opposite Parties' Appeal.—Where a complainant, and a defendant whose rights are involved in the same question, both appeal from the same decree, but the complainant permits his appeal to be dismissed for failure to give the appeal bond, he may, nevertheless, under rule 9 of the supreme court, have his rights determined in the case in which the defendant appealed. Nicholson *v.* Gloucester Charity School, 93 Va. 101, 24 S. E. 899.

(5) Reinstatement.

Where a suit has been dismissed by the appellate court for want of prosecution, it can not as of right be redocketed at a subsequent term; but if upon a rule or notice it be shown, that the case was dismissed by fraud, accident or mistake, the case may be redocketed at a subsequent term of the court. Casanova *v.* Kreusch, 21 W. Va. 729; Thornton *v.* Corbin, 3 Call 232; Craigen *v.* Thorn, 3 Hen. & M. 269; Emory *v.* Erskine, 7 Leigh 267; Thornton *v.* Corbin, 3 Call 222.

2. Nonsuit.

As to the definition of nonsuit, see ante, "Nonsuit," I, C.

a. Right of Court to Order.

The court may recommend a nonsuit, but can not direct it to be entered, against the will of the plaintiff. Ross *v.* Gill, 1 Wash. 87; Wroe *v.* Washington, 1 Wash. 357.

The court were certainly right in rejecting the motion which was made; as we are of opinion that they had no power to direct a nonsuit, however destitute the plaintiff might be of a right to recover. They may advise it, and may direct the plaintiff to be called; but if he refuse to suffer a nonsuit, the court can no otherwise protect and enforce their opinion, but by awarding a new trial, in case the jury have found against their direction. Consequently a refusal in the court to direct a nonsuit, can not be a ground of exception. Ross *v.* Gill, 1 Wash. 89.

Upon a motion for a nonsuit, the court may give their opinion, that the plaintiff has no cause of action, and may direct him to be called. But he may nevertheless appear, and refuse to be nonsuited, nor can the court compel him against his will. So on the other hand, the court may declare, that the action is maintainable—or may refuse to give any opinion to the jury, and so leave the whole question with them; if they do instruct, still the jury may find against the opinion of the

court, who have no remedy left, but to grant a new trial. Thweat *v.* Finch, 1 Wash. 220.

b. When Proper,

"When the plaintiff makes default, he may be nonsuited; and, when the defendant makes default, judgment by default is rendered against him." Buena Vista Freestone Co. *v.* Parrish, 34 W. Va. 652, 12 S. E. 817.

By Court of Error.—If the evidence differs from the statement in the declaration, judgment of nonsuit be given by the court of error; and the cause will not be sent back to the court below with a direction to call the plaintiff, or to instruct the jury that the evidence does not support the declaration. Calvert *v.* Bowdoin, 4 Call 217.

Omission of Defendants.—If one of several joint contractors be omitted as defendant, advantage of the omission can be taken only by plea in abatement. But if the omission be disclosed only by the evidence, the plaintiff will be nonsuited. Prunty *v.* Mitchell, 76 Va. 169.

Action of Replevin.—At common law, in the action of replevin, after issue joined, both parties are plaintiffs, and therefore the plaintiff can not suffer a nonsuit. Bargamin *v.* Poitiaux, 4 Leigh 416.

But, before issue joined, he is the only plaintiff; and he might therefore have suffered a nonsuit, and terminated the whole process. But when he did so, the judgment was not merely that he take nothing by his bill, as in other cases of nonsuit; for having, by his replevin, got what he principally wanted, that is, his goods, and then abandoned the process instituted to establish his right to them, it was right he should be compelled to return them. Hence, the judgment, in case of nonsuit in replevin, went on to award that the defendant should have a return of the goods and chattels: Tidd's Pract. Forms, p. 599. And this was equally the case whether the nonsuit was before or after avowry, as where it was for want of a declaration; Id. 586. If then the case at bar stood unaffected by any statute, the court ought to have given a mere judgment for a return of the goods, when the plaintiff suffered a nonsuit; and whether there was a good or bad avowry filed, or whether an avowry was filed or not, the judgment must have been the same. Bargamin *v.* Poitiaux, 4 Leigh 418.

Before Jury Retires.—"The nonsuit is resorted to in Virginia practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when he is not ready or for any other reason. By our statute a nonsuit (that is, any voluntary abandonment of the cause) must be suffered, if at all, before the jury retires from the box." Va. Code, § 3387. Mallory *v.* Taylor, 90 Va. 348, 18 S. E. 438. See also, Parsons *v.* Riley, 33 W. Va. 464, 10 S. E. 806.

Where an action for damages for breach of the conditions of a written contract is brought before a justice, and upon a general denial by the defendant of the complaint the justice hears the case upon the evidence and arguments of counsel, and enters a judgment dismissing the plaintiff's suit for failure to prove the execution of the contract sued on, with costs, he can not, by adding the words "without prejudice to a new suit," authorize a new suit for the same cause of action. The dismissal of the action under the circumstances of this case, after it was heard and submitted, "without prejudice to a new suit," was equivalent to directing a nonsuit by the justice, which he had no authority to do after the case had been heard and decided. Parsons *v.* Riley, 33 W. Va. 464, 10 S. E. 806.

Suprise.—Where one party is taken by surprise, and he discovered a disposition in the other party to avail himself of the legal advantage, he may suffer a nonsuit. Tarpley *v.* Dobyns, 1 Wash. 186. See also, the title NEW TRIALS.

c. **Effect of Judgment.**

The only effect of a judgment of nonsuit is to put an end to the pending suit, without precluding another for the same cause of action. Cahoon *v.* McCulloch, 92 Va. 177, 23 S. E. 225.

As Bar Another Suit.—This judgment of non pros. is a species of nonsuit, and does not bar another suit. Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

"All authorities hold that a nonsuit does not bar a second suit for the same cause. The authorities just given say that a judgment on non pros. will not defeat a second suit." Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

Nonsuit by Justice.—"Thus, a nonsuit ordered by a justice must be regarded, after a trial on the merits as a judgment for the defendant, and consequently a bar in any other litigation between the same parties (in regard to the same subject matter), even though the order was made with the consent of the plaintiff." Parsons *v.* Riley, 33 W. Va. 464, 10 S. E. 807.

Evidence.—It would seem to have been held in Mackey *v.* Fuqua, 3 Call 19, that that it was proper for evidence of nonsuit to go to the jury and that a bill of exceptions to opinion of the court should be overruled.

Not a Final Judgment.—By suffering a nonsuit, plaintiff ends his present suit without prejudice to his right to bring another; and it is not a final judgment, but the opposite. Mallory *v.* Taylor, 90 Va. 348, 18 S. E. 438.

Final Order.—Section 46, ch. 125, W. Va. Code, 1899, provides as follows: "Every judgment entered in a clerk's office in a case wherein there is no order for an inquiry of damages, and every nonsuit or dismission entered therein, shall, if not previously set aside, become a final judgment on the last day of the next succeeding term of the court wherein the action is pending." Connolly *v.* Bruner, 48 W. Va. 71, 35 S. E. 927.

Partial Nonsuit.—There is a demurrer to a declaration and to each of the six counts thereof, the court sustains the demurrer as to four counts and overrules it as to two which set out a different cause of action. A subsequent order, which recites that the demurrer had been sustained as to four of the counts in the declaration, leaving and sustaining only the third and fourth counts, says as to them: "On which the plaintiff is unwilling to risk his case alone he suffers a nonsuit as to them without fine, which the defendant waives," and then proceeds: "It is therefore considered by the court, that the plaintiff be nonsuited as to said counts, and that defendant recover against the plaintiff his costs herein expended." It was held, it was not a nonsuit as to the two counts. If a nonsuit at all, it went to the whole case, as there is no such thing as a partial nonsuit. South Branch R. Co. *v.* Long, 26 W. Va. 692.

Will Not Avoid Statute of Limitations.—The operation of the statute of limitations will not be prevented by a scire facias sued out within the five years, on which the plaintiff suffered a nonsuit. Peyton *v.* Carr, 1 Rand. 435.

It is of every day's occurrence that a party loses his remedy by the operation of the statute of limitations, where he has been forced to suffer a nonsuit. Catlett *v.* Russell, 6 Leigh 344; Peyton *v.* Carr, 1 Rand. 435.

Need Not Prove Judgment.—In an action on a bond given by a plaintiff in detinue to obtain immediate possession of the property, under § 1, ch. 102, W. Va. Code, it is not necessary to aver or prove that there was a judgment in favor of the defendant in the action settling his right to the property, and fixing its value, where the action has been dismissed or nonsuit suffered by the plaintiff. Altizer *v.* Buskirk, 44 W. Va. 256, 28 S. E. 789.

Estoppel.—C. & J. sue B. in assumpsit. B. pleads general issue. Jury impaneled April 15, 1895. Plaintiff fails to

appear, court enters nonsuit and judgment for five dollars damages and costs. Plaintiffs at once move to sea aside nonsuit, and ask leave to file amended declaration, which motion is entered of record. Plaintiffs, on June 29, 1895, sue out writ on amended declaration, and file amended declaration at August rules. On February 14, 1896, plaintiffs sue out another writ, and at March rules, 1896, filed their second amended declaration, and on April 17, 1896, defendant appeared and demurred, and pleaded nonassumpsit to said two amended declarations. A jury was impaneled, the issue tried, and verdict and judgment for plaintiffs. It was held, that under W. Va. Code, ch. 134, § 3, defendant, not having taken advantage of the nonsuit below, is estopped, after trial, verdict and judgment, from raising the question in this court. Connolly *v.* Bruner, 48 W. Va. 71, 35 S. E. 927.

d. Setting Aside Nonsuit.

Notice.—When a plaintiff has suffered a nonsuit with leave to reinstate his action "within the time prescribed by law; by payment of all costs, etc." On payment of all costs by, and on motion of plaintiff the nonsuit was set aside and the cause reinstated without notice to defendant, who appeared generally and moved to dismiss the action for want of such notice. It was held, not error to refuse to dismiss as by general appearance defendant waived notice. Turk *v.* Shein, 55 W. Va. 466, 47 S. E. 253.

Payment of Costs.—Where a plaintiff is nonsuited, and is ordered to pay costs and damages, if by a subsequent order in the case the nonsuit is set aside, and the action is reinstated on the docket, as recited in the order, upon the payment of costs, and at another day the parties appear by their attorneys, and waive a jury, and consent to submit the matters of law and fact to the court in lieu of a jury, and the trial is proceeded with, it must be presumed that the former order, requiring the payment of costs, has been either complied with or waived by the parties. Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Entered by Mistake.—A nonsuit in a writ of right having been suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction given at the trial, it was held, the court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the nonsuit; and this not having been done, the judgment overruling such motion was reversed. Walkers *v.* Boaz, 2 Rob. 485.

Effect of Submission.—If the court direct the plaintiff to be nonsuited, and he submit to it (which he is not bound to do), he deserts his cause, and can not by an exception, avail himself of any legal objection to the opinion of the court. Thornton *v.* Jett, 1 Wash. 138.

Erroneously Entered.—The M. & F. B. brought an action of assumpsit on a bill of exchange against M. & G., as partners. M. demurred to the declaration, pleaded nonassumpsit and the statute of limitations, and issue was joined thereon. An amended declaration was subsequently filed, alleging the bill to be lost, to which M. also pleaded nonassumpsit. M. filed an affidavit at the same term when the amended declaration was filed, denying the partnership. The M. & F. B. then moved a continuance. M. thereupon withdrew his affidavit denying the partnership. The court refused a continuance, and the plaintiff being unable to proceed with the proof under the amended declaration, was nonsuited, which the court at a subsequent term refused to set aside. It was held, that the court erred in refusing a continuance and also in not setting aside the nonsuit. Manufacturers, etc., Bank *v.* Mathews, 3 W. Va. 26.

Nonsuits entered by default do not involve the merits of the case, they are

set aside when desired by plaintiff. Connolly *v.* Bruner, 48 W. Va. 71, 35 S. E. 927.

III. Discontinuance.

For a definition of discontinuance, see ante, "Discontinuance," I, B.

A. ACTS CAUSING A DISCONTINUANCE OR OPERATING AS A GROUNDS THEREFOR.

1. Failure to Make Entry.

A case stands continued without any order; and failure to enter order of continuance, works no discontinuance. Harrison *v.* Com., 81 Va. 491.

A failure for fourteen years to make an entry of a cause at all or to make any entry but a continuance is no discontinuance of the cause, if the court has made no order dismissing the cause for want of prosecution, as provided by § 8, ch. 127, W. Va. Code. Buster *v.* Holland, 27 W. Va. 510.

For Any Length of Time.—We have decided that a failure to make any entry but continuances in a cause for any length of time is no discontinuance of the cause, if the court has made no order dismissing the cause for want of prosecution for four successive years, as it may do under § 8, ch. 127, W. Va. Code. (Warth's Code, p. 715.) See Gillespie *v.* Bailey, 12 W. Va. 70. Buster *v.* Holland, 27 W. Va. 510.

Nine Years.—So though no order of continuance was entered on the order-book in the case for more than nine years, yet this makes no difference, and the case is precisely the same, as if such orders had been regularly made at each term. Buster *v.* Holland, 27 W. Va. 510.

A failure for thirteen years to make any entry but continuances in a cause, where such entry of continuances has regularly been made at each term, is no discontinuance of a cause, if the court has made no order dismissing the cause for want of prosecution, as provided for by the statute. Gillespie *v.* Bailey, 12 W. Va. 70; Buster *v.* Holland, 27 W. Va. 510.

Statutory Provisions.—The Virginia statute law provided a mode by which a defendant could have a cause, which was thus continued on the docket for years, discontinued. After it had thus been continued for seven years, the court would, on the defendant's motion, have it struck from the docket, which then operated as a discontinuance of the cause; and unless a motion to reinstate it was made within one year, such cause could never thereafter be reinstated. Acts of 1825-6, p. 17, Code of Virginia of 1860, ch. 173, § 8, 718. This act has been re-enacted in this state, except that the time which must elapse before the defendant can by such steps have a cause discontinued, is reduced to four years. No such steps having been taken in this cause, there has been no discontinuance thereof and the court below properly rendered a decree on the merits of the cause. Gillespie *v.* Bailey, 11 W. Va. 70.

Chapter 127, p. 795, W. Va. Code, especially §§ 8, 11, gives the rule of practice, and defines the powers of the court in such cases after the term has ended. Section 8 provides that "any court in which is pending any case, wherein for more than four years there has been no order or proceeding but to continue it, may, in its discretion, order such case to be struck from the docket, and it shall thereby be discontinued. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

Entire Absence of Entries.—The failure of a plaintiff to take any steps toward maturing a cause against a defendant, beyond the entrance of a common order, for eleven years, there not being, during that period, even an order of continuance, and no appearance, for some years, of the case upon the docket of the court, is a discontinuance of said cause. Exchange Bank *v.* Hall, 6 W. Va. 447.

2. Misjoinder of Parties.

Where a joint action for slander is brought against two or more persons, as they can not be jointly held liable for a slanderous utterance, nor can they be prosecuted severally in a joint action, a judgment could be rendered against the one most guilty according to the allegations and proof, and a discontinuance entered as to the others. Porter *v.* Mack, 50 W. Va. 581, 40 S. E. 459.

Faulty Writ.—If the relator has embraced too many persons in his alternative writ, there is no error in permitting him, before the trial, to enter a discontinuance as to one or more, and to proceed against the remainder. State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

3. Failure to Serve Process.

The 52d section of the West Virginia Code of 1899 declares: "Where, in an action or suit against two or more defendants, the process is served upon part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them, until judgments be obtained against all." Carlon *v.* Ruffner, 12 W. Va. 306.

The discontinuance provided for by § 3396, Va. Code, 1904, is a discontinuance as against any one or more defendants upon whom process has not been served. Corbin *v.* Planters' National Bank, 87 Va. 661, 13 S. E. 98.

In an action against several defendants, the capias being returned executed on part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place, by a failure to take out further process against them, a judgment against the defendants in general terms, must be understood as against those only who appeared, notwithstanding the declaration charged them all as "in custody," etc., and the caption of the entry of the judgment in the order book, mentioned the names of all. Moss *v.* Moss, 4 Hen. & M. 293.

In an action ex contractu against several defendants, the common-law rule was that all should be summoned actually, or constructively by prosecution to outlawry, before judgment could be had against any. Va. Code, 1873, ch. 167, § 50, changes this for another rule, whereby judgment may be had against one defendant served with process, and a discontinuance as to the others, or at the plaintiff's election, subsequent service of process and judgment, in the same suit, against the other defendants. Bush *v.* Campbell, 26 Gratt. 403; Beazley *v.* Sims, 81 Va. 644.

To Compel Appearance of Defendants.—According to those authorities the omission to sue out the succeeding process prescribed by the act, to compel the appearance of the four defendants who were not arrested upon the first or second capias, was unquestionably a discontinuance of the suit, as to those defendants. Moss *v.* Moss, 4 Hen. & M. 300.

Not Aided after Verdict.—It may be proper, however, to notice in this place, that although a discontinuance is aided after a verdict, and even after a judgment by nil dicit or non sum informatus, that is to be understood where the defendant has actually appeared; and not where there has been neither an appearance nor even a service of process upon him. The mischiefs and inconveniences of a contrary doctrine would be altogether incalcuable. Moss *v.* Moss, 4 Hen. & M. 301.

4. Death of Party.

If the plaintiff in a chancery cause dies, the defendants may hasten the prosecution or discontinuance of such suit by suggesting the death of the plaintiff on the record, and, if no steps are taken to revive the suit in any of these modes at or before the second term of the court next after that at which there may have been a suggestion on the record of the death of the

plaintiff, the court ought to enter an order discontinuing the suit. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

For the right of the appellees to have suit discontinued because of the death of the appellant is by no means absolute; in fact, it is never absolute, and of course "good cause can be shown to the contrary." It is true, the right of the defendant to have a chancery cause discontinued at the end of the second term after the plaintiff's death has been suggested of record, when the plaintiff's representative has taken no steps to have it revived, is much stronger than the right of an appellee to have a suit discontinued for such reason. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 430.

G. files a bill to enforce a vendor's lien for the purchase money on a tract of land. The defendants file answers denying material allegations in the bill, and numerous depositions are taken to sustain and to contradict these allegations, but, before the court renders its decree, the plaintiff dies, and at the instance of the defendants, an order is entered suggesting the plaintiff's death on the record. No order was made at the next term of the court; but at the second term of the court after that at which the death of the plaintiff was so suggested on the record, no motion having been made that the suit proceed in the name of the representative of the plaintiff, or any other party, and no application having been made for a scire facias to revive the suit, the court, at the instance of the defendants, entered an order which, reciting these facts, ordered that the suit be discontinued. After this order was entered, and the court had adjourned, administration was granted the estate of the deceased plaintiff by the clerk of a county court; and, at the following term of the court in which said cause had been pending, the administrator of the plaintiff appeared, and filed a duly certified copy of the order appointing him administrator of the deceased plaintiff, and moved the court to revive said cause in his name as plaintiff, and to reinstate the same upon the docket of the court; but the court overruled his motion. It was held, that the court did not err in the entering of said order suggesting the plaintiff's death, or said order of discontinuance. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

5. Adjournment of Court.

In a proceeding of forcible entry and detainer, the court is constituted and then adjourns to a day certain. The court failing to meet on the day to which it is adjourned, the cause is not discontinued, but stands adjourned by operation of law, to the next term of the county court. Mann *v.* Gwinn, 8 Gratt. 58.

B. OBJECTION TO DISCONTINUANCE.

The defendants having failed to plead in abatement puis darrein continuance, and in no way objecting in the circuit court to the said discontinuance, it is too late to raise the question in the appellate court. Carlon *v.* Ruffner, 12 W. Va. 297.

He had a right under § 52, ch. 125, W. Va. Code, either to discontinue his action as to them, or from time to time, as the process was served as to them, to proceed to judgment against them, until judgment was obtained against all. Evidently he did not intend to discontinue his action as to them, as he accepted judgment against them, and not having abided his time, as authorized by statute, until process had been duly executed, it was error to take judgment against them. Carlon *v.* Ruffner, 12 W. Va. 310.

C. EFFECT OF DISCONTINUANCE.

Where there is a discontinuance of a case by reason of a gap or chasm in proper proceedings at rules, and the case has not reached the trial docket, and no order of discontinuance having been entered at rules, the defendant may have action of the court declar-

ing the fact of discontinuance, and dismissing the case, though the chasm operating as such discontinuance occurred prior to the last vacation. Herring *v.* Bender, 48 W. Va. 498, 37 S. E. 568.

Where there is a discontinuance of a case by a chasm in the proceedings at rules, and it has never been set for hearing so as to be on the hearing docket, the defendant can not sustain a motion under W. Va. Code, ch. 76, § 6, to enforce the execution of a release of a notice of lis pendens, recorded in such suit, in advance of a judgment to declare such discontinuance and dismissing the suit. Herring *v.* Bender, 48 W. Va. 498, 37 S. E. 568.

Upon the discontinuance of the action by the plaintiff because of the improper joinder of the defendant, where his motion embraces only part of the defendants, the remaining defendants would have the right if they wished, to put in a plea of abatement puis garrein continuance, that such persons to whom the action had been continued were jointly bound with them. Carlon *v.* Ruffner, 12 W. Va. 297.

The defendant, in support of a special plea, relies upon Beazley *v.* Simms, 81 Va. 644. But that case is not in point. The rule, moreover, announced in that case has been changed by the new Code. That was an action against two joint obligors, in which process was served on one of the defendants only, and there was a judgment against that one, and a discontinuance as to the other. And in a subsequent action against both, it was held, that the cause of action was merged in the judgment recovered in the first suit. Afterwards, however, the present Code was adopted, § 3396 of which, after providing that where, in any action against two or more defendants, the process is served on part of them, the plaintiff may proceed to judgment as to any so served, and either discontinue it as to the others, or from time to time, as the process is served as to such others, proceed to judgment as to them until judgments be obtained against all, goes on further to enact that "such discontinuance of the action as to any defendant shall not operate as a bar to any subsequent action which may be brought against him for the same cause." Corbin *v.* Planters' National Bank, 87 Va. 663, 13 S. E. 98.

Effect of Judgment.—In an action against several defendants, the capias being returned executed on part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place, by a failure to take out further process against them, a judgment against the defendants in general terms, must be understood as against those only who appeared, notwithstanding the declaration charged them all as "in custody," etc., and the caption of the entry of the judgment in the order-book, mentioned the names of all. Moss *v.* Moss, 4 Hen. & M. 293.

D. SETTING ASIDE DISCONTINUANCE AND REINSTATEMENT OF SUIT.

The order discontinuing a suit can never, after the adjournment of the court, be set aside, though the court may refuse to enter such order, or may set it aside, at any time during the term of the court, if good cause be shown why the suit should not be discontinued. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

G. files a bill to enforce a vendor's lien for the purchase money on a tract of land. The defendants file answers denying material allegations in the bill, and numerous depositions are taken to sustain and to contradict these allegations, but, before the court renders its decree, the plaintiff dies, and at the instance of the defendants, an order is entered suggesting the plaintiff's death on the record. No order was made at the next term of the court; but at the second term of the court next after that at which the death of the plaintiff was so suggested on the record, no

motion having been made that the suit proceed in the name of the representative of the plaintiff, or any other party, and no application having been made for a scire facias to revive the suit, the court, at the instance of the defendants, entered an order which, reciting these facts, ordered that the suit be discontinued. After this order was entered, and the court had adjourned, administration was granted the estate of the deceased plaintiff by the clerk of a county court; and, at the following term of the court in which said cause had been pending, the administrator of the plaintiff appeared, and filed a duly-certified copy of the order appointing him administrator of the deceased plaintiff, and moved the court to revive said cause in his name as plaintiff, and to reinstate the same upon the docket of the court; but the court overruled his motion. It was held, that the court did not err in overruling the motion to revive said cause and reinstate it on the docket. Gainer *v.* Gainer, 30 W. Va. 390, 4 S. E. 424.

We must not conclude that because the Code in ch. 125, § 60, says: "The court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the proceedings or correct any mistake therein, and make such order concerning the same as may be just," that the court is limited in all its action upon cases pending at rules to the correction or reversal of the clerk's action during the preceding vacation; for such is not the object of that section. Herring *v.* Bender, 48 W. Va. 498, 37 S. E. 568.

E. DISCONTINUANCE OF CRIMINAL PROSECUTIONS.

As to the discontinuance of criminal prosecutions, see the title CRIMINAL LAW, ante, p. 48.

IV. Retraxit.

For a definition of retraxit, see ante, "Retraxit," I, D.

A. WHO MAY ENTER—PLAINTIFF IN PERSON.

A retraxit can only be entered by the plaintiff in person, and in open court. Muse *v.* Farmers' Bank, 27 Gratt. 252.

A retraxit must be the act of the party himself. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

The authority of the attorney does not extend to the making of releases. 6 Ency. Pl. & Pr. 724; 1 Dan. Ch. Pr. 708; Dickerson *v.* Hodges, 43 N. J. Eq. 47. In order to be binding, it must be either a disclaimer or a retraxit and neither can be made by an attorney without special authority therefor. Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

"In the progress, and until the consummation of the judgment, the attorney has, no doubt, and ought to have, a large and liberal discretion; but he can not enter a retraxit, for that is a perpetual bar, and equivalent to a release. This was the resolution of the court in Beecher's Case (8 Co. 58) 'because,' said the court, 'it shall be a perpetual bar, and, in a manner, a release, and the admittance of the court can not prejudice the plaintiff in so high a degree. But in all dilatory matters, the admission of the court may turn the plaintiff, or demandant to delay, but shall never bar the plaintiff, or demandant." Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

Personal Consent of Plaintiff.—"It is improper to enter a retraxit or a judgment in the nature of a retraxit and having the effect of a judgment upon the merits without the personal consent of the plaintiff in the action. Such is the rule of the English common law, and, in the absence of statute, such is the rule in this country." Forest Coal Co. *v.* Doolittle, 54 W. Va. 210, 46 S. E. 238.

After Interest Has Terminated.—A retraxit is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. A dismissal by a plaintiff who no lon-

ger has any interest in the cause of action is not a retraxit, and can not prejudice the rights of the real owner of the subject of litigation, who is neither a party to the action nor a privy of the plaintiff. Tate *v.* Bank of New York, 96 Va. 765, 32 S. E. 476.

Unknown to Criminal Law.—Because a retraxit is believed to be unknown to the criminal law, at least as far as it regards a prosecution at the suit of the commonwealth, although it is used in England in cases of appeal, which is a prosecution carried on at the suit of an individual. As was well observed at the bar, this power of a retraxit is a dispensing power, and the law has not entrusted it to a prosecuting attorney. Wortham *v.* Com., 5 Rand. 669.

B. FORM OF RETRAXIT.

A retraxit is an open and voluntary renunciation by the plaintiff in open court of his suit, and the cause thereof. The usual and proper order, where there is a retraxit, is as follows: "This day came the plaintiff in his proper person, and here in open court acknowledges that he can not support his action, and voluntarily withdraws the same, and renounces the cause thereof; wherefore on motion of the defendant by his attorney, it is considered by the court that the plaintiff take nothing by his bill, but for his false clamor be in mercy, etc., and that the defendant go thereof without day, and recover against the plaintiff his costs by him about his defense expended." Rob.'s Forms, p. 96. Tate *v* Bank of New York, 96 Va. 765, 32 S. E. 476.

C. EFFECT OF RETRAXIT.

By a retraxit the plaintiff forever loses his action. Hoover *v.* Mitchell, 25 Gratt. 387.

But surely it can not be said that a dismissal of a suit by a plaintiff who no longer has a right to a judgment upon the cause of action sued on, but this right is then in another, who is not a party to the suit or a privy of the plaintiff, is a retraxit, whereby the party having the right to the subject matter of the suit is absolutely and forever barred from bringing another action thereon. Tate *v.* Bank of New York, 96 Va. 765, 32 S. E. 476.

Damages.—It has been held, that in case of a retraxit the damages of $5, authorized by a former act of the assembly in cases of dismissal, discontinuance and nonsuit, ought not be awarded. Pinner *v.* Edwards, 6 Rand. 675; Overfield *v.* Henderson, 6 Rand. 675.

V. Nolle Prosequi.

A. WHAT CONSTITUTES.

Dismissal without Prejudice.—A court dismissed an indictment without a trial of the accused against his objection and without prejudice to the commonwealth's right to arrest, indict and try him for the offense with which he was charged. It was held, that if the court had jurisdiction of the case, the order of dismissal would have the effect of ending the proceedings, in the same manner as if the indictment had been quashed, or a nolle prosequi entered. Dulin *v.* Lillard, 91 Va. 722, 20 S. E. 821.

In this case, therefore, the justice, with full power upon hearing the evidence to convict or acquit the defendant in error of the charge made in the warrant, without hearing any evidence, dismissed the warrant and discharged him. This action amounted to no more than the assent of the justice to a cessation of the proceedings without any examination whatever of the cause upon its merits. It was the equivalent of a nolle prosequi—nothing more—and could not establish the innocence of the defendant in error, nor show want of probable cause for the prosecution. Ward *v.* Reasor, 98 Va. 399, 36 S. E. 470.

The dismission of a presentment by the court, at the instance of the attorney for the commonwealth, is not an

acquittal. It is an informal nolle prosequi. Wortham *v.* Com., 5 Rand. 669.

B. WHEN ENTERED.

In a joint action of trespass against several who plead jointly, if the jury find them guilty, they should assess the damages jointly against all. If in such case the jury by mistake assess several damages, the plaintiff may cure the defect by entering a nolle prosequi as to some, and taking judgment against one. Crawford *v.* Morris, 5 Gratt. 90.

In an indictment for larceny, the name of the owner of the property charged to have been stolen, must be stated; and if it appears that the person so stated to be the owner was a married woman at the time of the larceny, it is error and the prisoner should be acquitted. In such a case if there is a verdict and judgment against the prisoner, which on appeal is reversed, when the case goes back a nolle prosequi may be entered, and a new indictment may be found. Hughes *v.* Com., 17 Gratt. 565.

Necessity for Leave of Court.—It is necessary for the prosecuting attorney to ask and obtain leave of the court to enter a nolle prosequi to an indictment, information or presentment. Com. *v.* Adcock, 8 Gratt. 661; Wortham *v.* Com., 5 Rand. 669; Randall *v.* Com., 24 Gratt. 644.

Entry upon Reversal of Judgment.—Where there is a verdict or judgment against a person, which on appeal is reversed, when the case goes back a nolle prosequi may be entered and a new indictment may be found. Randall *v.* Com., 24 Gratt. 644; Robinson *v.* Com., 32 Gratt. 866; Stuart *v.* Com., 28 Gratt. 950; Hughes *v.* Com., 17 Gratt. 565.

Upon Variation of Allegations and Proof.—Upon the trial of an indictment for larceny of bank notes the evidence for the commonwealth discloses that the denomination of the notes were in fact known to the grand jury, while the indictment charged that they were "to the jurors unknown." It was held, that at this stage of the proceedings, it would have been competent for the attorney for the commonwealth to have entered a nolle prosequi under this indictment, and prefer another indictment, by the same or another grand jury against the prisoner, leaving out the words "the denomination of which said notes are to the jurors unknown." Robinson *v.* Com., 32 Gratt. 866. See the title VARIANCE.

Indictment for Lower Grade of Offense.—When a grand jury returns an indictment for a lower grade of offense than that for which the prosecuting attorneys think the prisoner should be indicted, he may enter a nolle prosequi to that indictment and the accused may be subsequently indicted. Eastham *v.* Holt, 43 W. Va. 599, 27 S. E. 883, 31 S. E. 259.

Where a joint action for slander is brought against two or more persons, as they can not be jointly held liable for a slanderous utterance, nor can they be prosecuted severally in one action, a judgment could be rendered against the one most guilty according to the allegations and proof, and a nolle prosequi entered as to the others. Porter *v.* Mack, 50 W. Va. 585, 40 S. E. 459.

C. EFFECT.

As Defense to Action on Recognizance.—A plea that a previous prosecution against the principal for the same offenses to which by the recognizance he had undertaken to appear, had been terminated by a nolle prosequi, presents no defense to the action. Archer *v.* Com., 10 Gratt. 627. See the title BAIL AND RECOGNIZANCE, vol. 2, p. 222.

Not an Acquittal.—A nolle prosequi entered by the attorney for the commonwealth, and a consequent discharge from custody, is not an acquittal, or

discharge from further prosecution. Lindsay *v.* Com., 2 Va. Cas. 345.

Does Not End Prosecution.—A nolle prosequi does not put an end to the prosecution, sweep off, nullify and render functus officio proceedings of a criminal nature previously had and thereby entitle a prisoner to be discharged from prosecution: Com. *v.* Adcock, 8 Gratt. 661, citing Halkem *v.* Com., 2 Va. Cas. 4; Derieux *v.* Com., 2 Va. Cas. 379; Huffman *v.* Com., 6 Rand. 685; Thomas *v.* Com., 2 Leigh 741; Lindsay *v.* Com., 2 Va. Cas. 345; Wortham *v.* Com., 5 Rand. 669. See also, Archer *v.* Com., 10 Gratt. 627; McCann *v.* Com., 14 Gratt. 570; Randall *v.* Com., 24 Gratt. 644; Robinson *v.* Com., 32 Gratt. 866; Stuart *v.* Com., 28 Gratt. 950; Eastham *v.* Holt, 43 W. Va. 599, 27 S. E. 883.

Evidence of Nolle Prosequi Insufficient.—Although an action for malicious prosecution can not be maintained, unless the plaintiff has been fully acquitted of the criminal charge, and a nolle prosequi is not sufficient; yet the plaintiff is not obliged to prove that he was acquitted by the jury promptly, without hesitation, delay or deliberation; and the evidence of a juror, to show that the deliberation of the jury was caused by their doubt as to the guilt or innocence of the accused, is inadmissible. Scott *v.* Boyd, 28 Gratt. 892.

DISMISSED AGREED.—An order **dismissing** a case **agreed** is a bar to another suit on the same cause of action. The court said: "The words **dismissed agreed** are very strong. Though the order is abbreviated, so far as it goes it imports compromise and adjustment and a decree ending the case on that ground. A compromise decree is final. Lockwood *v.* Holliday, 16 W. Va. 651; U. S. *v.* Parker, supra. A **dismissal agreed** is equivalent to a retraxit at common law, which is an 'open voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Bl. Comm. 296." Pethtel *v.* McCullough, 49 W. Va. 522, 39 S. E. 199.

DISMISSION.—In Old *v.* Com., 18 Gratt. 923, it is said: "It does not seem to me correct or fair to impute to the term **dismission** any of that technical force or meaning which it might have been applied to cases in a court of record. Used in the connection in which it is here employed, it is tantamount to 'abandonment,' 'failure to prosecute,' or 'a destruction or nonreturn of the warrant;' and in my view any one of these acts of misfeasance or nonfeasance would constitute that official delinquency denounced and punished by this statute."

Disorderly Conduct.

See the titles AFFRAY, vol. 1, p. 238; BREACH OF THE PEACE, vol. 2, p. 615; DISORDERLY HOUSES; DRUNKENNESS; MUNICIPAL CORPORATIONS.

DISORDERLY HOUSES.

I. Disorderly Houses, 727.
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CROSS REFERENCES.

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As to gaming houses, see the title GAMING. As to tippling houses, see the title INTOXICATING LIQUORS.

I. Disorderly Houses.

A. WHAT CONSTITUTES A DISORDERLY HOUSE.

It has been held, that where a set of drunkards were in the habit of visiting a certain saloon and there singing vulgar songs, and creating confusion generally, these facts constituted evidence sufficient to give the jury as to what constituted a disorderly house. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

Under an indictment charging the keeping of a disorderly house it is sufficient to prove that a room is kept for the purpose and with the intent of bringing together and entertaining prostitutes and men desirous of their company, and that such persons were in the habit of assembling there to drink and play cards together, even though it appear that the house is kept quietly and no conspicuous improprieties permitted inside. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573, cited in State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

B. JURISDICTION.

Under an indictment for keeping a disorderly house it is necessary to show that the offense was committed within the jurisdiction of the court trying the case. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

C. DEFENSE.

Where a building is used for purposes of prostitution it is no defense to an indictment for running a disorderly house, that the defendant had a license to run a saloon or hotel. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

D. QUESTION FOR THE JURY.

The question whether a certain place constitutes a disorderly house is a question for the jury when there is evidence introduced showing that it is frequented by a vulgar class of people who are in the habit of creating confusion there. State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

II. Keeping Houses of Ill Fame.

A. AT COMMON LAW.

The offense of keeping a house of ill fame is a public nuisance and therefore indictable at common law. Miller *v.* Com., 88 Va. 618, 14 S. E. 161, 342.

B. UNDER THE STATUTE.

The keeping of houses of ill fame is prohibited by statute both in Virginia and West Virginia. See Va. Code, 1904, § 3790; W. Va. Code, ch. 149, § 10.

C. LIABILITY OF MARRIED WOMEN.

In a charge for keeping a house of ill fame it is immaterial that it is operated by a married woman, since under this charge the ordinary rule of coercion does not apply and the husband and wife are equally criminal in keeping or permitting a house of ill fame in property resided in and mutually controlled by them. State *v.* Jones, 53 W. Va. 613, 45 S. E. 916. See generally, the title HUSBAND AND WIFE.

D. INDICTMENT.

See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

1. In General.

An indictment charging in the language of the statute the keeping of a house of ill fame, is sufficient on demurrer or motion to quash. State *v.* Jones, 53 W. Va. 613, 45 S. E. 916, citing State *v.* Emblem, 44 W. Va. 522, 29 S. E. 1031.

The following indictment (omitting the formal part) has been held sufficient on demurrer: "Upon their oaths present and say that M. A. McGahan, on the 28th day of April, 1898, and thence continually, until the day of finding this indictment, at the county of Mineral, a certain ill-governed and disorderly house unlawfully did keep and maintain, and in said house, for her own lucre and gain, certain evil-disposed persons, as well men as women, of evil name, fame, and conversation, to come together, on the day times aforesaid, there unlawfully and willingly did cause and procure; and the said persons in the said house at unlawful times, as well in the night as in the day, on the day times as aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarreling, and otherwise misbehaving themselves, unlawfully did permit and suffer; to the common nuisance of all the people of this state, and against the peace and dignity of the state." State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

2. Acts of Lewdness.

In an indictment for keeping a house of ill fame it is not necessary to allege any act of lewdness or prostitution, as all this is implied under the statute by the use of the words "keeping a house of ill fame." State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

3. Nature of Place.

In an indictment for keeping a house of ill fame it is not necessary to allege that the house was in a public place, or that the public is affected, since houses of ill fame are recognized as injurious to the public whether they are situated in private or public places. State *v.* Jones, 53 W. Va. 613, 45 S. E. 916, citing State *v.* McGahan, 48 W. Va. 438, 37 S. E. 573.

4. Date of Offense.

In an indictment charging the keeping of a house of ill fame the date charged is immaterial, provided it is not impossible, subsequent to the finding of the indictment or subject to the bar of the statute of limitations. State *v.* Jones, 53 W. Va. 613, 45 S. E. 916.

E. RIGHT OF TRIAL BY JURY.

The offense of keeping a house of ill fame, which has always been triable by jury, can not, by statute be made triable without a jury, and the right to a jury on appeal be made sufficient to satisfy the constitutional provision guaranteeing the right of trial by jury in criminal prosecutions (§ 10, art. 1, Const. of Va.). Va. Code, 1887, § 4106,

retained in 1904. Miller *v.* Com., 88 Va. 618, 14 S. E. 342. See Brown *v.* Epps, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676, which seems to overrule the proposition in Miller *v.* Com. that the right to a trial by jury on appeal does not satisfy the constitutional right to trial by jury. See generally, the title JURY.

F. LIABILITY OF PUBLIC OFFICERS.

If a public officer, whose duty it is to prosecute the keeper and inmates of a house of ill fame, resorts to the same for immoral purposes, he is guilty of gross immorality and thereby forfeits his office. Moore *v.* Strickling, 46 W. Va. 515, 33 S. E. 274. See generally, the title PUBLIC OFFICERS.

III. Letting Buildings for Use as Houses of Ill Fame.

As to leases, see generally, the title LANDLORD AND TENANT.

A. UNDER THE STATUTE.

The statutes of West Virginia forbid the letting of buildings to be used as houses of ill fame. W. Va. Code, ch. 149, § 10.

B. SCIENTER.

Under an indictment for letting a building to be used as a house of ill fame, it is necessary for the state to show that the defendant unlawfully and knowingly permitted the property to be used for such purpose. State *v.* Emblem, 44 W. Va. 521, 29 S. E. 1031.

C. EVIDENCE.

Under an indictment for letting a house to be kept as a house of ill fame, where the occupant alleges to hold under a contract of sale to escape the results of such instrument, it is not necessary for the state to prove by direct evidence a secret contract of lease contrary to the alleged contract of sale, but the jury may find from the facts and circumstances that the relation was in fact that of landlord and tenant. State *v.* Emblem (W. Va.), 49 S. E. 554.

D. OCCUPANT AS PURCHASER.

An indictment charging the letting of a building to be used as a house of ill fame, where the proprietor occupies the property as a purchaser, can not be sustained even though the defendant sells the property in the full knowledge of the purpose for which it is to be used. State *v.* Emblem, 44 W. Va. 521, 29 S. E. 1031. (Brannan, P., dissenting.)

E. COLORABLE SALE.

Under an indictment charging the leasing of a house to be used as a house of ill fame, an alleged contract of sale may be shown to be merely a device to evade the law and an actual relation of landlord and tenant be shown. State *v.* Emblem (W. Va.), 49 S. E. 554.

F. CONSTRUCTION BY COURT.

If in an indictment charging for knowingly leasing or letting to another any building for the purpose of being used as a house of ill fame, a written contract purporting to be a contract of sale is offered in evidence, it is the duty of the court to construe such contract. State *v.* Emblem, 44 W. Va. 521, 29 S. E. 1031.

G. INSTRUCTIONS.

When, under an indictment for letting a house to be used as a house of ill fame, the defendant offers in evidence an alleged contract of sale in writing, it is the duty of the court to instruct the jury as to the character, meaning and legal effect of such instrument. State *v.* Emblem, 44 W. Va. 521, 29 S. E. 1031.

Disparagement of Title.

See the titles DECLARATIONS AND ADMISSIONS, ante, p. 325; LANDLORD AND TENANT.

Dispatch.

See the titles DOCUMENTARY EVIDENCE; TELEGRAPHS AND TELEPHONES.

DISPATCHING TRAINS.—The object of a train dispatcher is to place in the hands of conductors in charge of trains proper and safe orders for their guidance. These orders emanate from the office of the train dispatcher, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transit from the time it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination. An operator to whom such an order is sent by the dispatcher is an employee "charged with **dispatching** or transmitting telegraphic or telephonic orders" within the meaning of § 162 of the constitution of 1902. That section includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement or trains to the conductors of such trains, no matter what instrumentalities may be employed for that purpose. Virginia, etc., R. Co. *v.* Clowers, 102 Va. 867, 47 S. E. 1003. See also, the titles NEGLIGENCE; RAILROADS; TELEGRAPHS AND TELEPHONES.

DISPOSE.—Dispose of.—A gift to A. to **dispose of** among her children, may create a trust if it so appears from the whole will. Baker *v.* Baker, 53 W. Va. 171, 44 S. E. 174. See the title WILLS.

Disposal.—In Milhollen *v.* Rice, 13 W. Va. 569, it is said: "With reference to the other half of the proceeds of this sale he says: 'They are to be at her **disposal,** to whom she thinks proper of her heirs.' Is not this the common sense meaning of these words, 'to be **disposed** of by her amongst her heirs, as she thinks proper?' Is it not obvious that he wanted them **disposed** among her heirs, and not in any other manner?" See also, the title WILLS.

Disposing Mind and Memory.—See the title TESTAMENTARY CAPACITY.

DISPUTE.—Matter in Dispute.—In Harman *v.* Lynchburg, 33 Gratt. 39, it is said: "'By **matter in dispute,**' says Mr. Justice Field, 'is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined." See the title APPEAL AND ERROR, vol. 1, p. 479.

DISSEISIN.—In Johnston *v.* Virginia Coal, etc., Co., 96 Va. 163, 31 S. E. 85, it is said: "In Sedg. & Wait on trial of title to lands, § 287, the law is thus stated: 'Where the grantee has obtained a conveyance of the whole estate from one of the cotenants, entry made under such a title is **disseisin** of the other cotenants. This doctrine is just and reasonable, for the grantee does not intend to enter or hold as a cotenant. His entry is adverse. The same principle applies to joint tenants.'" See also, Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239; Cooey *v.* Porter, 22 W. Va. 120; Justice *v.* Lawson, 46 W. Va. 163, 33 S. E. 102. And see the titles ADVERSE POSSESSION, vol. 1, p. 212; JOINT TENANTS AND TENANTS IN COMMON.

DISSOLUTION.—In White *v.* Clay, 7 Leigh 73, it is said: "The money due to the plaintiff at law, which the condition of the bond required the plaintiff in equity to pay, was the money found to be due by the chancellor; and so the words 'in case the injunction be dissolved,' must of necessity be construed to apply to a partial as well as a total **dissolution.** Besides, he said, those words were strictly, in themselves, applicable to any case of **dissolution,** partial or total; and the meaning of them was put beyond doubt by the 61st section of the same statute, relating to the same subject, which provided, that where an injunction 'shall be dissolved in whole or in part,' ten per centum per annum damages shall be paid to the plaintiff at law, from the time the injunction was awarded, 'till the **dissolution;**' expressly applying the general phrase **dissolution** to a partial **dissolution** of the injunction."

Dissolution of Attachment.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 117.

Dissolution of Corporations.

See generally, the title CORPORATIONS, vol. 3, p. 588. See also, the titles BANKS AND BANKING, vol. 2, pp. 312, 327; BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 347; BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 652.

Dissolution of Injunctions.

See the title INJUNCTIONS.

Dissolution of Partnership.

See the title PARTNERSHIP.

Distress for Rent.

See the title LANDLORD AND TENANT.

DISTRIBUTION.—The term **distribution** is applicable only to personal estate. Williams *v.* Stonestreet, 3 Rand. 561. See generally, the title DESCENT AND DISTRIBUTION, ante, p. 588.

District and Prosecuting Attorney.

See the title COMMONWEALTH'S ATTORNEY, vol. 3, p. 30.

District Courts.

See the title COURTS, vol. 3, p. 715.

District of Columbia.

See McLaughlin *v.* Bank, 7 Gratt. 68. See also, the titles DEBT, THE ACTION OF, ante, p. 269; FOREIGN JUDGMENTS; FOREIGN LAWS.

DISTRINGAS.

CROSS REFERENCES.

See the titles DETINUE AND REPLEVIN, ante, p. 634; EXECUTORS AND ADMINISTRATORS; SHERIFFS AND CONSTABLES.

Distraining Property for Which the Execution Issued.—On a distringas fi. fa. the sheriff can not distrain the very property for which the execution issued; nor can he seize and sell it to pay the damages mentioned in the execution. Jordan *v.* Williams, 3 Rand. 501; Va. Code (1904), §§ 3581, 3585.

Order to Supersede the Distringas, as Relates to Specific Property, and Execute for Value.—After a distringas upon a judgment in detinue has been returned executed, but without satisfaction, if the court, on the plaintiff's motion, direct the distringas to be superseded, so far as it related to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems, the plaintiff may have a new distringas, to be executed as to such value. It is not necessary to state the reasons of such order on its face, because it will be presumed to be correct, unless the contrary appears. Garland *v.* Bugg, 5 Munf. 166; Va. Code (1904), § 3586.

A Ca. Sa. or Fi. Fa. May Be Issued to Supersede the Distringas.—After the distringas upon a judgment in detinue has been executed without satisfaction, or superseded as to the specific property, and directed to be executed as to the alternative value, if it appear to the court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff can not get it by the distringas, a ca. sa. or fi. fa. may be directed to be issued for the alternative value. Garland *v.* Bugg, 5 Munf. 166.

Need Give Defendant No Notice of Motion to Supersede a Distringas.—Notice of a motion to supersede a distringas, or for a ca. sa. or a fi. fa. in lieu thereof, need not be given by the plaintiff to the defendant. Garland *v.* Bugg, 5 Munf. 166.

Plaintiff Not Entitled to the Issues of Property Held on Distringas.—It seems that according to the common law, still in force in Virginia, the plaintiff in detinue is not entitled to the issues of the defendant's lands or other property, received by the sheriff upon the distringas. Garland *v.* Bugg, 5 Munf. 166.

Distringas against Executors of Old Sheriff.—No distringas lies against the executors of the old sheriff, to oblige them to sell property taken by him in his lifetime under a writ of fieri facias. Harrison *v.* Tompkins, 1 Call 295.

The present status of distringas both in Virginia and West Virginia is that it has been abolished except on judgments for specific personal property. Va. Code (1904) secs. 5381, 3585; West Va. Code (1899) p. 936, ch. 111, sec. 2. See Garland *v.* Bugg, 5 Munf. 166; Jordon *v.* Williams, 3 Rand. 501.

Also it may be superseded as to the specific things in Virginia and ordered to be executed in lieu thereof for the alternative value. Va. Code (1904) sec. 3586. See Garland *v.* Bugg, 5 Munf. 166.

DISTURBING MEETINGS.

Disturbance of Religious Worship.—For description of offense and form of indictment, see W. Va. Code, 1889, ch. 149, § 18.

Time of Disturbance.—Where a Methodist camp meeting was annoyed at night it was held, that "the statute is applicable not only to disturbances which are made whilst the religious services are progressing, but to disturbances made whilst the congregation is assembled for religious worship, though it be at night after the religious services are closed for the day, and the congregation has retired to rest." Com. *v.* Jennings, 3 Gratt. 624.

The Indictment.—See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Allegations.—An indictment for disturbing a religious congregation, need not set out the means by which the disturbance and disquieting was effected. Com. *v.* Daniels, 2 Va. Cas. 402.

Amendment.—Where defendants were indicted jointly on the charge of disturbing religious worship, and had been duly summoned but failed to appear, the court may in their absence amend the indictment against S. C. and make it read S. S., alias S. C. Va. Code, § 3999. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Trial.—See the title CRIMINAL LAW, ante, p. 1.

Presence of Accused.—Where defendants were indicted jointly upon the charge of disturbing religious worship, it was held, not error to try defendants in their absence without first awarding a capias for their arrest. (Va. Code, § 4012). Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Fines and Imprisonment.

Fines.—See the title FINES AND COSTS IN CRIMINAL CASES.

Where defendants were jointly indicted upon a charge of disturbing religious worship, it was held, not error to order their arrest and imprisonment for nonpayment of a fine before a fieri facias had been issued. Va. Code, 1904, § 726. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Sentence.—See the title SENTENCE AND PUNISHMENT.

Where defendants were indicted jointly upon a charge of disturbing religious worship, it was held, not error to enter judgment for their imprisonment in jail. Va. Code, § 4076. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Confrontation of Witnesses.—See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

Where defendants were jointly indicted upon a charge of disturbing religious worship and were tried and sentenced by the court in their absence, it was held, not violative of the constitutional guaranty that the accused in all criminal prosecutions have a right to be confronted with the witnesses against him. The appellants were given the opportunity as the statute requires to appear and defend, and their choice not to appear, but to make default, was a waiver of the constitutional provision relied on. Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Disturbing the Peace.

See the title BREACH OF THE PEACE, vol. 2, p. 615.

Ditches.

See the titles DRAINS AND SEWERS; WATERS AND WATERCOURSES.

Diversion of Waters.

See the titles NUISANCES; WATERS AND WATERCOURSES.

Divided Court.

See the title DIVISION OF OPINION.

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See the title STOCK AND STOCKHOLDERS.

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See the titles FENCES; PARTY WALLS.

DIVISION OF OPINION.

CROSS REFERENCES.

See generally, the titles APPEAL AND ERROR, vol. 1, p. 537; STARE DECISIS.

Division of Opinion.—Where the opinion in the court of appeals is equally divided; that is, a decision which settles the principles of the cause involved in the decree of the inferior court, the decree of such inferior court is thereby affirmed. Philips *v.* Williams, 5 Gratt. 259.

DIVORCE.

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I. Introductory.

It must not be lost sight of that the state is to be regarded as a party to all suits for divorce; that the family and the home are the corner stone of the welfare of the state, and so far the state has never seen fit to say that mutual separation, had collusively or in the best faith, shall be ground to give both parties an absolute divorce. Up to this time, the marriage bond is not so easily dissolved, and it is the

duty of the court, as far as may be, to see to it that there is no collusion; no suppression of evidence; in a word, no divorce by agreement, or otherwise, in violation of the statute. The parties may make their own agreements, but they can not enact or amend the divorce law. See Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

II. Grounds of Divorce.

A. ADULTERY.

1. In General.

In both Virginia and West Virginia a divorce from the bond of matrimony may be decreed for adultery. Va. Code, 1904, § 2257; W. Va. Code, 1899, ch. 64, § 5.

2. Evidence.

In General.—Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised at it; and so it not only may, but ordinarily must, be established by circumstantial evidence. The testimony must convince the judicial mind affirmatively, that the actual adultery has been committed, since nothing short of the carnal act can lay a foundation for a divorce. It is, generally speaking, necessary to prove that the parties were in some place together where the act might probably be committed. The facts in such case are not of a technical nature, but are determinable on common grounds of reason. The rational and legal interpretation must be the same. Musick *v.* Musick, 88 Va. 12, 13 S. E. 302. In this case, the defendant, a young man of the neighborhood, in good standing, seduced the plaintiff, under promise of marriage, then in fear of punishment married her and deserted her within a few days. Defendant then spent his time, openly and lasciviously with lewd women, but denied the act of adultery, charged in a suit for divorce by his wife. A divorce was granted on the ground of adultery as shown by circumstantial evidence, though the defendant and the alleged particeps criminis both denied the adultery, and a decree was entered prohibiting defendant from marrying again. Lascivious conduct alone, such as being seen at a ball in a house of ill fame, is not sufficient proof of adultery. See also, Latham *v.* Latham, 30 Gratt. 307.

Weight and Sufficiency.—In a suit for divorce on the ground of adultery, proof thereof should be "such as to lead the guarded discretion of a reasonable and just man to the conclusion of the defendant's guilt." Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289; Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

"To establish the charge of adultery, the evidence must be full and satisfactory—the judicial mind must be convinced affirmatively. The proof should be strict, satisfactory and conclusive." Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Frequenting Brothels.—The fact of a married man closing himself in a room of a brothel, unexplained, is sufficient proof of adultery. Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289; Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

The fact that a man is seen in a house of ill fame is not conclusive proof of the crime of adultery on his part, though it is prima facie sufficient to establish the crime. Latham *v.* Latham, 30 Gratt. 307; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

No presumption of guilt can be raised from the fact of a brother-in-law being often seen in the bed room of the defendant, when such room was frequently used as a sitting room by the family and for the brothers to transact their business. Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

B. CRUELTY.

1. In General.

Cruelty or reasonable apprehension of bodily hurt is ground for a divorce from bed and board. Va. Code, 1904, § 2258; W. Va. Code, 1899, ch. 64, § 6.

2. Definition.

The cruelty that authorizes a divorce is anything that tends to bodily harm, and thus renders cohabitation unsafe; or as expressed in the older decisions, that involves danger of life, limb or health; and angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, may as effectually endanger life or health as personal violence, and will, therefore, afford ground for relief by the court. Latham *v.* Latham, 30 Gratt. 321; Myers *v.* Myers, 83 Va. 806, 6 S. E. 630; Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531, 5 Va. L. R. 401. See also, Kinsey *v.* Kinsey, 90 Va. 16, 17 S. E. 819; Carr *v.* Carr, 22 Gratt. 168.

Cruelty consists of successive acts of ill treatment, if not of personal injury; so that something of a condonation of earlier ill treatment must, in such cases, necessarily take place. It is cumulative, admitting of degrees and augmenting by addition. It may be condoned and even forgiven for a time and up to a certain point, without barring the right to bring it all forward when the continuance if it has rendered it no longer condonable. Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.

3. What Constitutes.

Cruelty by Members of Husband's Family.—In Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903, it is held, that if the husband permit the inmates of his house to treat his wife with cruelty, the cruelty is his and she may leave his home without furnishing him with cause for divorce.

A malicious charge of adultery made by one consort against the other, standing absolutely alone, is not sufficient to justify a divorce, but, when presented with other facts enhancing its enormity, is an act of gross cruelty. Owens *v.* Owens, 96 Va. 191, 31 S. E. 72; W. Va. Code, 1899, ch. 64, § 6; Ball *v.* Stewart, 41 W. Va. 654, 24 S. E. 633.

A long series of vexations, culminating in a charge of larceny, and a serious assault by a person of greatly superior physical force, is cruelty within the meaning of the law. Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903.

The husband is the head of the family, and, as such, is entitled to select the place of residence of his family, and to say to whom the family circle shall consist. He is entitled to obedience and respect from his wife as long as he deserves it, but he owes to her the duty of protection from whatever danger may threaten her. Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903.

Violence Amounting to Cruelty.—It was held, in Kinsey *v.* Kinsey, 90 Va. 16, 17, S. E. 819, in a suit for divorce a mensa et thoro, that where defendant habitually annoyed and mortified the plaintiff, was often drunk and struck her, came into her room at night flourishing a pistol, threatening to kill her, and finally drove her with their young child out at night, plaintiff was entitled to relief asked. See also, for other examples, Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531; Heninger *v.* Heninger, 90 Va. 271, 18 S. E. 193.

Profane, Abusive, or Harsh Language.—Frequent indulgence in such language will not constitute cruelty where such conduct does not create an apprehension of bodily harm. Such conduct may be sufficient, however, where it produces mental suffering sufficient to injure health. Myers *v.* Myers, 83 Va. 806, 6 S. E. 630; Kinsey *v.* Kinsey, 90 Va. 16, 17 S. E. 819; Latham *v.* Latham, 30 Gratt. 307.

Where the husband kicked and beat without provocation his wife as she was engaged in nursing her infant, and afterwards obscenely threatened a repetition of the assault, chased her out of his house menacing her with a switch, and threatened "to split her open," and during a series of years kept up not only such personal violence, but a constant course of unkind-

ness, insult and petty tyranny towards her, so as to make it notorious and cause his neighbor to testify that it would be unsafe for her and her child to dwell with him; held, that she is entitled to a divorce a mensa et thoro from him. Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

4. Suit by Husband.

A husband, as well as a wife, may maintain a suit for divorce on the ground of cruelty, or reasonable apprehension of bodily harm, but in either case the charge should be clearly proved. House *v.* House, 102 Va. 235, 46 S. E. 299.

Though the complaint of cruelty or fear of bodily harm usually comes from the wife, yet the husband is entitled to protection if he really needs it. House *v.* House, 102 Va. 235, 46 S. E. 299.

C. DESERTION.

In General.—The statutes provide that where either party willfully abandons or deserts the other for three years, a divorce from the bond of matrimony may be decreed; likewise that this shall be ground for a divorce from bed and board, but no particular period is prescribed in which the desertion shall continue to entitle a party to a divorce from bed and board. In short, the abandonment or desertion which is cause for divorce from the bond of matrimony, differs from that which is cause for divorce from bed and board, in nothing save only in duration. Va. Code, 1904, §§ 2257, 2258; W. Va. Code, 1899, ch. 64, §§ 5, 6; Harris *v.* Harris, 31 Gratt. 13; Bailey *v.* Bailey, 21 Gratt. 43; Carr *v.* Carr, 22 Gratt. 168.

Definition.—Desertion in divorce law is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12. See also, Bailey *v.* Bailey, 21 Gratt. 43; Burk *v.* Burk, 21 W. Va. 445.

What Constitutes.

In General.—Abandonment and desertion which entitles a husband or wife to a divorce a mensa et thoro consists in the actual breaking off of matrimonial cohabitation with the intent to abandon and desert in the mind of the party so acting. Bailey *v.* Bailey, 21 Gratt. 43. In this case the husband, a professional gambler, had remained away from home one year and returned for two weeks, and leaving then, had not returned at the institution of this suit ten months later. These facts were held to sufficiently establish the intent to desert on the part of the husband, and justify a decree for divorce a mensa et thoro.

Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of matrimonial cohabitation; and, secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete, and a mere separation by mutual consent is not a desertion by either party. Latham *v.* Latham, 30 Gratt. 307. In Harris *v.* Harris, 31 Gratt. 13, it was held that the circumstances must be very peculiar indeed, if any such case there could be, which would justify a decree for an absolute divorce in behalf of the husband for willful desertion of the wife, and at the same time warrant a decree in her behalf. See also, Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Provocation or Excuse.—The wrongful conduct of husband or wife, or justifiable cause which will excuse the one consort for leaving the other, must be such conduct as could be made the foundation of a judicial proceeding for divorce a mensa et thoro. Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12. See also, Carr *v.* Carr, 22 Gratt. 168; Harris *v.* Harris, 31 Gratt. 13;

Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903.

Where a wife, without any apparent cause other than her dislike of him, voluntarily leaves the home of her husband, and refuses to return or cohabit with him, for a period of more than three years, although she is, in good faith, requested by the husband to do so, the husband will, under the West Virginia statute, be entitled to a divorce from the bonds of matrimony. Alkire *v.* Alkire, 33 W. Va. 517, 11 S. E. 11; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12. See Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537; Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50. In Carr *v.* Carr, 22 Gratt. 168, it was held, a wife has no legal grounds to leave her husband because he is rude and dictatorial in his speech to her, exacting in his demands and sometimes unkind and negligent in his treatment of her even when she was sick and worn and weary in watching and nursing their sick child. Latham *v.* Latham, 30 Gratt. 307. See Hutchins *v.* Hutchins, 93 Va. 68, 24 S. E. 903.

Although the husband gives his wife only a meagre or no support, denies her much of his society; puts her in a house separate from his ordinary residence, because she refuses to live at his residence and yet does not break off the matrimonial cohabitation, there can not be said to be any desertion by either. Burk *v.* Burk, 21 W. Va. 445.

The wife having left her husband in 1863, upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce a vinculo matrimonii on the ground of desertion, on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, the court upon decreeing the divorce can not allow her alimony out of the husband's estate. Harris *v.* Harris, 31 Gratt. 13.

Cessation of Cohabitation.—Willful desertion can not be inferred from the fact that the parties do not live together. Mere cessation of cohabitation is not enough. Burk *v.* Burk, 21 W. Va. 445; Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926; Bailey *v.* Bailey, 21 Gratt. 43; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

Desertion can not be inferred from the fact that the parties do not live together. Burk *v.* Burk, 21 W. Va. 455; Bailey *v.* Bailey, 21 Gratt. 43.

Desertion Must Be Willful.—It requires willful desertion to warrant a divorce from the bond of matrimony. Willful desertion is a breach of matrimonial duty, and is composed, first, of a breaking off of matrimonial cohabitation; and, second, an intent in the mind to desert. Both must combine to make the desertion complete. Noncohabitation alone is not desertion. Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926, citing Burk *v.* Burk, 21 W. Va. 445.

Proof of Intent.—The protracted absence, without detention, is as potent proof of the intent to desert on the part of the wife as of the husband. Harris *v.* Harris, 31 Gratt. 13. See Bailey *v.* Bailey, 21 Gratt. 43; Carr *v.* Carr, 22 Gratt. 168; Latham *v.* Latham, 30 Gratt. 307.

B. leaves his home and family in November, 1865, and returns in November, 1866. He remains at home two weeks, and then leaves it, and had not returned in September, 1867, when Mrs. B. files a bill for a divorce. B.'s intention to desert his wife being clearly proved, she is entitled to a decree for a divorce a mensa et thoro. Bailey *v.* Bailey, 21 Gratt. 43.

Presumed to Continue.—Intent to desert being once shown, is presumed to continue until the contrary appears. Burk *v.* Burk, 21 W. Va. 445; Bailey *v.* Bailey, 21 Gratt. 43.

Request by Wife in Good Faith to Return.—The wife, who has "left" her husband, may at any time avoid the consequences of such "leaving" by asking in good faith to return; and if in

good faith she does return, or asks to be permitted so to do, and her husband refuses to receive her, then, unless she has been living in adultery, he is guilty of deserting her, and her desertion is at an end, unless she again forms the intention of deserting him. Thornburg *v.* Thornburg, 18 W. Va. 522.

Period, Commencement and Duration.—As no definite period of desertion is required by the statute to sustain a suit for divorce a mensa et thoro, any desertion which fulfills the requirements of the definition given above is sufficient to sustain the suit, no matter if the parties have cohabited as man and wife for a short period since the first desertion by the defendant. Bailey *v.* Bailey, 21 Gratt. 43; Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

See Bailey *v.* Bailey, 21 Gratt. 43, cited in Carr *v.* Carr, 22 Gratt. 168, as authority for the proposition that under the statute no particular period is prescribed in which the desertion must continue, to entitle a party to a divorce a mensa et thoro.

If a wife, after leaving her husband's home, remains away for a considerable time, and her husband requests her return, which she refuses, from that time she deserts her husband. Burk *v.* Burk, 21 W. Va. 445.

Two periods of desertion can not be added together for the purpose of making up the term required by the statute. It must be a continuous, unbroken desertion. Burk *v.* Burk, 21 W. Va. 445, approved in Harris *v.* Harris, 31 Gratt. 13.

If a husband, without an offer on the wife's part to return and live with him at his own residence, consents to take her to his own premises in a house near his residence, without a demand that she shall live in his house with him, and there visits her as her husband, the desertion is broken. Burk *v.* Burk, 21 W. Va. 445.

The "desertion" or "leaving" of a husband or wife, is a continuing offense. When once commenced, it is presumed to continue, until the contrary appears. Bailey *v.* Bailey, 21 Gratt. 43; Thornburg *v.* Thornburg, 18 W. Va. 522.

If the husband cohabits with the wife during the time required by the statute for a divorce from the bonds of matrimony on the ground of desertion, the desertion is broken. Burk *v.* Burk, 21 W. Va. 445.

Concurrent Desertion.—Under the divorce law of this state, husband and wife can not each of them be guilty at one and the same time of willful desertion of the other, and either or both be entitled to a divorce from the bonds of matrimony. "Is it not an essential element of it, as a ground of absolute divorce, that if the one goes the other must stay? Or, if both go, it is merely a case of mutual separation, collusive or in good faith, as the fact may be. The one who deserts can not be deserted." Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

Wife's Residence Changes with Husband's.—The wife's residence changes with the husband's, and if without a legal excuse she refuses to go with him, it is desertion on her part. Burk *v.* Burk, 21 W. Va. 445.

Effect of Insanity of Defendant after Period.—A decree of divorce for willful abandonment and desertion for three years will be granted the plaintiff, where it appears that the defendant was guilty of such desertion and abandonment for three years while he was of sound mind, although subsequently he became insane and at the time of the commencement of the suit and the granting of the decree, he was a lunatic. Fisher *v.* Fisher, 54 W. Va. 146, 46 S. E. 118.

III. Marriage Annulment.

See generally, the title MARRIAGE.

Statutory Provisions.—See Va. Code, 1904, § 2255; W. Va. Code, 1899, ch. 64, § 4.

Grounds.

Duress.—One is not entitled to a divorce on the ground that the marriage was contracted under duress, where the only evidence of duress is the fact that, having been arrested on the charge of seduction, he married defendant to avoid the prosecution. Copeland *v.* Copeland, 2 Va. Dec. 81. In this case the evidence failed to establish that there was duress sufficient to justify the court in decreeing a divorce on that ground; it further showed that the plaintiff, immediately after the marriage had deserted his wife and remained away from her during the entire four years until the institution of this suit; and that he paid no attention to her requests for money, or treated her as his wife in any manner whatever.

Incest.—See the title INCEST.

Incestuous marriages will be annulled by a court of chancery at the instance of either party, although the applicant may have knowingly, willfully and wickedly entered into the same. Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120.

In prosecution prior to the act of 1827, for marrying a deceased wife's sister, or for marrying the husband of a deceased sister, the parties might appear by attorney; and upon a plea of "guilty" by the attorney, judgment might be entered, declaring the marriage a nullity. Kelly *v.* Scott, 5 Gratt. 479.

Precontract.—A marriage occurring between persons, one of whom had a husband living at the time, is absolutely void, and will be annulled by decree of court. Brown *v.* Brown, 2 Va. Dec. 308; Stewart *v.* Vandevort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

Want of Lawful Age.—Nonage is probably a ground for annulment under the Virginia statute. Va. Code, 1904, § 2254.

Judgment or Decree.

Validity.—A judgment declaring the marriage a nullity is valid, though it does not proceed to punish the parties, or to require them to enter into bonds, with condition to live separate. Kelly *v.* Scott, 5 Gratt. 479.

Necessity of Decree.—Though a marriage occurring between persons, one of whom had a former wife or husband then living, is absolutely void without any decree of divorce or other legal process, for obvious reasons such judicial sentence is prudent and advisable, and the statute gives either party the right to sue to obtain such a decree. Stewart *v.* Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. See Va. Code, 1904, § 2255; W. Va. Code, 1899, ch. 64, § 4.

Under §§ 1, 3, 4, ch. 64, W. Va. Code, all unlawful marriages are made voidable by decree of a court of chancery. Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120.

Decree of Annulment in Divorce Suit.—In a suit for divorce a mensa et thoro, a decree annulling the marriage would not be proper, but in such case a decree that the appellant was under a legal disability, and incapable to contract the alleged marriage with appellee; that the marriage was invalid; and that appellee was not liable or responsible for appellant's support or maintenance, and not liable for other marital obligations to her was held proper, in Brown *v.* Brown, 2 Va. Dec. 308.

In such suit a decree declaring that there was no valid marriage between the parties is not equivalent to a decree annulling the marriage. Brown *v.* Brown, 2 Va. Dec. 308.

Property Rights.

In General.—A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in the property which was the wife's at the time of the marriage; and his creditors can not subject it to the payment of his debts. Kelly *v.* Scott, 5 Gratt. 480.

Alimony.—See the title ALIMONY, vol. 1, p. 297.

In a suit to annul a second marriage, because either consort had a wife or husband then living, it was held, that in granting a decree of the nullity of such a marriage, alimony could not be decreed, because the statute declares such a marriage to be absolutely void, and alimony can not be decreed if there never was a marriage. Stewart *v.* Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50; Brown *v.* Brown, 2 Va. Dec. 308.

A marriage occurring between persons, one of whom had a husband living at the time, is absolutely void under Va. Code, 1860, ch. 109, § 1. Hence no alimony could be decreed on separation. Stewart *v.* Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50; Brown *v.* Brown, 2 Va. Dec. 308; Stones *v.* Keeling, 5 Call 143; W. Va. Code, 1899, ch. 64, § 1, p. 660.

Custody of Children.—See post, "Custody and Maintenance of Children," X.

A decree, in annulling a marriage declared voidable by statute, may provide for the custody of the children substantially as in a divorce suit. Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120.

IV. Foreign Divorces.

See the title ALIMONY, vol. 1, p. 301.

"The true position is, I think, that a state court, where the parties married and resided, and one of them continues to reside there, though one of them deserts the other and removes to another state, may grant a divorce, though the grounds of the divorce, such as adultery, may have occurred outside of the state. If, however, after the marriage both parties move to another state, and one of them then there commits adultery, and afterwards the other again removes to the state where the parties were married, in such case it is doubtful whether a divorce could be granted by the courts of the state in which the parties were married." State *v.* Goodrich, 14 W. Va. 834. See Stewart *v.* Stewart, 27 W. Va. 167.

"A decree of divorce is a judgment in rem, and as such is binding, so far as it fixes the status of the parties, on all the world; but it is binding on others no further than this. If the law of Ohio had authorized a divorce for no other cause than adultery, and this decree had found that adultery had been proven, which the court must have found before it could render such a decree, still others, though bound by the decree so far as it fixed the status of the parties as no longer that of husband and wife, yet the fact that adultery had been committed would not be regarded as established or proven by this decree in any controversy between other parties." State *v.* Goodrich, 14 W. Va. 834.

V. Defenses.

A. CONDONATION.

Condonation is defined to be the remission by one of the married parties, of an offense which he knows the other has committed against the marriage relation, on the condition of being continually afterwards treated by the other with conjugal kindness. While the condition remains unbroken there can be no divorce, but a breach of it revives the original remedy. Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.

Condonation of Desertion.—Desertion may be condoned by renewal of cohabitation of husband and wife during the time required by the statute for a divorce from the bonds of matrimony. Burk *v.* Burk, 21 W. Va. 445.

Condonation of Cruelty.—Cruelty consists of successive acts of ill treatment or personal injury, so that some condonation of earlier acts of cruelty must in such cases necessarily take place. Cruelty is cumulative, admitting of degrees and augmenting by addition. It may be condoned and even forgiven

for a time, and up to a certain point, without barring the right to bring it all forward when the continuances of it has rendered it no longer condonable. Owens *v.* Owens, 96 Va. 195, 31 S. E. 72.

While acts of cruelty on the part of the husband which have been condoned can not be made the sole foundation for a divorce, they form the subject of investigation and proof by which to determine whether the wife can with safety to her health and person continue to live with him. Owens *v.* Owens, 96 Va. 195, 31 S. E. 72.

B. RECRIMINATION.

Under the divorce law of West Virginia, as well as the general divorce law, husband and wife can not each of them be guilty at one and the same time of the act of desertion of the other, and either or both be entitled to divorce from the bonds of matrimony. Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537.

C. MISCONDUCT OF PLAINTIFF.

The misbehavior of the plaintiff in a suit for divorce and alimony, "to be an absolute bar must be of a nature to render it a sufficient legal cause for at least a judicial separation." Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

D. INSANITY.

An action for a divorce or separation is a civil action, and not a criminal suit or proceeding which can not be instituted or carried on while the accused is a lunatic. Fisher *v.* Fisher, 54 W. Va. 146, 46 S. E. 118.

VI. Evidence.

A. NECESSITY OF PROVING MARRIAGE.

The allegation of marriage in the bill and admitted in the answer, will dispense with the proof of marriage. Hitchcox *v.* Hitchcox, 2 W. Va. 435, Maxwell, J., dissenting.

B. COMPETENCY AND ADMISSIBILITY.

1. In General.

In Hitchcox *v.* Hitchcox, 2 W. Va. 435, it is said that the statute, Va. Code, 1860, ch. 109, § 9, "was never intended to change the proof further than to require proof of the adultery or other acts on which the divorce was sought; the evil which the statute was intended to guard against was collusion between the parties, to escape from the bonds of marriage and to remove the temptations to become the witness of their own dishonor." Bailey *v.* Bailey, 21 Gratt. 43; Latham *v.* Latham, 30 Gratt. 307; Cralle *v.* Cralle, 79 Va. 182. Practically the same statute exists in W. Va. Code, 1899, ch. 64, p. 662, where it is provided that divorce suits shall be tried in equity as other suits in equity, except that the cause shall be heard independently of the admissions of either party, but the testimony of either party aside from confessions and admissions is admissible. Hitchcox *v.* Hitchcox, 2 W. Va. 435; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

2. Cohabitation and Repute.

In a suit for divorce, the fact of the parties acting at times as husband and wife and calling each other such, and of the alleged husband following the alleged wife after she had fled from his house, and abusing and threatening her with violence, and of their general reputation as such among their neighbors, and the fact that the woman (who applied for the divorce) was proved to be chaste and virtuous, of good general character and submissive to her alleged husband, are sufficient evidence to force conviction on the mind of the truth of the alleged marriage. Hitchcox *v.* Hitchcox, 2 W. Va. 435; Purcell *v.* Purcell, 4 Hen. & M. 507. See also, Womack *v.* Tankersley, 78 Va. 242; Brown *v.* Brown, 2 Va. Dec. 308; Francis *v.* Francis, 31 Gratt. 283.

3. Letters.

See the title DOCUMENTARY EVIDENCE.

It is held, in Bailey *v.* Bailey, 21 Gratt. 43, that the letters of the parties are admissible in evidence for the plaintiff to show the intention on part of the defendant to desert her, and this decision seems to be approved in Carr *v.* Carr, 22 Gratt. 171. See also, Cralle *v.* Cralle, 79 Va. 182; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340; Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

4. Admissions.

See the title DECLARATIONS AND ADMISSIONS, ante, p. 325.

In Cralle *v.* Cralle, 79 Va. 182, it is held that in a suit for divorce the admissions of the plaintiff are competent evidence to support the averments of the answer, citing, with approval, Bailey *v.* Bailey, 21 Gratt. 43, in support of the statement that, "these admissions were not only competent evidence in support of the averments of the answer, but are evidence of the most satisfactory character." See Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Latham *v.* Latham, 30 Gratt. 307; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

Where husband in 1874 obtained upon order of publication against absent wife, decree of divorce a vinculo matrimonii for willful desertion for five years, and in 1876 wife asks for a rehearing and for alimony, and proves at rehearing, by plaintiff's admissions and otherwise, that the desertion was not willful, in fact not hers, but his; held, the plaintiff's admissions are admissible evidence to support the allegations of the defendant's answer. Cralle *v.* Cralle, 79 Va. 182.

"The evidence clearly shows that he abandoned his wife. Admissions from his own lips clearly prove it. Whatever construction may be properly put on the language in § 8, ch. 64, of the Code, that 'the cause shall be heard independently of the admissions of either party in the pleading or otherwise;' whatever we may think of the correctness of the case of Bailey *v.* Bailey, 21 Gratt. 43, holding that said statute does not render admissions, except by collusion, incompetent evidence on which to obtain a divorce, we can not question their admissibility as evidence to defeat a divorce. 'In a suit for divorce the admissions of the plaintiff are competent evidence to support the averments of the answer.' Cralle *v.* Cralle, 79 Va. 182. It is plain that we must reverse the decree and dismiss the bill." Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926.

Whether admissions are competent evidence on which to ground a divorce, or not, they are competent evidence to defeat a divorce. Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926.

5. The Decree.

The incompetency of husband and wife to testify is removed by divorce, and the record of the suit is evidence to prove the fact of divorce. But the pleadings and depositions are not admissible for such a purpose. Stoneman *v.* Com., 25 Gratt. 887.

Foreign Decrees.—In a prosecution for bigamy, to prove that the prisoner was a married man, when the first marriage named in the indictment was solemnized, it is proper to permit to go to the jury a paper purporting to be a decree of the court of common pleas of an Ohio county, properly authenticated, and which purported to be rendered in a suit brought by the prisoner's Ohio wife for a divorce, the decree offered purporting to be entered a year after the first marriage named in the indictment, and the court on the face of the decree reciting the legal service of the process on the defendant, and decreeing a divorce a vinculo matrimonii for the adultery of the prisoner. State *v.* Goodrich, 14 W. Va. 834. See Warner *v.* Com., 2 Va. Cas. 95.

6. Opinion Evidence.

See the title EXPERT AND OPINION EVIDENCE.

In a suit for divorce on the ground of cruelty, the opinions of witnesses based upon their knowledge of the character or reputation of the wife that they did not believe that the husband could, with safety, cohabit with her, are not admissible in evidence. The witnesses should state the facts, and not their opinions, and let the court determine from the facts proved whether the fact in issue has been established. House *v.* House, 102 Va. 235, 46 S. E. 299.

C. WEIGHT AND SUFFICIENCY.

1. In General.

In a suit for divorce on the ground of adultery, the courts do not place much weight upon the denial of the defendant and particeps criminis, when circumstantial evidence is full and satisfactory. Musick *v.* Musick, 88 Va. 12, 13 S. E. 302; Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50. "Nor upon the testimony of negro servants with whom defendant has 'bunked,' smoked, drank, ate, slept, and associated." Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340. Nor the unsupported testimony of the wife when she bases her charge on what she has heard. Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

2. Detectives.

In a suit for divorce on ground of adultery "where one man accompanies another to a house of ill fame, especially if the visit is made at the suggestion of the former, and he afterwards turns up as an active witness in support of an application for a divorce, based upon such visit, his testimony ought to be received with caution." Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

3. Threats.

"It is a principle, extending through all the departments of our law, that an act brought about by fraud or by duress, whoever the party may be, is void." Equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself, in the anomalous condition of a wife without a husband. Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

D. BURDEN OF PROOF.

The burden of proof is on the complainant in a suit for divorce to establish by full, clear and adequate evidence the charges made in his bill. Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

To authorize a divorce for willful desertion, the plaintiff bears the burden of proof, and the evidence of such desertion must be full and clear. Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926.

VII. Witnesses.

See the title WITNESSES.

In the proceedings for divorce, where the suit for divorce is brought on the ground of cruelty or desertion, the Virginia statute provides that the husband or wife may testify. In other instances, they are incompetent. Va. Code, 1904, § 3346a.

The complainant in a suit for divorce, on the ground that the marriage was contracted under duress, is incompetent to testify on his own behalf. Copeland *v.* Copeland, 2 Va. Dec. 81.

The decree is competent evidence to show that a divorce has been granted. But the pleadings and depositions are not admissible as evidence for such a purpose. Stoneman *v.* Com., 25 Gratt. 887.

VIII. Pleading and Practice.

A. IN GENERAL.

In Virginia and West Virginia the process, practice and proceedings is the same in suits for divorce as in other proceedings in equity. Latham *v.* Latham, 30 Gratt. 307; Bailey *v.* Bailey, 21 Gratt. 43; Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Hitchcox *v.*

Hitchcox, 2 W. Va. 435; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

B. THE PLEADINGS.

1. The Bill.

Adultery.—A bill for a divorce a vinculo on the ground of adultery, which only charges that the defendant has been guilty of adultery on many occasions is bad on demurrer. In this case the court said, in a dictum, that while the name of the paramour need not be stated, the time, place, and circumstances, should be set forth so as to enable the defendant to disprove the charge. Miller *v.* Miller, 92 Va. 196, 23 S. E. 232. This dictum is criticised at some length by W. Starke, Esq., of the Norfolk bar in 2 Va. L. Reg. 69, also disapproved by Prof. Lile in his notes to 1 Min. Inst. 162.

2. The Answer.

Where the answer in a suit for divorce is responsive to the allegation of the bill, defendant is entitled to the benefit of it as in other cases in equity. Latham *v.* Latham, 30 Gratt. 307.

Where the original bill does not waive respondent's answer, and his answer under oath is filed, plaintiff can not deprive respondent of benefit of his sworn answer by filing an amended bill waiving such oath. Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289.

3. The Cross Bill.

An answer may be treated as a cross bill, and the defendant may obtain any kind of relief, such as alimony, divorce or the setting aside of the decree if she was not properly summoned, etc., the same as if it had been a technical cross bill. Equity regards the substance and not the form of things. Cralle *v.* Cralle, 79 Va. 182, citing Mettert *v.* Hagan, 18 Gratt. 231.

Where a wife files a bill for divorce and alimony against her husband, if, at the time of the institution thereof, three years had not elapsed since she left her husband, and during the pendency of said suit said period does elapse, counting from the date of such desertion, the defendant may file a cross bill alleging that such desertion was willful, and had continued for three years; and, if the allegations of said cross bill be sustained by the proof, he may be decreed a divorce from the plaintiff. Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12. See Brown *v.* Brown, 2 Va. Dec. 308, where answer was treated as a cross bill; Cralle *v.* Cralle, 79 Va. 182; Mettert *v.* Hagan, 18 Gratt. 231.

Causes Arising after Commencement of Suit.—The defendant may set up cause for divorce which accrued after the suit for alimony was commenced, and he may file a cross bill alleging that the plaintiff is guilty of desertion for the required time to obtain a divorce, and thus defeat the suit for alimony and himself receive a divorce. Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12.

Amended Cross Bill.—In Willard *v.* Willard, 98 Va. 465, 36 S. E. 518, husband brought suit for a divorce from the bonds of matrimony in the hustings court of the city of Roanoke, Va., on the ground of cruelty and desertion, while the wife was in the state of Connecticut. He obtained the decree asked for and the case was dismissed from the docket. About ten months later the wife, on learning of the action of the court, alleged that she had not been served with process or had notice of the suit against her until after judgment, and asked that said decree be set aside, and she be permitted to file her answer to the bill, and that her answer be treated as a cross bill. This was permitted by the court, but a later request of the wife to file an amended cross bill to introduce new evidence of later acts of adultery on part of the husband was denied. The evidence in the case proved that three years had not elapsed before the original decree of divorce, since the parties had cohabited together as husband and wife,

and the former decree of divorce was set aside and the case dismissed. From that decree appeal was taken, and it was held that there was no error except in the refusal to allow the wife to file her amended cross bill, the court saying that she was clearly entitled to file her petition to have the case reheard and to plead or answer, in order to have any injustice in the proceeding corrected.

C. JURISDICTION.

By statute in Virginia, the circuit and corporation courts on the chancery side thereof have jurisdiction of suits for annulling or affirming marriages, or for granting divorces. And in West Virginia this same power is vested in the circuit courts. Porter *v.* Porter, 27 Gratt. 599; W. Va. Code, 1899, ch. 64, § 7. See Va. Const., § 63.

D. DEPOSITIONS.

See the title DEPOSITIONS, ante, p. 549.

Notice is given to take depositions at two distant places on the same day. The other party may attend at one of the places, and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he can not except to the depositions taken at either or both places. Latham *v.* Latham, 30 Gratt. 307, cited in Fant *v.* Miller, 17 Gratt. 187.

Objections in Appellate Court.—See the title APPEAL AND ERROR, vol. 1, p. 562.

Objections to the reading of depositions in an action for divorce, on the ground of insufficient notice, can not be raised on appeal, where no objection to the reading was made below, and the decree entered was indorsed by appellant's counsel. Brown *v.* Brown, 2 Va. Dec. 308.

E. PROCESS AND APPEARANCE.

Where a petition is filed in a divorce case under § 11, ch. 64, W. Va. Code, as amended by ch. 60, acts of 1882, unless the defendant to the petition appear thereto in court, it should be sent to rules for process to be issued thereon and to be matured for hearing. If such petition should be filed and no appearance be made thereto, and no process issued thereon, it would be error upon such petition to enter any new decree against the petitioner or in his favor. Phillips *v.* Phillips, 24 W. Va. 591.

F. THE DECREE.

See generally, the title JUDGMENTS AND DECREES.

1. Conformity to Pleadings and Proof.

Suits for divorce are governed by the general rule that requires the decree to be justified by both the pleadings and the proofs, which must coexist and correspond. Wass *v.* Wass, 41 W. Va. 126, 23 S. E. 537; Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

2. Decrees Pro Confesso.

A bill for divorce may not be taken as confessed. Latham *v.* Latham, 30 Gratt. 307; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340; Va. Code, 1904, § 2260; W. Va. Code, 1899, ch. 64, § 8.

Suits for divorce shall be instituted and conducted as other suits in equity, except that the bill can not be taken for confessed, and whether answered or not, shall be heard independently of admissions of either party in the pleadings or otherwise. Acts of 1897-8, p. 753; Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340.

3. Decree on Admission of Parties.

In General.—The fact that decree of the court confirmed the former agreement of the parties, did not make it a decree on the admission of the parties. Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

The fact that a decree of divorce from bed and board confirmed a prior agreement of the parties, in respect to separation, property arrangements, etc., did not make it a decree on the admissions

of the parties. Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

4. Prohibition against Remarriage.

Decree from the bonds of matrimony dissolves the marriage and each party is free to marry again, unless the statute prohibits the marriage of the guilty party. In granting a divorce on the ground of adultery, the court has power under Va. Code, 1887, § 2265, to decree that the guilty party shall not marry again unless such decree be annulled, and this section of the Code is constitutional. The court, in its discretion, may set a decree aside, which prohibits the marriage of the guilty party. Musick *v.* Musick, 88 Va. 12, 13 S. E. 302.

5. Vacating Decree.

Where husband in 1874 obtained upon order of publication against absent wife, decree of divorce a vinculo matrimonii for willful desertion for five years, and in 1876 wife asks for a rehearing and for alimony, and proves at rehearing, by plaintiff's admission and otherwise, that the desertion was not willful; in fact not hers, but his; held, she might have asked to have the decree of divorce set aside; and though not asking for that, she is entitled to her support out of plaintiff's estate. Cralle *v.* Cralle, 79 Va. 182.

6. Res Adjudicata.

See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Where the plaintiff sued for a divorce, alleging intemperance, cruelty and abandonment, and a decree was entered for the defendant, the plaintiff and defendant not having lived together in the meantime, the plaintiff again sues for a divorce on the same ground, the issue is res judicata. Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

G. CONTINUANCES.

See the title CONTINUANCES, vol. 3, p. 297.

"In the proper circumstances, where justice requires," the courts in divorce causes are liberal in allowing continuances and suspensions of the hearing, to supply defects in the evidence or pleadings. Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12; Willard *v.* Willard, 98 Va. 465, 36 S. E. 518.

H. HEARING.

In suits for divorce, the cause must be heard independent of the admissions of either party on the pleadings. Latham *v.* Latham, 30 Gratt. 307; Va. Code, 1904, § 2260; W. Va. Code, 1899, ch. 64, § 8.

I. REHEARING.

Under Va. Code, 1873, ch. 166, § 16, defendants not served with process and not appearing, may, if not served with copy of judgment more than a year before the end of five years from its date, within such five years, have the case reheard; and if so served more than a year before the end of such five years, may do so within a year from such service. Cralle *v.* Cralle, 79 Va. 182.

J. APPEAL.

See generally, the title APPEAL AND ERROR, vol. 1, p. 418.

The court of appeals has jurisdiction to review by appeal a decree of the court below in matters of divorce. Hitchcox *v.* Hitchcox, 2 W. Va. 435, cited with approval in Martin *v.* Martin, 54 W. Va. 301, 46 S. E. 120.

Alimony.—Pending an appeal from a decree, by which decree the appellee is allowed temporary maintenance and counsel fees out of the estate of the husband for services to be performed in this court, to which a supersedeas has been issued and perfected by bond, the only orders that the court below can make in a suit are such as are needed to preserve the rem in litigation. The statute authorizing the trial court to make any order that may be necessary to compel the man to pay such sum as may be required for the maintenance of the woman, and to enable her to carry on the suit while it is pending in that court, affords no justification for the circuit court to

render any decree, whilst an appeal is pending from a former decree allowing alimony in the same cause. Cralle *v.* Cralle, 81 Va. 773.

Custody of Children.—When a party files an undertaking and gives notice of an appeal, according to the provisions of ch. 135, W. Va. Code, 1868, from a decree awarding the custody to one spouse, the jurisdiction of the circuit court quoad the judgment, order or decree appealed from, ceases pending such appeal; and it is not competent for such court to proceed in disregard of such appeal, to carry the judgment, order or decree into execution. It is not competent for such court to determine the legality of such appeal. Dunbar *v.* Dunbar, 5 W. Va. 567.

Amount in Controversy.—Pending a divorce suit, trial court decree alimony to the woman. From the decree appeal was taken and supersedeas awarded. Pending the appeal, trial court decreed to the woman an allowance of $150 to enable her to defend the suit in this court, and $25 a month for her maintenance during the pendency of the suit. On appeal from last decree, held, the amount decreed being less than the minimum jurisdictional sum, the appeal must be dismissed. The appellant's remedy is by writ of prohibition from this court to the execution of the decree. Cralle *v.* Cralle, 81 Va. 773.

IX. Property Rights.

A. NECESSITY OF VALID MARRIAGE.

One spouse has no marital rights in the property or estate of the other, unless there has been a valid marriage between them. Brown *v.* Brown, 2 Va. Dec. 308; Offield *v.* Davis, 100 Va. 250, 40 S. E. 910.

B. DIVORCE FROM BOND OF MATRIMONY.

Upon the dissolution of the marriage relation, the husband's rights to his wife's property become extinguished. Porter *v.* Porter, 27 Gratt. 599; Cleek *v.* McGuffin, 89 Va. 324, 15 S. E. 896; Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285; Cralle *v.* Cralle, 79 Va. 182; Muse *v.* Friedenwald, 77 Va. 62; Harris *v.* Harris, 31 Gratt. 33.

"It is well settled, that upon the dissolution of the marriage by a decree of divorce which does not otherwise direct, the wife's choses in action, which has not been previously reduced to possession by the husband, or specifically assigned by him, revert immediately to her. But her choses in action, and her personal chattels, which had been reduced to possession by the husband prior to the divorce, had become absolutely vested in him as his property, and could not be divested by the divorce. Why may it not be true also as to the wife's real estate? Mr. Bishop says, 'All transfers of property which were actually executed, either in law or fact, abide; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. But this divorce puts an end to all rights depending on the marriage, and not actually vested, as dower in the wife, curtesy in the husband, and his right to reduce to possession her choses in action.' 2 Bishop on Mar. & Div., § 705." Porter *v.* Porter, 27 Gratt. 599.

Vested Rights.—A statute which empowers the chancery court to restore to the injured party, as far as practicable, the rights of property conferred by marriage on the other, does not authorize the court to interfere with, or defeat the vested rights of third persons, which attached upon the property prior to the institution of such proceedings for divorce and when the property was the absolute estate of the husband. Jennings *v.* Montague, 2 Gratt. 350.

Attaching Creditors' Rights.—An attachment against the effects of the husband as an absconding debtor,

levied before the institution of a suit for a divorce by the wife, entitles the attaching creditors to be satisfied out of the attached effects, in preference to the claims of the wife. The courts in adjusting the property of divorced parties have no right to interfere with the vested rights of bona fide creditors or purchasers for value who have acquired a vested right in the property. Va. Code, 1887, § 2263; 1 Min. Inst. (4th Ed.) 294; Jennings *v.* Montague, 2 Gratt. 350; Bailey *v.* Bailey, 21 Gratt. 57; Carr *v.* Carr, 22 Gratt. 168; Harris *v.* Harris, 31 Gratt. 33; Cralle *v.* Cralle, 81 Va. 773.

Curtesy and Dower.—See the titles CURTESY, ante, p. 148; DOWER.

Curtesy and dower are barred by a decree of divorce a vinculo, and the same principle applies to maintenance in the absence of any provisions in the decree as to the parties' property rights. Cralle *v.* Cralle, 79 Va. 182; Porter *v.* Porter, 27 Gratt. 599.

The provision in the West Virginia Code of 1868, ch. 65, § 7, declaring: "If a wife voluntarily leave her husband without such cause, as would entitle her to a divorce from the bond of matrimony, or from bed and board, and without such cause and of her own free will be living separate and apart from him at the time of his death, she shall be debarred of her dower and inheritance," is not restricted, but embraces within its power, a widow, who had, nine years before the said act passed, "left" her husband without such cause, as is specified in the act, and which "leaving" or "desertion" continued for two years after the passage of the act until his death, and who was living separate and apart from her husband, when he died; and under such act she is therefore barred of her dower and inheritance in her husband's estate. The legislature had the power to pass said act. A wife's right of dower, so long as it remains inchoate, is subject absolutely to the control of the legislature, which may modify or destroy it at will without exceeding its constitutional limits; and this right or dower becomes consumate and vested only by the death of the husband. Thornburg *v.* Thornburg, 18 W. Va. 522.

Where a wife leaves her husband because of his cruel and inhumane treatment of her, such as charges of infidelity, she is entitled to dower, and an answer setting up that she voluntarily left him, without such cause as would entitle her to a divorce from the bonds of matrimony or from bed and board, and without such cause of her own free will, was living separate and apart from him at the time of his death, can not be sustained, because a charge of prostitution is included within the meaning of cruel treatment. Ball *v.* Stewart, 41 W. Va. 654, 24 S. E. 632.

Husband's Rights in Wife's Property.—For the rule that upon the dissolution of the marriage relation, the husband's rights to the wife's property are extinguished, see Cleek *v.* McGuffin, 89 Va. 324, 15 S. E. 896; Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285; Cralle *v.* Cralle, 79 Va. 188; Muse *v.* Friedenwald, 77 Va. 57; Harris *v.* Harris, 31 Gratt. 33, all citing the important case of Porter *v.* Porter, 27 Gratt. 599; 1 Min. Inst. (4th Ed.) 302; 2 Min. Inst. (4th Ed.) 118.

E. is possessed of an estate in fee in a tract of land and marries P. and they have two children born of the marriage. Upon a bill by P. the marriage is dissolved for the adultery and desertion of E., but the decree directs nothing as to the property of the parties. Upon the dissolution of the marriage all the husband's claims to the wife's lands which depended on the marriage, were extinguished, and she is entitled to the possession of the land. Porter *v.* Porter, 27 Gratt. 599.

Payment of Husband's Debts.—Where the facts do not justify it, it is error for the circuit court to subject a divorced wife's property to the pay-

ment of the debts of the husband's creditors, by reason of improvements alleged to have been placed thereon with intent to hinder and delay such creditors. Adams *v.* Irwin, 44 W. Va. 740, 30 S. E. 59; Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

Marriage Annulment. — See ante, "Marriage Annulment," III.

A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in the property which was the wife's at the time of the marriage; and his creditors can not subject it to the payment of his debts Kelly *v.* Scott, 5 Gratt. 408.

Husband's Assignment of Wife's Property.—Assignment of wife's choses in action made by the husband is effectual, if, at the time of the assignment or afterwards during his lifetime, he is in a condition to reduce such choses into his possession; if, however, he dies before the event happens on which he is entitled to reduce the choses into his possession, his assignment is inoperative.

The assignment, in order to be valid, must be of a present (as distinguished from a reversionary) interest, must be for valuable consideration, and must also be a special assignment. Browning *v.* Headley, 2 Rob. 340, 40 Am. Dec. 755.

Restitution from Aggressor.—Where husband kicked and beat without provocation his wife as she was engaged in nursing her infant, and afterwards obscenely threatened a repetition of the assault, chased her out of his house, menacing her with a switch, and threatened "to split her open," and during a series of years kept up not only such personal violence, but a constant course of unkindness, insult and petty tyranny towards her, so as to make it notorious and cause his neighbors to testify that it would be unsafe for her and her child to dwell with him; held, that she is entitled to a restitution of her property. Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

Res Adjudicata.—Where in a divorce suit the question as to the property rights of the wife is raised, and by the decree in that case they are disposed of by the decree of absolute divorce, without settling the property rights, but such property rights are left where they were at the date of the decree, if these rights might have been disposed of in the divorce suit, the rights of property between them become res judicata by the decree of divorce. Osburn *v.* Throckmorton, 90 Va. 311, 18 S. E. 285, citing Throckmorton *v.* Throckmorton, 86 Va. 768, 11 S. E. 289; Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 142; Porter *v.* Porter, 27 Gratt. 599; Campbell *v.* Campbell, 22 Gratt. 649.

C. DIVORCE FROM BED AND BOARD.

"In granting a divorce from bed and board the court may decree that the parties be perpetually separated and protected in their persons and properay." Such a decree of perpetual separation has the same effect upon property thereafter acquired as a divorce from the bonds of matrimony, except that neither party shall marry again during the life of the other. Va. Code, § 2264; Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

Pending suit for divorce from bed and board, husband and wife agreed to live separate, each to acquire and hold property free from claims of the other, and that decree be entered confirming the agreement. Afterwards, decree was entered reciting the taking of depositions and arguments of counsel and confirming the agreement; Held: The decree was in substance for a divorce from bed and board within Code, § 2264, and was final and valid and operated upon after acquired property and the legal rights and capacities of the parties, as a decree from the bond of matrimony except that

neither party could marry again during the life of the other. The fact that decree confirmed the agreement did not make it a decree on the admissions of the parties. After decree of separation the woman acquired land and sold it to appellant. After death of both the man and the woman, her heirs brought ejectment for the land, and the circuit court rendered judgment for the plaintiffs; Held: Error. Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

X. Custody and Maintenance of Children.

See the titles PARENT AND CHILD; SUPPORT AND MAINTENANCE.

A. CUSTODY.

Statutory Provisions.—The provisions in the Virginia and West Virginia Codes are substantially the same. Va. Code, 1904, § 2263; W. Va. Code, 1899, ch. 64, § 11.

Words and Phrases in Statute.—Where, in a suit for divorce, the bill is filed, the writ of summons issued, and returned executed, all on the same day, such suit is on that day "a pending suit," within the meaning of the West Virginia Code, ch. 64, § 9. Handlan *v.* Handlan, 37 W. Va. 486, 16 S. E. 597.

Who Entitled.

In General.—By the common law the father is the legal guardian of his minor child, and has a right to its custody against all the world. Latham *v.* Latham, 30 Gratt. 307. See Armstrong *v.* Stone, 9 Gratt. 102; Carr *v.* Carr, 22 Gratt. 168; 1 Min. Inst. 427.

"The law as to the custody of children has been greatly modified. Formerly, the right of the father to its custody was almost an inflexible rule. That rule forgot that a mother had a heart. The real owner of the child, be it even a baby, must give it up. But civilization, advanced thought and human kindness have bent this iron rule and opened the ears of the courts to the pleading of the true friend and owner of the child. The courts do not these days inexorably take from mothers their children of tender years even for the father, if the mother is a fit person, and has a home for them, but look at all the circumstances. The welfare of the child is the test. The welfare of a tender child is with the mother generally. 9 Am. & Eng. Ency. L. (2 Ed.) 867; Cunningham *v.* Barnes, 37 W. Va. 746, 17 S. E. 308; Green *v.* Campbell, 35 W. Va. 698, 14 S. E. 212. The law leans in this matter to the innocent parent, the one without fault." Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930, cited with approval in Meyer *v.* Meyer, 100 Va. 228, 40 S. E. 1038.

Ordinarily the father is entitled to the care and custody of his infant child, but when the father is claiming the custody of the child, the court will exercise its discretion according to the facts and what appears to be the best interest of the child. The welfare of the child is the controlling consideration. Meyer *v.* Meyer, 100 Va. 228, 40 S. E. 1038, following Stringfellow *v.* Somerville, 95 Va. 701, 29 S. E. 685.

When the question as to the custody of the child has to be decided, the court will exercise its discretion according to the facts, consulting the infant's wishes, if of the age of discretion, and if not, exercise its own judgment as to what is best calculated to promote the infant's welfare, having due regard to the legal rights of the claimants. Coffee *v.* Black, 82 Va. 567; Armstrong *v.* Stone, 9 Gratt. 102.

The innocent parent on whose prayer a divorce is granted is usually entitled to the custody of the children. A woman compelled by her husband to resort to a divorce ought not to obtain it at the expense of losing the society of her children; and as one who has done well or ill in the marriage relation will be likely to do the same in the parental, all courts lean to the in-

nocent parent when determining the custody of the child. Owens *v.* Owens, 96 Va. 191, 31 S. E. 72.

When Mother Entitled to Custody.—Where there is no showing in a suit for divorce that the mother is not a proper person to have the custody of the children, but it is shown that she has a home, while the father, a railroad engineer, boards around and can see very little of the children, and further where the evidence shows that the mother of the children has a deep affection for them, whereas, as to the father, just the reverse is shown, because, though of tender years, he never visited or cared for them through months and years, it was held, that a decree giving the custody of the children to the mother was proper and would not be reversed, unless it was shown that the welfare of the children demanded it. Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335. See Heninger *v.* Heninger, 90 Va. 271, 18 S. E. 193.

In Bailey *v.* Bailey, 21 Gratt. 43, the child was given to the mother, who was the innocent party and had instituted the suit for divorce.

Where husband kicked and beat without provocation his wife as she was engaged in nursing her infant, and afterwards obscenely threatened a repetition of the assault, chased her out of his house menacing her with a switch, and threatened "to split her open," and during a series of years kept up not only such personal violence, but a constant course of unkindness, insult and petty tyranny towards her, so as to make it notorious and cause his neighbors to testify that it would be unsafe for her and her child to dwell with him; held, that she is entitled to the custody of the infant child. Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

On decreeing a divorce the wife is the proper custodian of an infant of seven months. Trimble *v.* Trimble, 97 Va. 217, 33 S. E. 531, 5 Va. L. Reg. 401.

When Father Entitled.—The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parties. Latham *v.* Latham, 30 Gratt. 307.

Where the wife has left her husband without good legal ground, and taken their child with her, though there is no imputation of unchastity or other bad conduct, the child will be restored to the husband upon a decree for divorce a mensa et thoro, at the suit of the husband, on the ground of desertion, though the child was a female and but three years old, and this though the husband's treatment of the wife had been coarse, rude, close, petulant, exacting and penurious, leaving her to bear alone the burdens and trials which it should have been his highest pleasure to share and relieve. Carr *v.* Carr, 22 Gratt. 168; Latham *v.* Latham, 30 Gratt. 307. And the wife was denied access to the child in these cases. See Brown *v.* Brown, 2 Va. Dec. 308.

Right of Other Parent to Access.—If the application by the wife for divorce is refused, if the court is satisfied that she is the chief obstacle in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him and to say he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the wishes and feelings of the mother. Latham *v.* Latham, 30 Gratt. 307.

Consent Decrees.—No valid marriage being proved in an action by a woman for a divorce a mensa et thoro, such woman was competent to consent to a decree giving custody of their children to the defendant, and she having so consented, could not complain on appeal that the court erred in making said decree. Brown *v.* Brown, 2 Va. Dec. 308.

Process and Appearance. — After a divorce on the ground of adultery at suit of the wife, leaving the child in the wife's custody, husband filed a petition on apparently good ground to recover custody of the child. Held, that the court erred in further decreeing against the husband when no process had issued against the wife on said petition, and no appearance had been made. Phillips *v.* Phillips, 24 W. Va. 591.

Change or Modification of Decree.— The West Virginia statute allows a change in the decree for the custody of the children, only where the benefit of the children demands it. Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335.

Wherever a power is given by statute to order a decree as to custody or alimony, the former decree has such force that it will not be reviewed on facts existing at its date, but will be altered only on changed circumstances, or as to custody of children on material facts unknown at the date of the decree, showing that the welfare of the children demands a change. Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335.

The decree fixing the custody of a child upon decree in a divorce suit, is final on the conditions then existing, and should not be changed afterwards, unless on altered conditions since the decree, or on material facts then existing, but then unknown, and for the welfare of the child. Cariens *v.* Cariens, 50 W. Va. 113, 40 S. E. 335.

Notice of Application. — Where no notice of the application to modify a decree and to change the custody of the children is given to the husband, the order of the court modifying such decree at suit of the wife is void. Phillips *v.* Phillips, 24 W. Va. 591.

Nature of Proceeding. — Under W. Va. Code, 1884, ch. 64, § 11, providing that in divorce proceedings the court may, from time to time, on petition of either of the parents, revise and alter decrees concerning the custody of the children, the proceeding should not be ex parte. Phillips *v.* Phillips, 24 W. Va. 591.

B. SUPPORT AND MAINTENANCE.

Where the custody of the children is awarded to the mother, the court may make an order that the husband pay a certain sum for their maintenance. Heninger *v.* Heninger, 90 Va. 271, 18 S. E. 193. See also, in this regard, Dunbar *v.* Dunbar, 5 W. Va. 567.

On granting a wife a divorce from "bed and board" on the ground of cruelty, where it appears that the wife's separate property is larger than the husband's, and amply sufficient for the support of herself and child, the husband will not be compelled to contribute to their support. Myers *v.* Myers, 83 Va. 806, 6 S. E. 630.

XI. Counsel Fees.

See generally, the title ATTORNEY AND CLIENT, vol. 2, p. 162.

The statutes in express terms, authorize the trial court to make any order that may be necessary to compel the man to pay such sums as may be required for the maintenance of the woman and to enable her to carry on the suit. Va. Code, 1904, § 2261; W. Va. Code, 1899, ch. 64, § 9; Cralle *v.* Cralle, 81 Va. 773.

The allotment of counsel fees is a matter within the discretion of the court, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case. Brown *v.* Brown, 2 Va. Dec. 308, citing Bailey *v.* Bailey, 21 Gratt. 43; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

The husband is liable for the fees, where an attorney was employed by the wife to prosecute a suit against the husband for a divorce a mensa et thoro, because of actual cruelty, or because

of apprehension on her part of bodily hurt where she won the suit, on the ground that husband is liable for necessaries of the wife, but this would not be the case if the suit had been for a divorce from the bonds of matrimony, nor for a suit to obtain a divorce a mensa et thoro on the ground of abandonment and desertion. Peck *v.* Marling, 22 W. Va. 708.

Wife Liable.—W. Va. Code 1883, ch. 66, § 13, authorizing a married woman when living apart from her husband "to carry on any trade or business," by implication removes her common law incapacity to contract, and she would be liable in assumpsit for an attorney's services, rendered in obtaining a divorce, when based on abandonment by the husband, but not when based on his cruelty, for in that case the husband would be liable. Peck *v.* Marling, 22 W. Va. 708.

But even where he would have had such an action against her husband, yet, if such married woman, when she employs such attorney to bring such a suit, expressly though verbally promises him, that she will pay his fees, and he looks to her alone for the payment of his fees and every part of them, he may sue her on such express contract. She is liable if by the express contract he gave credit to her alone; but if to any extent he gave credit to her husband, he can not recover on such contract in a suit against her. Peck *v.* Marling, 22 W. Va. 708.

Failure to Prove Valid Marriage.—One who failed to prove a valid marriage, can not complain of a refusal to allow suit, money and alimony. The allotment of alimony, counsel fees, etc., are matters within the discretion of the court, to be exercised in reference to established principles of law relating to the subject, and upon an equitable view of all the circumstances of the particular case. Brown *v.* Brown, 2 Va. Dec. 308; Bailey *v.* Bailey, 21 Gratt. 43; Miller *v.* Miller, 92 Va. 196, 23 S. E. 232.

Fees in the Appellate Court.—Allowance will not be made to the defendant in a divorce suit, to pay counsel fees in the appellate court, in the absence of anything to show the financial condition of the plaintiff, but allowance made below will be sufficient. Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50; Cralle *v.* Cralle, 81 Va. 773.

The measure of the husband's liability to pay the expenses of the wife's defense to a suit for divorce brought by him depends upon his ability to meet them, and, in the absence of anything in the record to guide this court, it will not make an allowance for fees of counsel in this court, but will adhere to the sum fixed by the trial court. Engleman *v.* Engleman, 97 Va. 487, 34 S. E. 50.

Docketing Judgments.

See the title JUDGMENTS AND DECREES.

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As to necessity of stamp as condition to admissibility, see the titles BILLS, NOTES AND CHECKS, vol. 2, p. 401; CONTRACTS, vol. 3, p. 307. As to proof of foreign laws, see the title FOREIGN LAWS. As to admissibility in evidence of records generally, see the title RECORDS. As to admissibility in evidence of judgments and decrees, see the title JUDGMENTS AND DECREES. As to proof of marriage, see the titles BIGAMY, vol. 2, p. 373; MARRIAGE. As to abstracts or copies of judgments, see the title JUDGMENTS AND DECREES. As to report of commissioners as evidence, see the title REFERENCE. As to recitals in deeds, see the title DEEDS, ante, p. 364. As to authentication and proof of records, see the title RECORDS.

I. Public Documents.

A. SCOPE OF SECTION.

Most questions relating to public documents or records will be found treated under the titles COMMON LAW, vol. 3, p. 29; FOREIGN LAWS; JUDGMENTS AND DECREES; JUDICIAL NOTICE; ORDINANCES; RECORDS; STATUTES.

B. CERTIFICATES.

1. Certificates of Public Officers.

Of Recorder.—See the title RECORDS.

The certificate of a recorder of an incorporated town, stating facts which appear upon the records of the common council of the town, and not certifying copies from such records, is not admissible as evidence. Roe *v.* Town of Philippi, 45 W. Va. 785, 32 S. E. 224.

Of Auditor.—But a certificate by the auditor of the state, of land forfeited for nonpayment of taxes, being in the usual form in which he certifies papers from his office, is evidence of the execution of such certificate, and of the official character of the paper, and also of the facts therein stated. Usher *v.* Pride, 15 Gratt. 190.

In a suit to establish a deed alleged to have been made a century ago, and lost, neither the certificate of the auditor showing that the lands were charged to the grantee for a great number of years after the date of the alleged deed, nor any number of intermediate conveyances, however nu-

merous, from those claiming under the alleged grantee, unaccompanied by possession or other circumstance, can serve to establish the execution of such deed. In the case in judgment the evidence of possession in appellants amounts to nothing so far as it affects the rights of other parties to the controversy. Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

Of Magistrate of Another State.—And the certificates of magistrates of other states, have been sufficient evidence of the execution of a deed by a feme covert, since the act of 1814; but until the act of 1819, the certificates of such magistrates were not evidence of the execution of deeds by other persons than feme coverts. Sexton *v.* Pickering, 3 Rand. 468.

Of Clerk of Court.—See the title CLERKS OF COURT, vol. 2, p. 834.

So also, the certificate of the clerk of the circuit court of Monroe county, West Virginia, of the records of which court the records of the former county court of Monroe form a part, of the copy of a judgment rendered in the county court, is proper evidence of the judgment. Gatewood *v.* Goode, 23 Gratt. 881.

The plaintiffs claim their freedom as being the children of a negro woman named Nan. The registry of Nan as a free woman, and the certificate of the clerk of the county court in which Nan was registered, to the correctness of the registry, and the affidavit of the person to whom Nan had been bequeathed for the time she was to serve, by a person under whom the testator of the defendants claimed the plaintiffs, of the fact that Nan was free, which affidavit was acted on by the court, and was filed in the clerk's office, when the registry of Nan was directed by the court, are competent evidence for the plaintiffs. "It is at least questionable whether a register, made and certified according to law, is not prima facie evidence of every fact therein stated, in any controversy involving the freedom of the negro registered, or of any other persons claiming freedom under such negro. See 1 Greenl. Ev., §§ 483, 485, 491, 493. If it be so, then the register of Nancy is prima facie evidence of the fact therein stated, that she was born free." Fulton *v.* Gracey, 15 Gratt. 314.

Certificates of clerk of county court as to the entry or nonentry of land on the tax books, and other certificates specified in § 5a, ch. 130, W. Va. Code, are made admissible evidence by it, but must be filed and notice given prior to trial for the period of twenty days, required by the statute. "That certificate would be admissible only under statute, because it is hearsay, or the clerk's finding from the tax books. 1 Greenl. Ev., § 498." High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536.

Of Notary Public.—See the title NOTARIES AND NOTARY PUBLIC.

A certificate of a notary public, that a release was acknowledged by a party to be his act and deed, ought to be received in evidence; but the depositions of the notary public, or some equivalent testimony, ought to be produced to the court. Kidd *v.* Alexander, 1 Rand. 456.

Of Postmaster General.—See Wilkinson *v.* Jett, 7 Leigh 115.

Certificate of Justice.

Surrender of Bail.—If a surety in a recognizance surrenders his principal to a justice, the failure of the justice to give a certificate of the surrender, will not prevent the use of other evidence to prove the surrender. The certificate is not the sole evidence. State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

Certificate of Governor.—When a claim for revolutionary services is brought before the court, the certificates of the governor and the council, allowing such claims, do not come within the rule that the best evidence

of which the nature of the case will admit, must be introduced. Doggett *v.* Helm, 17 Gratt. 96.

2. Certificate of Foreign Probate.

The certificate of probate or of administration granted by a court of Virginia, and attested by the clerk, will enable the executor or administrator to act, and may be given in evidence in any court of this commonwealth. Dickinson *v.* M'Craw, 4 Rand. 158.

3. Certificate of Incorporation.

See the title CORPORATIONS, vol. 3, p. 579.

A corporation created under the laws of the state of New York is sufficiently proved in this state, by the production of a copy of the certificate of its incorporation, attested by the secretary of the state of New York under the seal of his office, authenticated by the governor of New York under the great seal thereof, or by a copy of such certificate of incorporation made by the clerk of the county, in which the business of the corporation shall be carried on, under the seal of his office, and certified by the presiding justice of the supreme court of said county, and further authenticated by the clerk of such court under the seal of said court in the manner prescribed by § 20, ch. 130, W. Va. Code. Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

C. REPORTS OF CASES.

See the title REPORTS AND REPORTER.

Mayo *v.* Murchie, 3 Munf. 358, is cited in Taylor *v.* Com., 29 Gratt. 786, 789, 795, where the question arose as to the right to introduce in evidence the report of that case as contained in 3 Munf., the original record in the case having been lost by fire.

II. Private Documents.

A. BILL OF SALE.

See the title SALES.

A bill of sale of a slave should be permitted to go to the jury as evidence, though not recorded. Fowler *v.* Lee, 4 Munf. 373.

B. CIRCULARS ISSUED BY CORPORATIONS.

A circular issued by an insurance company, showing its business and mode of doing it, is not admissible as evidence on trial of a cause against it for breach of one of its policies. Clemmitt *v.* New York Life Ins. Co., 76 Va. 355.

C. CONTRACTS.

Simple Contracts.—In an action of assumpsit for use and occupation of land, the agreement being not under seal, and being fully executed on the part of the plaintiff, he had the right to avail himself of the written agreement, whereby the rent certain was fixed, as evidence of the amount of the recovery in the action. Goshorn *v.* Steward, 15 W. Va. 657.

In an action of assumpsit to recover money paid on a contract which has been rescinded, it is competent for the plaintiff to introduce in evidence the contract, though under seal and not signed by him, which has been rescinded, and which shows the amount paid by the plaintiff, and the consideration therefor. The contract is not in support of the form of the action, but is a part of the evidence necessary to prove the plaintiffs' case. Buena Vista Co. *v.* McCandlish, 92 Va. 297, 23 S. E. 781.

Working Contracts.—At the trial of an action of trespass on the case for breach of a contract in writing signed by the defendant, and binding him to build on a lot and pay ground rent for a term of years, the contract is admissible as evidence in behalf of the plaintiff, although it may have been a mere memorandum of an agreement to be afterwards substituted by a formal lease. "This paper constituted the first step in the plaintiffs' case, was the foundation for his action, and was properly admitted as evidence; there was

no ground whatever for its exclusion." Bohn *v.* Newton, 81 Va. 480.

D. DEEDS.

See the titles ACKNOWLEDGMENTS, vol. 1, p. 104; DEEDS, ante, p. 364.

1. In General.

Instruments, such as deeds and supplemental agreements, that are muniments of title, are, as such, competent evidence. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710; Bulkley *v.* Sims, 48 W. Va. 106, 35 S. E. 971, citing Olinger *v.* Shepherd, 12 Gratt. 462.

Original deeds made outside of the state, and so certified as to warrant recordation in the state, are admissible in evidence there. Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035.

A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title, to show the bounds of the land claimed by him, and the extent of his possession. Olinger *v.* Shepherd, 12 Gratt. 462, citing Flannagan *v.* Grimmet, 10 Gratt. 421. See Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Commissioner's Deeds.—See the titles JUDICIAL SALES; REFERENCE.

Where a deed made under a decree by a commissioner or other authority, is offered in evidence as a connecting link in the party's chain of title to land, it is necessary to introduce with it so much of the record of the suit in which such decree was made, as will satisfactorily show that the persons having the legal title to the land conveyed were parties to the suit, and as such will identify the land. Waggoner *v.* Wolfe, 28 W. Va. 820; McDodrill *v.* Pardee, etc., Lumber Co., 40 W. Va. 564, 21 S. E. 878.

2. Copies of Deeds.

See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 361.

a. In General.

An office copy of a deed admitted to record by the proper authority, upon due acknowledgment or proof of its execution, is admissible evidence; because, in the first place, the reception of such acknowledgment or proof, and the admission of the instrument to recordation, are public acts performed by mandate of the law, and therefore, entitled to confidence; and because, secondly, the certificate of the public officer having custody of the record, of the acts which it indicates, by furnishing an attested copy thereof, is to be taken as authentic, on account of the inconvenience which would be occasioned by the necessity of producing the original. But where the law gives no authority for the reception of such acknowledgment or proof and admission to recordation, the record of those acts, and the certificate of the public custodian of the record, are entitled to no more respect than if the same had been performed by a private individual. Pollard *v.* Lively, 4 Gratt. 73.

In Ben *v.* Peete, 2 Rand. 539, the court said: "The case of Maxwell *v.* Light, 1 Call 117, may also be considered as having some bearing on the present; the court deciding there, that if the deed of lease was admitted to record at the instance of the appellant, a copy might, under circumstances, be received as evidence."

In Lamb *v.* Cecil, 25 W. Va. 288, it is said: "It is true that the original deed was not filed as an exhibit, but a properly authenticated copy from the record is filed. That was sufficient and answered all the purposes of the original. (W. Va. Code, 615; Pollard *v.* Lively, 4 Gratt. 73; Ott *v.* McHenry, 2 W. Va. 73.)" See also, Pollard *v.* Lively, 4 Gratt. 73; Baker *v.* Preston, Gilmer 235, cited in Johnston *v.* Slater, 11 Gratt. 321.

"Where both parties claim under the same third person, it is sufficient to prove the derivation of title from him without proving his title. 2 Greenl. Evi., § 307. The recitals in the deed subsequent to the deed objected to,

direct attention to that deed; it is referred to in the deed of Shepherd to Wilson and Winn, by its terms, its date and place of record. These recitals are evidence against parties and privies in blood, in estate and law, and an office copy from the place described as the place of record is good evidence in controversies with them." Hannon v. Hannah, 9 Gratt. 146.

A copy of a deed connected with a transaction with which an alleged forged receipt is connected, is competent evidence on a trial for uttering such forged receipt. State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

The copy of a deed acknowledged by the grantor before justices, by them certified to the clerk for record, and by him certified to be a true copy, is admissible as primary evidence, equivalent to the original. Baker v. Preston, Gilmer 235, 285, citing Maxwell v. Light, 1 Call 117; Whitacre v. Mc'Ilhaney, 4 Munf. 310; Turner v. Stip, 1 Wash. 319; Lee v. Tapscott, 2 Wash. 276. Maxwell v. Light, 1 Call 117, is cited in this connection in Taliaferro v. Pryor, 12 Gratt. 290.

Office Copy of Foreign Deed.—An office copy of a deed registered in North Carolina, is not admissible as primary evidence in this state, unless there be some statute of North Carolina making them so. Petermans v. Laws, 6 Leigh 523.

A deed acknowledged or proved before a hustings or county court, which conveys land in another county, and thereupon ordered to be certified to the court of the county in which the land lies, was upon this certificate recorded in the general court, when deeds were authorized to be recorded in that court. A copy of the deed certified from the clerk's office of the general court is competent evidence in place of the original. Pollard v. Lively, 4 Gratt. 75, cited in Johnston v. Griswold, 8 W. Va. 240; Johnston v. Slater, 11 Gratt. 324, 325.

Copy of a Copy.—A copy of a copy of a deed is not legal evidence, if the original, or a copy thereof, could be had. Whitacre v. M'Ilhaney, 4 Munf. 310.

Where an original deed, conveying lands lying wholly in Virginia, is admitted to record outside of this state, upon proof and authentication wholly insufficient to have admitted it to record in Virginia, and a copy thereof is subsequently admitted to record in a county in Virginia where a part of the land conveyed lies, and the absence of the original deed is not accounted for, a copy from the copy so admitted to record is not admissible in evidence to prove the recitals in the deed. Barley v. Byrd, 95 Va. 316, 28 S. E. 329.

b. Necessity and Sufficiency of Recordation.

(1) Necessity of Recordation.

A certified copy of a deed, recorded upon the acknowledgment of the grantor, not required by law to be recorded, is evidence against the grantor, and all claiming under him, subsequently to the acknowledgment. But it is not evidence against any person, deriving title from the grantor, before the acknowledgment. Ben v. Peete, 2 Rand. 539; Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240, citing Ben v. Peete, 2 Rand. 54; Braxton v. Bell, 92 Va. 229, 23 S. E. 289; Lee v. Tapscott, 2 Wash. 270; Fleshman v. Holyman, 27 W. Va. 728.

(2) Sufficiency of Recordation.

See the title RECORDING ACTS.

The admission of a deed to record is a ministerial act, though done in open court; and if not in conformity to law, the recordation is void, and a certified copy of the deed is inadmissible as evidence. Carter v. Robinett, 33 Gratt. 429.

An office copy of a deed improperly admitted to record is not competent evidence. Clark v. Perdue, 40 W. Va. 300, 21 S. E. 755.

A certified copy of a deed not duly

recorded, is not admissible evidence of the contents of the original. Maxwell *v.* Light, 1 Call 117.

In a case of escheat between the heirs of the alien and the commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land, as recorded in the county of K., an office copy of said deed is evidence for the heirs, though it was not recorded upon proper proof. Fiott *v.* Com., 12 Gratt. 564.

On the first trial of an action of ejectment, copies of certain deeds offered by the plaintiffs are admitted, and the defendant objects to them, because their acknowledgment and certificate of recordation are insufficient, and on a writ of error they are decided by this court to have been properly received in evidence, and the case being for other reasons remanded, if on the second trial thereof, copies of the same deeds with the same acknowledgments and certificates are again offered in evidence, the court below is bound to admit them; and this court on a writ of error will not review its action, though the case, when formerly before this court, was decided by only two judges. Postlewaite *v.* Wise, 17 W. Va. 1.

In 1802, the county court of Ohio county made this order: "Deed from James Caldwell to John Young was proven in court to be the act and deed of said James Caldwell, who hath acknowledged the same in the presence of Samuel Wharton and William Adcock, justices of the court of common pleas, and ordered to be recorded in perpetuam rei memoriam." The said deed was thereupon recorded in said county by the clerk who omitted to record said order, but added to said record the following certificate: "A copy from the original which was proven in court at January term, 1802, by a certificate from under the hand and seal of office of Mathew Clarkson, mayor of the city of Philadelphia, and ordered to be recorded." He also recorded with the deed a certificate of said Wharton and Adcock, that the deed had been acknowledged before them in Philadelphia, but no certificate of Clarkson, mayor, etc. Held, the said deed was a recorded instrument and a copy therefrom admissible in evidence in this state. Peterson *v.* Ankrom, 25 W. Va. 56.

A deed admitted to record by the county court of Harrison, in 1804, on the certificate of two justices "in and for the city and county of Philadelphia," certified by a prothonotary of the court of common pleas of said county, was held by the court to be properly recorded in Harrison county, and a copy therefrom admitted in evidence in the case of Campbell *v.* Hughes, 12 W. Va. 183, 194. Peterson *v.* Ankrom, 25 W. Va. 56.

In Cox *v.* Wayt, 26 W. Va. 807, the court said: "As a deed when properly admitted to record becomes in itself a record, which is evidence against any person of the due execution thereof, and stands as notice to all persons of the contents thereof, it follows, that if in this case, as in all others, it appears on the face thereof, that the court or officer making the same had no jurisdiction over the subject or authority to make the same, it can, as a record, have no force or effect whatever. Maxwell *v* Light, 1 Call 117; Tavenner *v.* Barrett, 21 W. Va. 656." Maxwell *v.* Light, 1 Call 117, is cited in this connection in Herring *v.* Lee, 22 W. Va. 561; and in footnote to Johnston *v.* Slater, 11 Gratt. 321.

c. Grounds of Admission.

See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

The refusal of a party to produce the original, which is in his possession, on due notice, will authorize the admission of a copy in evidence, on proof of its being a true copy. Maxwell *v.* Light, 1 Call 117; Robison *v.* Pitzer, 3 W. Va. 335.

The copy of a deed may be read in

evidence, upon the oath of a party, that he had searched the clerk's office and all other places where he supposed the original deed might probably be found, and had not been able to find the original. Ben *v.* Peete, 2 Rand. 539.

d. Authentication and Proof.

Domestic Deeds.—A deed not acknowledged or not certified according to law, though actually admitted to record, can not be read in evidence as a recorded deed, but as between the parties it is valid. Raines *v.* Walker, 77 Va. 92.

If a deed, not properly authenticated, is admitted to record, a copy of the deed from the record is not competent evidence. Carter *v.* Robinett, 33 Gratt. 429.

So, also, a copy of a deed from the records of the clerk's office of the county court of W. county, West Virginia, attested as follows: "A copy. Teste: H. R. Thompson, Clerk," is sufficiently attested to be so admitted in evidence in such action under said chapter. Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454.

An original deed having been authenticated for record in the manner then prescribed by law, is admissible as evidence without further proof of its due execution, though it had not been duly recorded. Hassler *v.* King, 9 Gratt. 115.

Foreign Deeds.—The statutes of Virginia concerning the authentication of foreign deeds, apply to the original deeds, not copies. Petermans *v.* Laws, 6 Leigh 523.

Office copies of deeds registered in another state, are not admissible as evidence in this state, unless duly authenticated according to the laws of the United States. Petermans *v.* Laws, 6 Leigh 523.

E. FORGED NOTE.

See the title FORGERY AND COUNTERFEITING.

On the trial of an indictment for uttering a forged writing, the note, which purports to have been paid by money of which the alleged forged receipt is the evidence of such payment, is competent evidence upon a trial for uttering such forged receipt. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

F. LETTERS.

See the title DIVORCE, ante, p. 734.

In General.—Letters which have a tendency to prove the facts in issue are generally admissible as evidence. For example, in actions for slander they have been admitted to prove the circulation of the report, in divorce cases to show the intention of the defendant to desert his wife, and in actions for breach of promise of marriage to prove the contract. In actions for seduction, too, the defendant's letters to the plaintiff's daughter relative to the charge, have been admitted. Schwartz *v.* Thomas, 2 Wash. 167, 1 Am. Dec. 479 (slander); Bailey *v.* Bailey, 21 Gratt. 43 (divorce); Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749; Tefft *v.* Marsh, 1 W. Va. 38 (breach of promise of marriage); Fry *v.* Leslie, 87 Va. 269, 12 S. E. 671 (seduction). See Cluverius *v.* Com., 81 Va. 787.

In Downer *v.* Morrison, 2 Gratt. 250, a letter written by the plaintiffs to the defendants, and received by them, being in answer to one by the defendant to the plaintiffs, which had been read as evidence in the cause, having been filed by the defendants, and read by them on a former trial, was held, under the circumstances, to be competent evidence for the plaintiffs.

Addressee.—Letters are personal property, and the possession of them is prima facie evidence of title and ownership in the possessor; especially when they are addressed to the christened or given name of the party, and bear on their face evidence of their being intended for the party producing them. Tefft *v.* Marsh, 1 W. Va. 38.

In an action for breach of promise of marriage it is not error to refuse to allow the defendant to introduce in

evidence letters written by the plaintiff to another than the defendant, when it appears that the letters are not improperly indelicate, and in no way compromise the character of the writer, for which purpose they were offered in evidence. Burke *v.* Shaver, 92 Va. 345, 23 S. E. 749.

Agency.—Where there is evidence to prove that the acts of an unauthorized agent have been subsequently ratified by the principal, letters written by an officer of the corporation to such agent, and letters written by the agent, are admissible evidence in an action against such corporation. Richmond Union Passenger R. Co. *v.* New York Sea Beach R. Co., 95 Va. 386, 28 S. E. 573, citing Downer *v.* Morrison, 2 Gratt. 237.

Ejectment.—And in ejectment between cotenants, where the defendants rely upon adversary possession, and acquiescence by the plaintiff, letters by a party under whom the defendants claim, and also a correspondence between one of the plaintiffs and the agent of the defendant, are competent evidence to show for what purpose the tenant in possession had claimed the property, and the plaintiffs acquiesced in their claim. Stonestreet *v.* Doyle, 75 Va. 356.

Privileged Communications.—See the title ATTORNEY AND CLIENT, vol. 2, p. 156.

The general rule is that letters by a client to his attorney are privileged communications, and can not be disclosed by the attorney. But several things must concur to bring a case within the rule. Lyle *v.* Higginbotham, 10 Leigh 63.

Res Gestæ.—Letters written long after a contract has been broken, which contain mere statements of one party's view of the differences between the parties, and the expression of a desire to have them adjusted, constitute no part of the res gestæ, and are not admissible in an action to recover damages for a breach of the contract. Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

Letter Must Be Received.—A letter addressed to a party can not be admitted as proof against him, unless it be proved that he received and acted on it. Payne *v.* Com., 31 Gratt. 855.

On a trial for a misdemeanor, proof of the contents of a letter or paper which the defendant did not receive, is inadmissible. Payne *v.* Com., 31 Gratt. 855.

In Cluverius' Case, 81 Va. 787, the headnote reads: "A note addressed on the 13th in the handwriting of the deceased, from room No. 21 of the hotel in Richmond, to the accused, under circumstances indicating that it was written by the deceased to the accused in answer to a note addressed to the occupant of that room, is admissible as part of the res gestæ, and also for the purpose of identifying that occupant with the deceased, and of showing that she was in communication with him on the day of her death." In the opinion of this case, Payne *v.* Com., 31 Gratt. 855, was discussed at length and distinguished. See also, dissenting opinion in same case by Hinton.

Entire Correspondence Must Be Submitted.—But the rule is well settled that when letters are laid before a jury, the parties affected by them have a right to the entire correspondence, that the true meaning and extent of what is written may be fully understood. Stonestreet *v.* Doyle, 75 Va. 356, 375; Downer *v.* Morrison, 2 Gratt. 250.

Where there is a contract by correspondence, the plaintiff is bound to prove it, and to this end he must introduce the entire correspondence; or if any of the letters are lost or beyond his control, he must show this fact, and then prove their contents. Heatherington *v.* Richter, 31 W. Va. 858, 8 S. E. 609.

For example, the plaintiff can not, against the objection of the defendant, read in evidence to the jury a copy of a letter written by him to the defendant, purporting on its face to be in reply to a letter written by the defend-

ant to the plaintiff, without offering to read also the letter to which it was a reply. He can not leave it to the defendant to call for and put in the letter to the plaintiff. Heatherington *v.* Richter, 31 W. Va. 858, 8 S. E. 609.

Postmark.—The postmark of a letter is not of itself evidence of the time it was deposited in the office, but it is prima facie evidence that it was mailed on the day stated therein. Early *v.* Preston, 1 Pat. & H. 228.

Relevancy.—A letter not showing on its face that it is relevant to the issue, and no legal evidence being introduced to connect it with the subject matter of the suit, is not admissible. Hubbard *v.* Kelley, 8 W. Va. 46.

Copies of Letters.—Although it is improper and irregular to admit in evidence copies of letters, without notice to produce the originals, or other foundation laid for the introduction of the copies, yet, if it appears from an examination of the letters, that they were not necessary for the maintenance of the plaintiff's case, and could not have prejudiced the defendant, the appellate court will not, for this reason, reverse the judgment of the court below. George Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

The burden of showing the relevancy, intrinsic or in connection with other facts, of a letter offered in evidence, is upon the party offering the evidence. Hubbard *v.* Kelley, 8 W. Va. 46.

Authentication.—See the title EXECUTION AND PROOF OF DOCUMENTS.

A letter addressed to a third person, to be admissible in evidence, must be sufficiently authenticated, and the mere answer of a party can not always be fairly considered as an admission of its genuineness. What is sufficient proof that they were written by the person to whom they are accredited, must of course, depend on the circumstances of each particular case, and is a question for the jury. Lyle *v.* Higginbotham. 10 Leigh 63.

If a defendant in a chancery suit in his answer alleges, that a third person or the plaintiff wrote a letter touching the matter in controversy, and files with his answer as part thereof what purports to be the original letter, such letter under § 40, ch. 125, of the W. Va. Code will be regarded by the court as genuine, without any proof of the handwriting, unless the fact that such letter was written by such third person or by the plaintiff, is denied by an affidavit. Robinson *v.* Dix, 18 W. Va. 528.

Order of Proof.—After the cross-examination of the defendant, the only witness for the defense, the plaintiff, was recalled by his counsel for the purpose of identifying and then reading in evidence two letters purporting to be written by the defendant, and which had not before been offered. On objection of defendant, this evidence was not admitted. Held, that the court did not err in excluding it. McManus *v.* Mason, 43 W. Va. 196, 27 S. E. 293.

Exceptions.—An exception by a party to the reading of any and all letters from the third persons to the other party, filed in the cause, as res inter alios gesta, except such as the exceptor made evidence by reading them himself, some of which letters are competent evidence for some purposes, is too broad, and may properly be overruled on that ground. The exception should specify the letters or parts of letters intended to be excepted to. Fant *v.* Miller, 17 Gratt. 187.

G. MAPS, SURVEYS AND DIAGRAMS.

In General.—An ex parte map or diagram, made by a witness, and shown by him to be correct, may be given in evidence for the consideration of the jury, not as independent evidence, but to be considered by them in connection with other evidence, so as to enable them to understand and apply it. State *v.* Harr, 38 W. Va. 58, 17 S. E. 794; Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782; Hoge *v.* Ohio River

R. Co., 35 W. Va. 562, 14 S. E. 153; King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022. See Taylor *v.* Com., 29 Gratt. 780; Harrison *v.* Middleton, 11 Gratt. 527.

But, generally, ex parte maps are not of themselves admissible, and can only be used to go with and explain the testimony of the particular witness. Opinion of Holt, J. Hoge *v.* Ohio River R. Co., 35 W. Va. 562, 14 S. E. 153.

Maps of Surveys.—The plan or map of the survey and location of a turnpike road, with the certificates thereon by the surveyor, returned to the clerk's office and recorded in pursuance of the statute, is evidence of the line of the road as located, in an action by the owner of the land against a contractor for entering thereon, and injuring the land. Callison *v.* Hedrick, 15 Gratt. 244.

And streams mentioned in an old survey, no longer capable of being located by the names given, may be identified from maps of contemporaneous surveys. Kain *v.* Young, 41 W. Va. 618, 24 S. E. 554.

Survey.—A private survey may be admitted as evidence of boundary between those who were parties to it, or who claim under them; but not as to strangers. Lee *v.* Tapscott, 2 Wash. 276, cited in Jones *v.* Carter, 4 Hen. & M. 195. See Johnson *v.* Brown, 3 Call 259.

Upon a question of the identity of the patentee with the ancestor of the demandants in a writ of right, the survey on which the patent issued, and the assignments thereon, and the surveys and patents of lands in the neighborhood of the land in controversy, may be competent evidence for the tenant to disprove the identity of the patentee and the ancestor of the demandants. Pollard *v.* Lively, 4 Gratt. 73.

In a controversy concerning the location or boundary of a tract of land patented by the commonwealth, pursuant to a survey, the calls and descriptions of another survey made by the same surveyor, about the same time or recently thereafter, of a coterminous or neighboring tract, upon which last mentioned survey the commonwealth issued a grant, whether to a party to the controversy or to a stranger, is proper evidence upon such question of location or boundary, unless clearly irrelevant. But a grant must have issued on such survey to render it admissible. And if the calls of the survey on the surveyor's books do not correspond with those of the grant, the books are not admissible in evidence; in case of doubt, the true location of the survey may be shown by evidence aliunde. Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

But surveys made many years after another survey, and by a different surveyor, are not competent evidence as to the boundaries of the previous survey. Clements *v.* Kyles, 13 Gratt. 468.

Surveyor's Report.—Where, in an action to try the title to land, an order is made directing the surveyor to go upon it, and make a survey and report, which he does, but before the cause comes on for trial, the surveyor dies, his report is competent evidence. Cline *v.* Catron, 22 Gratt. 378.

In a writ of right the demandants claim as heirs of B., the patentee of the land; and they claim upon the seizin of their ancestor. The report of the surveyor who surveyed the land in controversy under the order of the court speaks of one of the demandants as heir of B. This is not evidence that he is such heir. "The surveyor was directed to make a survey of the land and report what he found on the ground. He was charged with no inquiry as to the relation in which the demandants stood to Joseph Bell; and any statement he might make upon the subject is to be regarded as totally irrelevant, or as but a repetition of the pretensions of the demandants." Bell *v.* Snyder, 10 Gratt. 350.

Field Notes of Surveyor.—An extract or copy taken by a surveyor from his field notes, is not evidence, and he can use it only to refresh his memory, and must then speak from his recollection. Harrison *v.* Middleton, 11 Gratt. 527. See Richardson *v.* Carey, 2 Rand. 87.

Copies of Surveys.—Copies of surveys of waste and unappropriated lands, and of patents from the register's office, are competent evidence in place of the originals. Pollard *v.* Lively, 4 Gratt. 73.

Diagram.—Where a surveyor has made a survey from a diagram handed him by the plaintiff, which he has in court, the diagram is itself evidence, and he may point out on it what lines he ran. Harrison *v.* Middleton, 11 Gratt. 527.

Authentication.—It is not error to allow a witness, who is not an engineer or surveyor, to introduce before the jury a sketch or map of the premises in controversy, where it is shown by the witness that he is well acquainted with the premises, and that the sketch is substantially correct. New River Mineral Co. *v.* Painter, 100 Va. 507, 42 S. E. 300.

A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a book labeled "Plans and Charts," not appearing to have been made by the authority of the city government, or adopted by it, is not competent evidence for the commonwealth, in a prosecution for obstructing what is claimed to be a street of the city. Harris *v.* Com., 20 Gratt. 833.

H. MORTALITY TABLES.

See the titles DEATH BY WRONGFUL ACT, ante, p. 226; JUDICIAL NOTICE.

In General.—For an exhaustive review of this question, and references to many tables, see opinion of Judge Green in Abell *v.* Penn. Mutual Life Ins. Co., 18 W. Va. 400. He says that the table generally used in Virginia is one made by Professor Wigglesworth of Cambridge University, published in Robinson Practice (old), vol. 2, p. 381. But Judge Green was of opinion that either the table known as the combined experience or actuary table, or the table constructed from the experience of the Mutual Life Insurance Company, of New York, by Mr. Shepherd, could be more relied on than Professor Wigglesworth's table. He said further that of these two latter tables, the combined experience table was, in his opinion, preferable, because, on account of the material out of which it was constructed, it was more likely to be accurate, and better adjusted than the American experience table.

In an action for death by wrongful act, mortality tables are admissible in evidence, whenever the probable duration of a person's life is a material issue. Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. 394.

In estimating the damages for a permanent personal injury the jury may take into consideration the plaintiff's probable duration of life, and to show this, standard mortality tables are usually esteemed the safest guides upon the subject, to be taken and weighed along with other facts and circumstances applicable to the expectation of the particular life under consideration. Virginia, etc., R. Co. *v.* Bailey, 103 Va. 205, 49 S. E. 33.

I. NOTARIAL PROTEST.

See the titles BILLS, NOTES AND CHECKS, vol. 2, p. 450.

Notary Public.—The true construction of § 7, ch. 51, and of § 8, ch. 99, W. Va. Code, is that the protest of a negotiable note and other instruments mentioned therein shall be prima facie evidence of the facts "stated therein, or at the foot or on the back thereof, in relation to presentment and dishonor, and notice thereof." The notarial certificate of protest is in the nature of documentary evidence; and the proper construction as well as the legal ef-

fect thereof, as an instrument of evidence of the facts stated therein, are questions of law, to be determined exclusively by the court. Peabody Ins. Co. *v.* Wilson, 29 W. Va. 528, 2 S. E. 888.

A copy of a bill of exchange and notarial protest, with an affidavit of the payee that the original is lost or mislaid, is not legal evidence to charge the drawer. Wright *v.* Hencock, 3 Munf. 521.

In an action for the return of the premiums on two policies of marine insurance, in which controversy, the defense of deviation from the voyage was set up by the insurer, it was held, a protest before a notary public, by the master of the vessel, after his return to Virginia, is no evidence in such case; and quære, would such a protest, made at St. Thomas's, have been any evidence, the person who made it being alive, and no impediment to prevent his deposition from being regularly taken? Marine Ins. Co. *v.* Stras, 1 Munf. 408.

J. PATENTS AND GRANTS.

See the title PUBLIC LANDS.

In a suit against a defendant holding land lying west of the Alleghany, under a grant from the commonwealth issued previously to the act of 1831, it appearing that he had had his land duly entered, and had paid all the taxes chargeable upon it, the circuit court refused to allow his adversary to give his grant in evidence; but the court of appeals, being of opinion that he too had shown that he had had the land duly entered and charged with taxes, and had paid the taxes chargeable upon it, reversed the judgment. Taylor *v.* Burdett, 11 Leigh 334.

Entries in the books of the register of the land office, labelled "Patents," not signed nor having the seal of the colony attached, are not patents nor grants, but may be received in evidence as memoranda from colonial records tending to prove that proceedings had been taken looking to the execution and delivery of a grant, to be followed up, if possible, by evidence tending to prove that such grant was actually executed and delivered. Hudgins *v.* Simon, 94 Va. 659, 27 S. E. 606, reviewing Holloran *v.* Meisel, 87 Va. 398, 13 S. E. 33.

Entries in the books of the office of the register of land office, labelled "Patents," without signature or seal, are not patents, nor grants, but are admissible in evidence as "colonial records," tending to prove that proceedings had been taken looking to the execution and issuing of a grant, to be followed, if possible, by evidence tending to show that the grant so contemplated and begun was actually executed, issued, and delivered. Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658.

Copies.—It is error for the court to refuse to admit a copy of a land patent duly signed, sealed and certified. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

Duly authenticated copies of grants of land from the commonwealth, which do not show that the original patents were sealed with the lesser seal of the commonwealth, may be received in evidence in the courts of this state for the reasons set forth in Virginia Coal, etc., Co. *v.* Keystone Coal, etc., Co., 101 Va. 723, 45 S. E. 291; Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

For more than two centuries the practical construction put upon the law which is now embodied in § 2350 of the Virginia Code, has been that it is not necessary to record the seal of the state annexed to land grants recorded in the office of the register of the land office, but that only the grant itself and the plat and certificates of survey on which it is founded need be recorded, and this construction must prevail. Duly authenticated copies of such grants, containing no copy of the seal of the state, and not reciting that such seal was recorded, may, therefore, be

received in evidence in the courts of this state. Virginia Coal, etc., Co. *v.* Keystone Coal, etc., Co., 101 Va. 723, 45 S. E. 291.

Authentication and Proof.—See the title EXECUTION AND PROOF OF DOCUMENTS.

A land patent issued to the plaintiff's ancestor, lacking state seal, was not admitted until evidence was offered to show the seal was on it when issued. Then it was admitted, but the jury was required to ascertain if the seal was on it when issued. Held, error, as patent should have been admitted with instruction that its validity depended on its legal execution. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

A copy of a grant from the commonwealth of Virginia certified as follows: "Land office, Richmond. The foregoing is a true copy from the records. Given under my hand and seal of office this 14th day of September, 1881. (Seal) J. M. Brockenbrough, Reg. Land Office," is sufficiently attested under ch. 130, W. Va. Code, to be admitted in evidence in the trial of an action of ejectment. Robinson *v.* Lowe, 50 W. Va. 75, 40 S. E. 454. See Ott *v.* McHenry, 2 W. Va. 73.

The copy of a patent signed, "Samuel Matthews. William Claiborne," dated 1658, and recorded in a county court, together with an assignment of it (which assignment was acknowledged and admitted to record, but it did not appear that the patent was proved or acknowledged), admitted as evidence of title, though it did not appear that the patent was signed by Matthews, as governor. Lee *v.* Tapscott, 2 Wash. 276.

Constitutionality of Statute.—The act of April 1, 1831, declared, that in a suit for the recovery of land lying west of the Alleghany, against a person bona fide claiming such land under a grant from the commonwealth issued previously to the act, who has had the land duly entered, and has paid all the taxes chargeable upon it, his adversary shall not be allowed to give his grant in evidence, unless he shall show that he too has had the land duly entered and charged with taxes according to law, and has actually paid the taxes charged and justly chargeable upon it. Per Tucker, P., this act is constitutional. Taylor *v.* Burdett, 11 Leigh 334.

Weight and Sufficiency.—In a writ of right, where the mise is joined upon the mere right, if no actual seisin by the demandants is proved, the tenants may give in evidence an older patent than that under which the demandants claim, with which the title of the tenants is in no way connected, to show a better outstanding title in a third person, which is evidence to be weighed by the jury, but not conclusive against the demandants. (Dawson *v.* Watkins, 2 Rob. 259—accord.) Breathed *v.* Smith, 1 Pat. & H. 301.

K. POWERS OF ATTORNEY.

See the title POWERS.

On the trial of a writ of right, the demandants, as a foundation for proof of an entry made upon the lands in controversy by their agent, offered in evidence, a power of attorney executed by them, and properly authenticated, giving authority over the lands in controversy to their agent; which was objected to by the tenant. Held, it was proper evidence. Taylor *v.* Burnsides, 1 Gratt. 165.

Copy of Power—Recording Acts.—In 1792 a power of attorney authorizing the attorney to convey land, was admitted to record on the certificate of a notary public of its execution. At that time there was no statute of Virginia authorizing the admission to record of a power of attorney on such a certificate; and a copy of the power from the record is not competent evidence. Carter *v.* Robinett, 33 Gratt. 429.

The county court of Virginia, or its clerk, had no authority, in the year 1824, to admit to record a power of

attorney executed in Kentucky, where its execution was acknowledged before a notary public, and certified by him. And a copy of such paper, authenticated by the clerk, is not competent evidence in place of the original. Johnston *v.* Griswold, 8 W. Va. 240, citing Pollard *v.* Lively, 2 Gratt. 216.

L. RECORDS OF BUILDING ASSOCIATION.

See the title BUILDING AND LOAN ASSOCIATIONS, vol. 2, p. 645.

Upon an indictment against S., the secretary of a building fund association, for the larceny of a check, the property of said association, the records of the association whilst he was in office, and oral evidence relating to the organization, objects and business of the building association, the appointment and duties of S. as secretary, his conduct with respect to the funds of the association in his hands, and his disposition and appropriation of the check, for the larceny of which he was indicted, are competent evidence against him. Shinn *v.* Com., 32 Gratt. 899.

M. REPORT OF INSURANCE SUPERINTENDENT.

See the title INSURANCE.

A New York insurance company was reported by the state insurance superintendent to the attorney general as not in the condition required by law. Thereupon proceedings were started to dissolve the company and appoint a receiver. The report of the state insurance superintendent having been, without objection, read as evidence in the court below, the failure to except there is tantamount to a waiver of objection here. Universal Life Ins. Co. *v* Binford, 76 Va. 103.

N. RESOLUTION OF BOARD OF DIRECTORS.

In an action by a logging company for breach of contract on the part of the defendant for failing to pay for logs actually delivered to it by the plaintiffs, the plaintiffs introduced in evidence the resolution, passed by the board of directors of defendant, as evidence of the modified contract, relied on by them to sustain their action; the "defendant objected to said resolution being given in evidence to the jury, upon the ground that it contained only part of the contract between the parties, as it offered to show by its original books, produced in court, and which it offered to prove, which defendant claimed contained the full contract between the parties, and asked the court to require the plaintiffs to give to the jury as part of their evidence, in connection with their resolution," certain other matters from the books of defendant. "But the court being of opinion, that the evidence offered by the plaintiffs, was at this stage of the cause competent to go to the jury by itself, and that the defendant could prove its revision of the contract, when it came to give its evidence to the jury," permitted the plaintiffs to give the resolution in evidence in connection with the proof, that had preceded. Held, there is no rule of practice, under which the court has power to compel the plaintiffs to introduce any evidence to prove the contract. If the plaintiffs introduce evidence, not admissible by itself, and fail to follow it with other evidence, to make it admissible, it is to their own folly and loss, and not to the injury of defendant; and the court should direct the jury to disregard it. In this case, had the resolution been inadmissible by itself, the defendant could have asked the court to direct the jury to disregard it; but the defendant had no right to ask the court, to compel the plaintiffs, to introduce parts of its entries in its own records, if the plaintiffs did not consider it proper to do so of their own accord. The defendant's objection is not to the admissibility of the resolution, but to the ruling of the court, in refusing to compel the plaintiffs to introduce other matters in evi-

dence. The court did not err in refusing to give the instructions. Patton *v.* Elk River Navigation Co., 13 W. Va. 259.

O. RULES OF RAILROAD COMPANY.

When a plaintiff offers in evidence to the jury in an action against a railway company, certain printed rules of the defendant, to the reading of which it objects, on the ground that the rules were not the rules in force at the time the cause of action arose; and the plaintiff submits evidence which shows prima facie, that the rules were then in force, it is not error for the court to permit the rules, together with such evidence, to go to the jury. Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610.

P. STENOGRAPHERS' NOTES.

See the title STENOGRAPHERS.

Where, on the trial of an issue devisavit vel non a witness for contestants had testified that the testator, in giving his evidence in a certain action in ejectment, was incoherent, and on cross-examination said he had the stenographer's notes of his evidence in the action, but the stenographer was not sworn, but the witness said the notes were substantially correct, and on motion the proponents, to contradict the witness, were permitted to read the notes to the jury; held, no error. "The notes are not of that character properly authenticated to make them admissible as substantive, independent testimony. But they were offered to contradict the evidence of Caldwell, who had sworn that they were substantially correct. Caldwell had characterized the evidence as wandering and incoherent, and as evidence tending to contradict him they were admissible." Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493.

Q. TELEGRAMS.

See the title TELEGRAPHS AND TELEPHONES.

Telegraphic dispatches are not privileged communications, but may be called for and given in evidence, whenever, in the opinion of the court, they are regarded as proper or competent testimony. National Bank *v.* National Bank, 7 W. Va. 544.

A dispatch, or the copy of a dispatch, purporting to have been written and sent by A B, as cashier, to C D, can not be read in evidence, without first proving that it is a genuine paper, that is, that it was written and sent by the party whose name it bears. National Bank *v.* National Bank, 7 W. Va. 544.

R. WILLS.

See the title WILLS.

In General.—A will must be proved before a probate court and admitted to record, before it is admissible in evidence. Grand Fountain U. O. T. R. *v.* Wilson, 96 Va. 594, 32 S. E. 48.

An endorsement on a life insurance policy by the beneficiary therein, which is testamentary in its character, but which has not been, and can not be, admitted to probate, is not admissible in evidence to show title in the legatee named in said endorsement, and a payment of the policy by the insurer to such beneficiary is wrongful. A will must be proved before a probate court in a proceeding for that purpose. Grand Fountain U. O. T. R. *v.* Wilson, 96 Va. 594, 32 S. E. 48.

In the trial of an issue devisavit vel non, it is not improper for the proponents to offer the will, and the evidence of its due execution, and the competency of the testator at the time it was executed, and thus, having made a prima facie case, to rest; and after the contestants have offered their evidence against the validity of the will, to permit the proponents to offer other evidence to sustain the will, as well as evidence in rebuttal. Kerr *v.* Lunsford, 31 W. Va. 659, 8 S. E. 493.

At the trial of an action of ejectment the will of the patentee, under whom plaintiffs claimed, which did not mention, nor refer to, nor appear to have

any connection with, the land in controversy, is properly rejected as evidence in behalf of the plaintiffs. Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Copies of Wills.—See the title BEST AND SECONDARY EVIDENCE, vol. 2, pp. 362, 365.

A copy of a will, with the certificate thereon, that it had been admitted to probate in the county court of Louisa, is certified: "A true copy. J. H., C. L. C." This is a sufficient certificate that J. H. is clerk of the court; and the certified copy of the record is competent evidence. Wynn *v.* Harman, 5 Gratt. 157.

A copy of a will and of the probate thereof in a court of North Carolina, is offered in evidence; it is authenticated by a certificate of the clerk of the court under his seal of office, and by a certificate of the presiding justice of the court, that the clerk's certificate (not his attestation) is in due form. Held, the authentication is proper according to the act of congress of May 26, 1790, and that act, not the act of March 27, 1804, is applicable to the case; and, therefore, the copy is proper evidence in our courts. Gornto *v.* Bonney, 7 Leigh 234.

In order to trace the title from the original patentee to themselves, the demandants offered as evidence, an office copy of the will of their testator. The will appears to have three attesting witnesses, who were not examined on its probate; but it was admitted to probate in the proper court, upon proof by two other witnesses, that it was wholly written by the testator. Held, the copy was legal evidence. Taylor *v.* Burnsides, 1 Gratt. 165.

A paper purporting to be a copy of a will executed in, and certified by the officers of another state, which has been spread upon a will book of the county court of one of the counties of this state, with a certificate of the clerk of such county court that it has been duly admitted to record, but it appears upon the face of said record that said certificate has been erased. Held, in the absence of any explanation, that said copy is not a recorded paper and can not be used as evidence. Duff *v.* Good, 24 W. Va. 682, citing Herring *v.* Lee, 22 W. Va. 661.

The clerk's office of a county court, with all the records therein, having been consumed by fire, a paper purporting to be an official copy of a will of record in that office, and to be certified by a former clerk of the court, is admitted to record under the act of February 19, 1840, Sess. Acts, ch. 55, p. 47. The act of the clerk admitting the paper to record is conclusive upon the question whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person, who was not authorized to make the certificate, is inadmissible in a collateral action. Taliaferro *v.* Pryor, 12 Gratt. 277.

Exceptions and Objections.—Where a will is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, this court will not hold such ruling to be error, if such will could be properly read as evidence for any purpose. Stansbury *v.* Stansbury, 20 W. Va. 23.

S. RELEVANCY.

If a paper offered in evidence is unobjectionable on its face, and the only objection is as to the time it should be introduced, its relevancy not then being apparent, it is not error to admit it, if other evidence is subsequently introduced, showing its relevancy. The court will not control a party in the mere order of introducing his evidence. Winkler *v.* Chesapeake, etc., R. Co., 12 W. Va. 699.

Where papers, although purporting to be letters of the accused, are immaterial and irrelevant they are inadmissible as evidence. Mullins *v.* Com., 2 Va. Dec. 666.

A draft in favor of a third person, without any evidence to connect the defendant's intestate with it, is not competent evidence against him. Perkins *v.* Hawkins, 9 Gratt. 649.

T. HARMLESS ERROR.

Where the copy of a paper has been properly introduced in evidence, the admission of another copy of the same paper, if improper, can not possibly do injury to the other party; and is, therefore, no cause for reversing the judgment. Corbett *v.* Nutt, 18 Gratt. 624.

U. EXCEPTIONS AND OBJECTIONS.

See the title EXCEPTIONS, BILL OF.

Where a paper is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, this court will not hold such ruling to be error, if such paper could be properly read as evidence for any purpose. Stansbury *v.* Stansbury, 20 W. Va. 23.

III. Books as Evidence.

A. PUBLIC BOOKS.

Treasury Books.—The treasury books are conclusive evidence of the balances on hand at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel. Baker *v.* Preston, Gilmer 235.

Execution Book.—So, the execution book kept by the clerk is prima facie evidence of the truth of the entries made in it. Taylor *v.* Dundass, 1 Wash. 92.

Warrant Book of Sinking Fund.—It has been held, that the warrant book of the sinking fund, kept by the second auditor in his office, of the transactions of the commissioner of the sinking fund of the state, is a public record, and is of itself evidence of what it contains, to be considered with the other evidence in the case. Coleman *v.* Com., 25 Gratt. 865.

Land Books.—But neither land books themselves, nor parol evidence of their contents, are admissible to show the meaning of the parties other than that plainly expressed in their written contract. Holston Salt, etc., Co. *v.* Campbell, 89 Va. 396, 16 S. E. 274.

Tax Books.—In an action for slander, malicious prosecution and false imprisonment, the plaintiff, in order to show the wealth and influence of the defendant, offered in evidence certified abstracts from the books containing the returns of the assessments for taxation of the land and personal property belonging to the defendant in the year 1876, the year of the trial of the cause. There being no objection to the form of the abstracts, or that they did not truly state what they purported, the evidence was admissible. Womack *v.* Circle, 29 Gratt. 192.

In an action of ejectment, the plaintiff introduced in evidence the books of the assessors of the county wherein the land lay, to prove that from 1829 to 1842, inclusive, the land in question was omitted from the land books of said county. The tendency of this evidence was to show that the land was forfeited to the state, and it should not have been excluded from the jury. Bowman *v.* Dewing, 37 W. Va. 117, 16 S. E. 440.

A document not purporting to be a copy or abstract from the assessor's personal property list, but merely a certificate of a clerk of a county court of the assessment or nonassessment of a person or his property in such book, is not admissible in evidence. Bartlett *v* Patton, 33 W. Va. 71, 10 S. E. 21.

In a suit by the personal representative of the testator to recover for chattels converted, such personal property book itself would not be admissible to show the value of the personal estate of the testator or the legatee for life. Bartlett *v.* Patton, 33 W. Va. 71, 10 S. E. 21.

B. CORPORATE BOOKS.

1. Private Corporations.

The books of a corporation are

proper evidence to prove its existence, and the regularity of its proceedings. Grays *v.* Turnpike Co., 4 Rand. 578.

And they are prima facie evidence of who are or have been its stockholders. Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806; Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866; Pittsburgh, etc., R. Co. *v.* Applegate, 21 W. Va. 172; South Branch R. Co. *v.* Long, 43 W. Va. 131, 27 S. E. 297; Stuart *v.* Valley R. Co., 32 Gratt. 146.

2. Municipal Corporations.

The corporation books concerning the government of a city, town or village, when they have been publicly kept, and the entries have been made by a proper officer, as well as duly authenticated copies therefrom, are admissible evidence of the facts witnessed in them. Town of Parsons *v.* Miller, 46 W. Va. 334, 32 S. E. 1017. See Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767.

C. BOOKS OF GRANTOR IN DEED OF TRUST.

In Griffin *v.* Macaulay, 7 Gratt. 476, it was held, that the books of the grantor in a deed of trust were proper evidence of the amount of the debts due to the creditors secured by the deed. Cited in Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910.

D. STATUTE BOOKS.

See the titles FOREIGN LAWS; STATUTES.

The printed copies of the acts of congress, distributed to the executives of the several states to be distributed among the people, are proper evidence of the statutes therein contained, without other authentication. "In England, the printed statute books have been at times admitted as evidence of public acts of parliament. Phil. Law of Ev. (307.) So in Virginia, our printed statute book is evidence of the acts of the general assembly. The printed statute book of any government thus seems to be evidence of the statutes of that government. And who doubts it as to the laws of the United States? Their printed statute book is every day referred to as evidence of the public acts of congress." Taylor *v.* Bank of Alexandria, 5 Leigh 471.

E. BANK BOOKS.

The book of a teller in a bank is not per se evidence to establish the facts appearing in that book, but may be given in evidence in connection with the evidence of the teller himself, if the teller's evidence makes it proper to refer to it, to prove that a particular entry was made. Courtney *v.* Com., 5 Rand. 666.

F. PARTNERSHIP BOOKS.

See the title PARTNERSHIP.

The books of a partnership are competent evidence to show what are debts of the partnership as against the partner who, upon the dissolution of the partnership, has purchased the assets of the partnership, and has undertaken to pay its debts. Shackelford *v.* Shackelford, 32 Gratt. 481. See Kyle *v.* Kyle, 1 Gratt. 526.

In a settlement of accounts between copartners, the books of the coparcenary are admissible evidence, and vouchers for every item need not be produced. Brickhouse *v.* Hunter, 4 Hen. & M. 363, following Fletcher *v.* Pollard, 2 Hen. & M. 544.

G. BOOK ENTRIES.

1. In General.

A book of accounts in the handwriting of and kept by a clerk, since deceased, is proper evidence upon those facts being proved. Lewis *v.* Norton, 1 Wash. 76; Downer *v.* Morrison, 2 Gratt. 250; Perkins *v.* Hawkins, 9 Gratt. 649; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910. See Brown *v.* Brown, 2 Wash. 151.

In Gale *v.* Norris, 9 Fed. Cas. 1079, the court said: "It is now fully settled, that the entries of his deceased clerk, in the books of a merchant, are evidence in his behalf, the handwriting being proved. Clark *v.* Magruder, 2 Har.

& J. 77; Welsh *v.* Barrett, 15 Mass. 386; Brown *v.* Brown, 2 Wash. 151; Union Bank *v.* Knapp, 8 Pick. 96; Patton *v.* Craig, 7 Serg. & R. 126; Hood *v.* Reeve, 3 Car. & P. 532; Holliday *v.* Martinet, 20 Johns. 168; Wilbur *v.* Selden, 6 Cow. 162."

Upon the question as to when the original entires on the plaintiff's books are admissible evidence for the plaintiff, Downer *v.* Morrison, 2 Gratt. 250, is cited in Wells *v.* Ayres, 84 Va. 344, 5 S. E. 21; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Richmond, etc., R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573; Oeters *v.* Knights of Honor, 98 Va. 206, 35 S. E. 356; Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910; foot-note to Griffin *v.* Macaulay, 7 Gratt. 476; 6 Va. Law Reg. 103, 186.

On the question whether goods were sold by the plaintiff to the defendants, or to a third person, the original entries on the plaintiff's books charging them to the defendants, are admissible evidence for the plaintiffs. Downer *v.* Morrison, 2 Gratt. 250; Richmond, etc., R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573; Griffin *v.* Macaulay, 7 Gratt. 476; opinion of Holt, J., in Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910.

An entry on the books of the party, made by his clerk, who is not then to be found, together with the oath of the party as to the quantity of the article charged, though admissible as evidence in the case of a sale and delivery of goods, is not proper to charge the other party with those articles, delivered to the master of the vessel for safe keeping. Kerr *v.* Love, 1 Wash. 172.

An entry by an administrator in his books, of money paid over by him to the guardian, has been admitted as evidence against the guardian, under all the circumstances of the case, the administrator being dead, and his handwriting proved. Brown *v.* Brown, 2 Wash. 151.

A paper called wheat receipts, containing figures accompanied with evidence explaining what is meant by the figures, is competent evidence to show an account between the plaintiff and defendant, the receipt being in the handwriting of the employer, and the subscribing witness thereto being dead. Perkins *v.* Hawkins, 9 Gratt. 649.

Goods Delivered to Third Person.—The book of accounts and oath of the party, are in no case admissible to charge a person with goods delivered, by order, to a third person, unless the order be otherwise proved. Kerr *v.* Love, 1 Wash. 172.

2. Ledger.

Where the defense is that credit was extended to another than the defendant, the ledger of the plaintiff is admissible to show that the account sued on was charged to the defendant at the time the goods were delivered. Richmond, etc., R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573. See Clarke *v.* Sleet, 99 Va. 381, 38 S. E. 183 (ledger and cash book of merchant).

3. Memorandum Book.

A memorandum book, which has been mutilated by tearing out and burning some of the entries concerning the action after action commenced, is not admissible in evidence. Johnson *v.* Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

4. Grounds of Admission.

A book of original entry is received as evidence not only from the necessity of the case, but also because it is a part of the res gestæ and general convenience compels its admittance, and hence it should be admitted without the bookkeeper being examined as a witness, whenever the court can not compel his attendance, as when he is a nonresident. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562; Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

5. Authentication and Proof.

Where there is no proof that the "book of sales" was a book of original entries made at the time, it can not be

admitted in evidence. Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612.

A book of original entry, in which an entry is made in the usual course of business, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, may be used as evidence on the trial of a suit, if the bookkeeper be dead at the time of the trial or a nonresident of the state, or if he be unable to be produced as a witness because of any other reason, as for instance, insanity. But if the bookkeeper be living and the court is able to enforce his attendance, the book can not be used as evidence, unless his testimony as a witness also accompanies its production. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562. See Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612; Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638, 38 Am. St. Rep. 47; Courtney *v.* Com., 5 Rand. 666.

Delivery or Communication of Document.—"That original entries on plaintiff's books may, in certain cases, be evidence for himself, see Downer *v.* Morrison (1845), 2 Gratt. 250. See also, Griffin *v.* Macaulay (1851), 7 Gratt. 476. Nor is it material that because the document has never been delivered or communicated, so as to influence conduct, so as to be ineffectual as an express promise or as an acknowledgment from which a promise may be implied, or for any reason creating no obligation; it is nevertheless competent and admissible as evidence. Hickey *v.* Hinsdale, 12 Mich. 99; Ayres *v* Bane, 39 Iowa, 518; Atkins *v.* Plympton, 44 Vt. 21; Reis *v.* Hellman, 25 Ohio St. 180; Huffman *v.* Cartwright, 44 Tex. 296. It is certainly competent evidence to prove the contract set up by plaintiff in his bill. It is an admission against the pecuniary interest at that time of the party who made the original entry in his book of accounts, proved by producing and proving the original book and the entry to be in his handwriting, and the signature in a suit wherein his heirs at law and privies in estate are defendants." Cann *v* Cann, 40 W. Va. 138, 20 S. E. 910.

Upon the question whether there was or was not a mistake in the settlement of the defendant's account with the plaintiffs, taken from the plaintiffs' books, it is competent for the plaintiffs, in order to show that there was a mistake in the account drawn off from their books, by which the settlement was made, by the introduction therein of particular items as a credit, to prove that the items of debit and credit in the ledger corresponded with the original entries in their books, and that there was no such item of credit in the ledger or in the original entries. Hampton *v.* Michael, 6 Gratt. 151.

6. Time When Entries Must Be Made.

The entries in a book made by a party since deceased, are not admissible in his favor, where such entries were not made in due course of business, as the business was carried on, and thus forming a part of the res gestæ, but were made several years after the business was closed. Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

7. Unauthorized Entries.

In an action on a contract of sale, an entry on the books of the broker, who acted as agent only for the seller, of a charge against the seller for a commission he thought he had earned, is not admissible in evidence as a memorandum of sale binding on the buyer. Carpenter *v.* Virginia-Carolina Chemical Co., 98 Va. 177, 35 S. E. 358.

An account given out by a merchant's clerk without his authority, is not evidence. Freeland *v.* Field, 6 Call 12.

8. Whole Book Must Be Given in Evidence.

When a party calls for the production of and uses a writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled; one side or showing of it merely can not be used for the hurt

of one party to the benefit of another. Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796, citing 1 Greenl. Ev. § 563; Whart. Ev. §§ 620, 1103; Jones *v.* Jones, 4 Hen. & M. 447; Freeland *v.* Cocke, 3 Munf. 352.

The books of account of a party ought to be taken altogether; therefore, credits ought not to be collected from them to charge him, without admitting the debits charged therein. Waggoner *v.* Gray, 2 Hen. & M. 603.

9. Weight and Sufficiency of Evidence.

Books of Original Entries Prima Facie Evidence Only.—Books of original entries of sales, made by a clerk at the time of the sale, and returned by an officer as a record of the amount of the sale, are only prima facie evidence of the fact, and may be overcome by satisfactory evidence that it was a false account, and does not give the true amount for which the property was sold. Harrison *v.* Garnett, 97 Va. 697, 34 S. E. 612.

Mental Condition of Bookkeeper.—Thus, if a plaintiff relies on the books of his intestate to prove the items of a store account against the defendant, the latter may show that the mental condition of the bookkeeper was such during the period the account was running, that he was incapable of keeping them correctly. Clarke *v.* Sleet, 99 Va. 381, 38 S. E. 183.

Question for Commissioner.—The weight and sufficiency of books of account as evidence is peculiarly a question of fact for the commissioner, and his finding with regard thereto will not be disturbed, unless manifestly erroneous. Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670, citing 9 Am. & Eng. Ency. Law (2d Ed.) 934, 935.

10. Best and Secondary Evidence.

See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 357.

If objected to, the court ought not, ordinarily, to permit a plaintiff to prove that he charged the account sued on to the defendants, and not to one of them only, on his original book of entries. This should be proved by the production of these original books of entry, unless it be shown that they had been destroyed, or, for some other sufficient reason, could not be produced. Hall *v.* Lyons, 29 W. Va. 410, 1 S. E. 582.

Books of account are not admissible as evidence of items entered therein, when it appears from the testimony of the parties or the nature of the transaction that more satisfactory evidence exists. Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

"Another error in the ruling of the court strongly insisted on by the plaintiff in error's counsel, in his brief, is that the court refused to allow the secretary of the Parkersburg Branch Railroad Company to testify in regard to the result of his examination of the books of the company as to a certain item of accounts covering the period of the work done in laying the Avery street track in question. These books were not kept by the witness, but were kept by some one in the city of Baltimore; nor was there any evidence that this particular account was kept in more books than one. This being the case, the proper mode of proving the account would have been the production of the books, or, if this were very inconvenient or impossible, there should at least have been presented to the jury an authenticated copy of such account; and this, upon the general principle that secondary evidence is not admissible where better evidence or the best evidence is accessible. 1 Greenl. Ev., § 82, 91." Fox *v.* Baltimore, etc., R. Co., 34 W. Va. 466, 12 S. E. 757.

If a book of original entry be in the possession of a person, who is a nonresident of the state, so that its production can not be compelled by the court, a copy of any such entry in it as answers the above description may be used as secondary evidence when it is proven that it has been examined by a witness, and compared with the origi-

nal entry, and proved to be an exact copy. Vinal *v.* Gilman, 21 W. Va. 301.

Evidence of a witness giving contents of a private entry in a book by a person deceased, of payments of money to his children, neither the book nor a copy of the entry being produced, nor the book verified, is not admissible to show such payment, even if the book itself would be evidence. Bennett *v.* Bennett, 37 W. Va. 396, 16 S. E. 638.

11. Declarations and Admissions.

See the title DECLARATIONS AND ADMISSIONS, ante, p. 325.

An entry in a book made by a party is not admissible as evidence in his behalf, though he is since deceased, but it is admissible against him as an admission. If, however, the adverse party calls for and introduces such book in evidence, all entries touching the subject are thus made evidence—the self-serving as well as the self-disserving entries. "'A party's self-serving declarations can not be put in evidence in his own favor, whether he be living or dead at the trial.' 2 Whart. Ev., §§ 1100, 1101; 1 Greenl. Ev. (17th Ed.) § 147; Vinal *v.* Gilman, 21 W. Va. 301. See High *v.* Pancake, 42 W. Va. 602, 26 S. E. 536; Crothers *v.* Crothers, 40 W. Va. 169, 20 S. E. 927." Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796; Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910.

But a book containing entries in the defendant's handwriting, of payments by him to the payee in her lifetime, on a note in action, is not admissible evidence in defendant's favor. Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21. Compare Hampton *v.* Michael, 6 Gratt 151.

12. Limitations and Exceptions.

But the rule in Virginia has never been extended beyond trades and business, where it was the usual and ordinary custom to keep books in which entries of the daily business are regularly made. Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329, citing Lewis *v.* Norton, 1 Wash. 76; Downer *v.* Morrison, 2 Gratt. 250.

Accordingly, it has been held, in a suit to set up a lost deed made a century ago, that a memorandum in the handwriting of Bushrod Washington, the grantee's attorney, found amongst the papers of the grantee, stating that the lands had been granted to the grantor, and by him and wife conveyed with general warranty to the grantee, is not evidence of the execution of such deed. Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329.

The act of Assembly of October, 1779, ch. 3, "for discouraging extensive credit, and repealing the law prescribing the method of proving book debts," applies only to the store accounts of retail merchants. Tomlin *v.* Kelly, 1 Wash. 190.

For the proposition that the act of 1779, ch. 3, for discouraging extensive credit, applies only to store accounts of retail merchants, Tomlin *v.* Kelly, 1 Wash. 190, is cited in footnote to Beall *v.* Edmondson, 3 Call 515; Wortham *v.* Smith, 15 Gratt. 491, 493, 494, 495, and foot-note; Radford *v.* Fowlkes, 85 Va. 852, 8 S. E. 817.

Private Memoranda.—An entry made in the usual course of business in a book of original entry, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, stands on an essentially distinct ground from a mere private entry of the person; such private entry itself never being evidence, though it may be used by a witness to refresh his memory. Vinal *v.* Gilman, 21 W. Va. 301, 45 Am. Rep. 562, citing Harrison *v.* Middleton, 11 Gratt. 544.

Books containing entries in the defendant's handwriting, of payments by him to the payee in his lifetime, on a note in action, is not admissible as evidence in the defendant's favor. "There is no doubt that shop books may be introduced as evidence of sales made or of work done, etc., under the pressure of certain necessities; but the record of payments on a debt evidenced by a bond or note of the debtor, made by

the debtor himself, do not come under this rule. It would open too wide a door to fraud, and be too easy a way to pay a debt, to allow a debtor's own entry of payment, in a memorandum or account made by himself, and embracing no other transaction, to wipe out a debt admitted to have existed and evidenced by his own hand; and there could be no plea of necessity or convenience for it, as in case of sales made and work done, where often the creditor is the only person present, and the nature and extent of the account is tested by the course of trade and the probable wants of the debtor. In the case of payments upon a debt, evidenced by the note of the debtor, the debtor is not left to the dependence of his own entries in his own book of account; he could have and no doubt would have receipts, or the cancelled note." Wells *v.* Ayers, 84 Va. 341, 5 S. E. 21.

Entries made by a broker in the memarandum of sale, provided he is the agent of the parties sought to be charged, and authorized to make an entry upon his books, is evidence against them. But in the case at bar it was not a memorandum containing the terms of sale, but a mere charge against the plaintiffs for the commission which the broker thought he had earned. Carpenter *v.* Virginia, Carolina Chemical Co., 98 Va. 177, 35 S. E. 358.

Book Entries to Prove Age.—See the title PEDIGREE.

Entries by the testator of the defendants in a book, of the ages of the plaintiffs, made along with the ages of other slaves owned by the testator, are not competent evidence for the defendants, to show that some of the plaintiffs who were the children of another plaintiff, were born before she attained the age of twenty-eight years, and that the children had not attained that age; even if such fact were material to be proved. Fulton *v.* Gracey, 15 Gratt. 314.

In a suit for freedom, where it is material to prove the age of a person, it was held, that a book entitled "Select Sermons by Mr. Andrew Gray," in which book the date of the birth of certain children was written, is admissible for this purpose, where it was proved that the book belonged to and was kept by the defendant in his house up to the time of his death, and that the entries therein, of the date of the births, was in his handwriting, and made many years ago. The principle upon which such entries are admitted is "that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." The very foundation on which such entries are admissible fails, where it is probable that parties who made them labored under any temptation to misrepresent the facts; when that is the case, such evidence is inadmissible. If the entries excluded in this case be material to the defense, then clearly the party who made them labored under a temptation to misrepresent the facts, and therefore the entries were inadmissible evidence, and were properly excluded. Fulton *v.* Gracey, 15 Gratt. 314.

DO GRANT.—See GRANT.

Dogs.

See the title ANIMALS, vol. 1, p. 375.

DOLLAR.—See the title PAYMENT.

In Jarrett *v.* Nickell, 9 W. Va. 354, it is said: "A bond payable in **dollars,** ordinarily means payable in such **dollars** as are recognized by the laws of the United States, and parol evidence would not generally be admissible to show any other sort of **dollars** were meant, as such evidence would modify the writ-

ten contract; but if it is shown that the bond was given by a foreigner, in a foreign country, parol evidence would be admissible to show what kind of **dollars** were meant, and the real value of the coin known in such foreign country as a **dollar**, for, under such circumstances, the word **dollar** in the bond would mean such foreign **dollar**, and not a **dollar** of the United States currency. * * * If the bond was executed, as in this case, in a portion of the country under the domination of the confederate government, and where the currency was confederate notes, the word **dollars** would, for like reason, be regarded as meaning 'confederate **dollars**.'"

Wherever an obligation is given for the payment of so many **dollars** payable before the 20th of October, 1863, the presumption is (in the absence of all proof as to the kind of currency in which it is to be paid) in favor of paying in a sound currency. Inquiry may be made as to the intention of the parties, and very slight proof may change this presumption, but in the absence of all proof, the presumption, where the obligation is payable before the 20th of October, 1863, is in favor of a sound currency. Hansbrough *v.* Utz, 75 Va. 959.

In Bierne *v.* Brown, 10 W. Va. 758, it is said: "At common law, in an obligation to pay **dollars**, this word would be interpreted to mean 'gold **dollars**,' if the contract was made in this country; but if made in a foreign country, it would mean the **dollar** of that country, and parol evidence would be admitted to show where the contract was made, and the value of the **dollar** of the country where the contract was made, as compared with our gold **dollar**. If the contract was made in the confederate states, or where the military authorities of the confederate government exercised control, and confederate notes constituted the currency, this fact might be shown, and the word **dollar** unexplained in a contract, would mean a confedrate note of one **dollar**. And the measure of recovery would be the value of such confederate **dollar** in gold currency, which might be shown by parol evidence. Thorington *v.* Smith, 8 Wallace, 1; Jarrett *v.* Nickell, 9 W. Va. 345."

In Omohundro *v.* Crump, 18 Gratt. 705, it is said: "It is doubtful, to say the least, whether parol evidence of the actual understanding and agreement of the parties as to the kind of currency in which a contract is to be fulfilled, which is expressed to be payable in **dollars** generally, would be admissible independently of the provisions of that act." See also, Hansbrough *v.* Utz, 75 Va. 962.

On the 23d of June 1865, R. C. sells to N. C. a tract of land, for which N. C. was to give him another tract and $6,500; $1,000 to be paid in six months from date, $2,500 in one year, $2,000 in two years, and $2,000 in three years; the interest on $2,000 for one year to be remitted. On the same day N. C. executes his bonds to R. C. for said sums of money, payable at the times specified in the agreement; thus—Twelve months after date, I bind myself, heirs, etc., to pay R. C. twenty-five hundred **dollars** in currency at its specie value, with interest from date. Two judges hold the word **dollars** is to be construed specie **dollars**; two that the contract is to pay currency at is then specie value; and one judge holds, that it is a contract to pay currency at is specie value at the time of payment. Caldwell *v.* Craig, 22 Gratt. 340.

In Hilb *v.* Peyton, 22 Gratt. 561, it is said: "In the second place a promise to pay a specific sum in **dollars**, or to pay so many **dollars**, is a contract to pay a particular kind of currency. It is a contract to pay a specie currency. This is the legal effect of such a promise, according to universal understanding in Virginia. This rule has of course been modified by the legal tender acts; but the principle is not affected. Now it is well settled, that at common law parol evidence is not admissible to vary the legal effect of a written obligation."

Domestic Attachment.

See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

DOMESTIC CORPORATION.—See the titles CORPORATIONS, vol. 3, p. 315; FOREIGN CORPORATIONS.

A foreign corporation, doing business in this state, is not a **domestic corporation.** See also, Savage *v.* People's Building Loan, etc., Ass'n, 45 W. Va. 275, 31 S. E. 991.

A statute merely enabling a foreign corporation to hold property or do business in this state does not make it a **domestic corporation.** Quesenberry *v* People's Building Loan, etc., Ass'n, 44 W. Va. 512, 30 S. E. 73.

Domestic Judgments.

See the title JUDGMENTS AND DECREES.

DOMESTIC MESSAGE.—See Western Union Telegraph Co. *v.* Reynolds, 100 Va. 459, 41 S. E. 856. And see the title TELEGRAPHS AND TELEPHONES.

DOMICILE.—For the distinction between **domicile** and residence, see the title CONFLICT OF LAWS, vol. 3, p. 116. And see Atkinson *v.* College, 54 W. Va. 47, 46 S. E. 253; State *v.* Allen, 48 W. Va. 154, 35 S. E. 990.

DOMINUS LITIS.—See Piedmont, etc., Ins. Co. *v.* Maury, 75 Va. 511.

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DOUBTFUL.—Certain choses were reported by commissioner as **doubtful** at date of assignment. Before trustee can be charged therewith, c. q. ts. must prove that those choses might have been collected by due diligence. Wimbish *v.* Blanks, 76 Va. 365.

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734; ESTOPPEL; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; INJUNCTIONS; JUDGMENTS AND DECREES; MARRIAGE; MARSHALING ASSETS AND SECURITIES; MISTAKE AND ACCIDENT; MORTGAGES AND DEEDS OF TRUST; RESCISSION, CANCELLATION AND REFORMATION; SEQUESTRATION; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES; WILLS.

As to dower in the slaves and all questions pertaining thereto, see the title SLAVES.

I. Definitions and Distinctions.

Dower is a widow's life estate in land. Nelson *v.* Kownslar, 79 Va. 468.

At Common Law.—"Where a woman marries a man seised at any time during the coverture, of an estate of inheritance such as that the issue of the marriage may by possibility inherit it, as heir to the husband, and the husband dies, the wife surviving is entitled to one-third for her life as tenant in dower." 2 Min. Inst. (4th Ed.) 134; 1 Th. Co. Lit. 569, 578.

By Statute.—"A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seised of an estate of inheritance (or entitled to a right of entry, or action for such estate), unless her right to such dower shall have been lawfully barred or relinquished." Va. Code, 1887, §§ 2267, 2268; W. Va. Code, 1899, ch. 65, §§ 1, 2. See Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225.

"There seems to be no other difference between the common law and this statutory dower, than that the latter does not require seisin even in law, but is content with a right of entry or of action, where the widow would have been entitled to dower, if the husband or any other to his use, has recovered possession." 2 Min Inst. (4th Ed.) 134, 135.

Synonymous with Third.—The word dower, in its ordinary acceptation, since its first introduction into this country, has been used synonymously with the word "third." 1 Scrib. on Dow. 25. So, by "dower out of all lands of which the husband is seised during coverture," is meant "one-third of such lands;" by "dower in the equity of redemption" is meant dower in the land subject to encumbrances paramount to dower, i. e., one-third for life of what remains of the land after satisfying the encumbrances; and by "dower in said surplus" (as is the language of the statute) is meant "one-third of such surplus for life." Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

Last Plank in Shipwreck.—Dower is the widow's last plank in her shipwreck, and is given by the common law ad sustationem exoris et educationem liberorum, for the sustenance of herself and the education of her children. Engle *v.* Engle, 3 W. Va. 246.

Dower Distinguished from Distributive Share.—"A widow's dower and her distributive share [in the personal estate of her deceased husband] are very different things. Dower is a widow's life estate in land; a widow's distributive share is (as the law was), a third part of the slaves for life, and of the other personal estate absolutely. The statutes regulating these different subjects, call them by different names, and prescribe different rules and incidents about them. Samuels, J., in Findley *v.* Findley, 11 Gratt. 434." Nelson *v.* Knownslar, 79 Va. 468.

II. Requisites.

A. IN GENERAL.

1. Must Be Beneficial.

"The requisites of consummate dower are marriage, seisin of the husband during coverture, and death of the husband. By marriage and seisin of the husband during coverture, the wife acquires a contingent interest which is called inchoate dower." 10 Am. &

Eng. Ency Law (2d Ed.) 128. For a full discussion of the requisites of dower, see 2 Min. Inst. (4th Ed.) 135, et seq.

B. SEIZIN OF THE HUSBAND.

Seizin of the husband is an essential requisite of dower. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

At common law the legal title only was regarded; and a mere legal seisin, without any beneficial ownership, enabled the wife to recover dower. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

But there is no longer any magic in the word seisin, by which the shadow may be made the substance, or the substance the shadow. A legal title in the husband is nothing as regards the wife's right of dower, unless accompanied by the beneficial ownership; and the beneficial ownership is everything, though separated from the legal title." Baldwin, J., in Wilson *v.* Davisson, 2 Rob. 384, quoted with approval in James *v.* Upton, 96 Va. 296, 31 S. E. 255; Waller *v.* Waller, 33 Gratt. 83.

Purchaser in Possession.—Where a purchaser of land takes possession, and pays part of the price, he is beneficially seized to the extent of the price paid, although he has not acquired the legal title; and hence, under Va. Code, 1887, § 2429, giving dower in equitable estates, his widow is entitled to dower, subject to the lien for the unpaid purchase money, whether he died possessed of the land, or had alienated it during coverture without her concurrence. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

"In order to entitle his widow to dower, the husband must be seized of the requisite estate during the coverture. If such seisin does not exist as to his equitable estate until the purchase money is fully paid, and it is not paid before his death, how can it be held that he ever had the required seisin? His dying in possession of the property can not affect the question." James *v.* Upton, 96 Va. 296, 31 S. E. 255.

Holder of Equity of Redemption.—A. and B. each held large debts against C., secured by a deed of trust upon his land. Afterwards, D. recovered judgment against C. for $1,800. B. assigned his debt to A. and C. was adjudged a bankrupt. C.'s assignees sold the equity of redemption in said land to A., who soon afterwards assigned all of said trust debts to E. D. then brought suit to sell said land to pay his judgment, wherein the trust debts, as the first lien thereon, were decreed to E., who at the sale of the land under said decree became the purchaser thereof; and A. having died, his widow filed her petition in a creditors' suit, in which said land was decreed to be sold to pay the debts of E., claiming dower therein. Held, that A. was never seised, at law or in equity, of any estate in said land, and that his widow is not entitled to dower therein. Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768.

Seisin Subject to Sale before Marriage.—A widow has no dower in lands sold by her husband prior to the marriage, although the husband may have died without conveying title; for, while he has the legal title, he is not beneficially seised during the coverture, as against the vendee. Waller *v.* Waller, 33 Gratt. 83; 2 Min. Inst. (4th Ed.) 147. See Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225.

Seisin Merely in Trust.—A father, desirous of providing for his daughter, procured H. to purchase land in his own name, and have it conveyed to him, to be held by him at a reasonable time, and then to be conveyed directly to the daughter. The father furnished the money to pay for the land, and the daughter entered into possession of the same. The father died shortly thereafter and H. sometime thereafter, without having made the deed. A bill was brought against the widow and infant heirs of H. to compel conveyance to

the daughter. Held, that the widow of H. is not entitled to dower in the land, as her husband held the bare legal title without any beneficial interest. Hardman *v.* Orr, 5 W. Va. 71.

Seisin in Another's Name to Defraud Creditors.—Where land, purchased by a wife and deeded to her, is successfully attacked by her husband's creditors as being in fraud of their rights, he having paid the purchase money, the husband has no seisin, actual or constructive therein, out of which the wife is dowable under Va. Code, 1887, § 2267. Grant *v.* Sutton, 2 Va. Dec. 149. See Blow *v.* Maynard, 2 Leigh 29.

1 Must Be Immediate.

In order to entitle the wife to dower, the husband must have immediate seisin of the inheritance, and therefore the wife can not be tenant in dower of a reversion or a remainder expectant upon an estate of freeholder, unless the particular estate be determined or ended during the coverture. Blow *v.* Maynard, 2 Leigh 29; Cocke *v.* Philips, 12 Leigh 248.

Same Day Means Same Time.—"The real question in this case is as to the right of dower. The authorities cited by the counsel leave no doubt that where the vendor passes the title to the vendee and at the same time takes a mortgage or deed of trust for the security of the purchase money, in which the wife of the vendee does not join, she will nevertheless take her dower in the estate subject to the trust or mortgage. In such case, the husband is seized but for an instant, and not beneficially for his own use; the deed of conveyance, and the mortgage or deed of trust, are to be considered, like the levy of a fine, as parts of the same transaction and of the same contract; as taking effect at the same instant, and as constituting but one act. If both contracts were contained in the same instrument there could be no doubt; and it is the same thing though they are contained in different instruments, provided they are parts of the same contract, and make together but one transaction. That they are parts of the same transaction, must be presumed where they are executed at the same time; and, moreover, as they can not be absolutely isochronous, as there must be some interval, however small, the court ought always to take the same day to mean the same time, unless the contrary be found—unless it be found that the acts were separate, distinct and independent." Gilliam *v.* Moore, 4 Leigh 30, 24 Am. Dec. 704, quoted with approval in Coffman *v.* Coffman, 79 Va. 504. See also, Wilson *v.* Davisson, 2 Rob. 384; Summers *v.* Darne, 31 Gratt. 791; Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800.

Mortgage Executed Ten Months after Purchase.—Two persons purchased real estate jointly, one of the terms of purchase being that on receiving a conveyance from the vendor they should, at the same time, execute a mortgage of the property to secure the purchase money. The vendor made the conveyance to the purchasers, but, owing to a disagreement as to its provisions, the mortgage was not executed till ten months thereafter. It was held that the rights of the mortgagee were paramount in equity to the dower rights of the purchasers' wives, and that, upon the death of one of the purchasers, his widow was only dowable of his equity of redemption in the land. Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Seizin Subject to Deed of Trust.—See post, "Mortgaged Lands," IV, O.

2. Duration of Seizin.

See post, "Mortgaged Lands," IV, O.

C. DEATH OF HUSBAND.

As the title of dower is consummated by the husband's death, when the wife is endowed she is in from the death of her husband, and like any other tenant of the freehold she takes upon recovery whatever is then annexed to the freehold, whether it be so by folly,

mistake or otherwise. Engle *v.* Engle, 3 W. Va. 246.

But immediately upon the death of her husband the dower right of the widow becomes consummate and perfect, and, if the heir then waste or deteriorate the estate, she may have a remedy for the loss thereby occasioned to her. George *v.* Hess, 48 W. Va. 534, 37 S. E. 564.

III. Nature and Incidents.

A. IN GENERAL.

Dower is a right given by law and not arising from the contract of the parties. Thorn *v.* Sprouse, 39 Va. 706, 20 S. E. 676.

Dower does not arise out of, and is not dependent upon, any contract. On the contrary, it is an estate which arises solely by operation of law, and not by force of any contract, express or implied, between the parties. It is the silent effect of the relation entered into by them; not as in itself incidental to the marriage relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law. Lewis *v.* Apperson, 103 Va. 624, 49 S. E. 978.

Possession of Heirs Not Possession of Widow.—The possession of the heirs is not the possession of the widow, like coparceners or tenants in common, nor is there privity between them. "Nor does she as tenant in dower hold her estate of the heir or tenant who set it out to her, but of her deceased husband, or rather by appointment of law. The law, moreover, does not consider that there is any privity of estate between the dowress and the reversioner of her lands." Sperry *v.* Swiger, 54 W. Va. 283, 46 S. E. 125.

B. INCHOATE DOWER.

1. In General.

During the life of the husband, the wife has no estate or interest in his lands. She has a mere contingent right of dower which may be the subject of a conveyance or relinquishment under the statute. It may also constitute a valuable consideration for a postnuptial settlement, because it is in the nature of a contingent lien or incumbrance upon the realty. Beyond this, however, it is not even a right in action. Corr *v.* Porter, 33 Gratt. 278. See in this connection, Miller *v.* Crawford, 32 Gratt. 277; Blow *v.* Maynard, 2 Leigh 29. But the contingent right of dower in real estate, in which her husband has no interest, is her separate estate, and she may dispose of the same by her sole act as if she were unmarried. Acts, 1899-1900, p. 34.

A contingent right of dower is not separate estate under chapter 103 of the Virginia Code. Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 6 Va. Law Reg. 158 and note.

"In Moore *v.* New York, 8 N. Y. 110, which was also a proceeding to condemn lands of a married man under the New York statutes, it was insisted that the wife was a necessary party defendant, but the court held, as in the case of Flynn *v.* Flynn, 171 Mass. 312, that she was not, for the reason that, while her inchoate right of dower in the land was an interest which might be released, it was not the subject of grant or assignment, 'nor is it in any sense an interest in real estate.'" Land *v.* Shipp, 98 Va. 284, 36 S. E. 391.

A covenant for seizin, or of the right to convey, which in most cases is its equivalent, is not broken by an outstanding inchoate right of dower. It does not affect the technical seizin of the grantee. Building, Light, etc., Co. *v.* Fray, 96 Va. 559, 32 S. E. 58, 4 Va. Law Reg. 838.

Not Property.—A wife's contingent right of dower in the lands of her husband is not property, and she does not become surety for her husband by uniting with him in a conveyance of his land as a security for his debts. Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

The contingent right of dower in the wife, not being in any sense property,

the theory that when she unites with her husband in the conveyance of his land to secure the payment of a debt of his, she becomes surety of the husband for his debt, with the right of exoneration out of the remainder of the land, or the surplus from its sale, after the debt is satisfied, has nothing to rest upon, for the wife neither becomes personally bound for the debt, nor pledges any property as security for its payment. No personal obligation rests upon her to pay the debt, or to make up any deficit should the land sell for less than the debt. Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

Inchoate dower is not a vested estate or property in a wife until the death of her husband, and in a suit to sell the husband's land in his lifetime to pay liens, no provision need be made out of its proceeds to meet the wife's dower when consummate. George *v.* Hess, 48 W. Va. 534, 37 S. E. 564.

Mere Possibility.—Now such an inchoate, contingent right of dower is defined by Bishop as a mere possibility; not only is it no estate, but the right itself is a mere contingent possible thing. If the wife dies before her husband, all is vanished. Southern Mutual Ins. Co. *v.* Kloeber, 31 Gratt. 739.

"In a recent Missouri case, Bliss, J., observed of this sort of inchoate dower that it 'is not an estate, but a mere contingent claim, not capable of sale in execution, nor the subject of grant or assignment. The dowress has merely a contingent possibility of interest in the premises, but no property, no actual interest in it which is the subject of grant or assignment,' 44 Missouri, 512, 515. See also, 2 Bishop on Law of Married Women, § 348, and cases cited." Southern Mutual Ins. Co. *v.* Kloeber, 31 Gratt. 739.

Not a Vested Right.—"Property interest in inchoate dower not an estate in land. During coverture, dower has been denominated by many of the authorities as a mere tangible, inchoate, contingent expectancy, and is not, strictly speaking, an estate in land, and does not even rise to the dignity of a vested right." George *v.* Hess, 48 W. Va. 534, 37 S. E. 564.

Seizin of Widow.—A widow entitled to dower in land, is not seized of any part of the land, by any right of dower, until it is assigned to her. Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 533.

Power to Alien.—"'Until actual assignment of dower, the widow can not alien or subject her dower to the payment of debts, and neither process of law nor her own act can transfer her right to a stranger so as to confer on him a right of action at law for the dower. She can not convey her contingent dower.' Again, on the same page, it is stated: 'She is not seized of any part of the land, on the death of her husband, by any right of dower, until it is assigned to her.'" Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 533.

Does Not Affect Vendee's Right.—Upon a bill filed by a vendee against a vendor for specific performance of a contract for the sale of real estate, the vendor's wife who has not signed the contract of sale is not a necessary party. If the vendee is willing to accept the title contracted for, his rights are unaffected by the outstanding inchoate right of dower of the vendor's wife. Nor can the vendee be defeated in his right to specific performance of the contract according to its terms by the fact that he may ultimately have to resort to the covenant of general warranty contracted for to protect himself against a claim of dower asserted by the vendor's wife after the death of her husband. Steadman *v.* Handy, 102 Va. 382, 46 S. E. 380.

Within the Meaning of a Covenant against Incumbrances.—Inchoate dower is an incumbrance within the meaning of a covenant against incumbrances contained in a conveyance. Ficklin *v.* Rixey, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891; Thorn *v.* Sprouse, 39 W. Va. 706, 20 S. E. 676.

"So, where a party has contracted to

convey lands with covenants of general warranty or against incumbrances, an existing right of dower, although inchoate, will constitute a good defense to a proceeding on the part of the vendor for a specific performance of the contract, unless the vendee has waived his right to object to the title." Thorn *v.* Sprouse, 39 W. Va. 706, 20 S. E. 676.

Defective Acknowledgment.—Where a vendor sells a tract of land to his vendee, and executes to such vendee a deed, in which his wife joins, but the certificate of acknowledgment is so defective in form as not to release the contingent dower of the wife, part of the purchase money having been paid in cash, and time having been given for the residue, specific performance of the contract will not be enforced by compelling the payment of the residue of the purchase money, unless such defendant is allowed to retain a sufficient amount of such purchase money to adequately indemnify him against such contingent right of dower. Thorn *v.* Sprouse, 39 W. Va. 706, 20 S. E. 676.

A suit is brought upon a bond executed to a married woman as part of the purchase money for a tract of land, which bond she claims was given to her to induce her to execute a deed for said land sold by her husband and herself in which she claims to have a contingent right of dower, and said married woman joins with her husband in a conveyance of said land, with covenants of general warranty to the obligor in said bond for said tract of land. Under the circumstances, she will be treated as a common vendor, and can not recover on said bond until the incumbrance on the title is removed. Hoke *v.* Jones, 33 W. Va. 501, 10 S. E. 775.

Policy of Insurance.—If the application for a policy of fire insurance is made a part of the policy, and is a warranty and covers the applicant's interest in and title to the property, and his answer to the question "What is your title to or interest in the property to be insured?" is "fee simple;" it was held, the fact that the wife of a former owner of the property who is still alive, has a contingent right of dower in it, does not affect the applicant's interest in or title to the property. Nor is it such an incumbrance as, not being mentioned in his answer, will be a breach of the warranty. Southern Mutual Ins. Co. *v.* Kloeber, 31 Gratt. 739.

The court in the above case said: "Mrs. Hall's undefined and contingent right of dower—a right and interest dependent upon the contingency of her surviving her husband—certainly did not affect the character of the interest or title which Kloeber had in the property. Although she had the contingent right to assert her claim of dower against the property if she should survive her husband, still the estate in Kloeber was a fee simple estate in the sense in which he makes the answer." Southern Mutual Ins. Co. *v.* Kloeber, 31 Gratt. 739.

Averments as to Dower.—C. sold to E. a tract of land. C. subsequently bought an outstanding title claimed to be older than that which he sold to E., from P. and C. On the bill of injunction filed by E., to enjoin payment of the purchase money to C. on the ground of defect in title; it is, among other defects, alleged that the title is imperfect, because there was a failure to procure the relinquishment of dower of Mrs. P. and Mrs. C., wives of the vendors of the outstanding title. It was held, that inasmuch as it was not averred in the bill that either P. or C. had a wife who was entitled to dower in the land, the objection is unavailing. Edwards *v.* Chilton, 4 W. Va. 352.

2. **Legislative Control Over.**

Since inchoate dower is not a vested right, it is subject absolutely to the control of the legislature, which may modify or destroy it at will without exceeding its constitutional limits. Thornburg *v.* Thornburg, 18 W. Va. 522.

3. How Present Value Computed.

The rule for computing the present value of a wife's contingent right of dower is to ascertain the wife's expectation of life and that of the joint lives of the husband and wife, and from the present value of an annuity, payable during the wife's life, deduct the present value of an annuity payable during their joint lives. Strayer *v.* Long, 86 Va. 557, 10 S. E. 574. See note on this case, and table for computing present value of a contingent right of dower, 3 Va. Law Reg. 69-80.

If a sum secured to a wife in consideration of a release of her contingent right of dower be set aside as excessive, she will be restored, if practicable, to her former rights. Runkle *v.* Runkle, 98 Va. 663, 37 S. E. 279, 6 Va. Law Reg. 613.

Value Fixed by Contract.—A wife having bought her husband's lands at $12,000, subject to dower, or $15,000, free of dower—"the sale being made in this way in order to fix the dower in said land"—and there being a number of debts paramount to her dower, the value of the contingent dower right is not to be determined in the ordinary way, but she should be charged with $15,000, as the purchase price of the land, and credited by one-fifth of the difference between that sum and the amount of the debts paramount to her dower, as the contract fixed the value of the dower of one-fifth of the whole. Miller *v.* Arthur, 102 Va. 356, 46 S. E. 323.

C. CONSUMMATE DOWER.

1. Right to Occupy Mansion House and Curtilage.

A husband devised his real estate to his wife for her life, and at her death to his son, and bequeathed his personal estate to be divided equally among his eight children. His widow renounced the provision made for her by the will. Held, that she was entitled to occupy the real estate in person or by agent, without rent, till her dower was assigned. McReynolds *v.* Counts, 9 Gratt. 242. See Grayson *v.* Moncure, 1 Leigh 449.

Right of Heir to Maintain Trespass.—The heir can not maintain an action of trespass for a trespass committed on the quarantine lands of the widow before the assignment of her dower. Latham *v.* Latham, 3 Call 181.

Such Possession Not Adverse.—Since the widow is entitled under the statute, Va. Code 1887, § 2274, to hold the mansion house and curtilage until her dower is assigned, her possession prior to the assignment, not being adverse, will not in law be so deemed, and the statute of limitations will not begin to run, until such possession ends, or she publishes her claim and her possession to be adverse and hostile by actual and open disseisin. Hannon *v.* Hounihan, 85 Va. 429, 12 S. E. 157. See also, Hope *v.* Norfolk, etc., R. Co., 79 Va. 283; Ball *v.* Johnson, 8 Gratt. 281.

House Rebuilt by Widow.—The dwelling house of a decedent was destroyed by fire during the lifetime of his widow before her dower had been assigned, and she rebuilt the house at her own expense, it being necessary for the use of herself and family. It was held, that in addition to her dower the widow was entitled to the use of the house which she had constructed. Casto *v.* Kintzel, 27 W. Va. 750.

Claim Paramount to Heir.—Under the operation of the statute, which gives to the widow the right to hold, occupy and enjoy the mansion and curtilege without charge until dower is assigned her, the widow is by law deemed in possession as a tenant in common with the heirs to the extent of her right in dower; and her right of entry does not depend upon the assignment of dower, which is a mere severance of the common estate. Though in point of tenure she holds of the heir or reversioner yet the widow claims paramount to the heir. Her estate is a

continuation of that of her husband, and, upon assignment, she is in by relation from her husband's death. 4 Kent. 62. Engle *v.* Engle, 3 W. Va. 246.

Power to Encumber Interest of Remainderman.—A widow entitled to dower in the real estate of her deceased husband is neither a joint tenant, in common, or coparcerner with the heirs at law, within the meaning of ch. 79 of the Virginia Code, White *v.* White, 16 Gratt. 264; but inasmuch as she may be tenant for life of the mansion house and curtilage unless her dower is assigned to her, she may be considered as tenant of a distinct part of the freehold. Her power to encumber the interest of the remaindermen can in no event exceed that which she might rightfully exercise over her dower when the same has been assigned to her. In that event she becomes tenant for life therein. Casto *v.* Kintzel, 27 W. Va. 750.

Considered a Proprietor.—It has been held, that a widow to whom dower had not been assigned, and who continued in the possession of the mansion house and plantation thereto belonging, must be considered as proprietor of the land in the meaning of the statute respecting writs of ad quod damnum; and a motion by the heir, who resided on the land with his mother, to dismiss the proceedings because notice was not served on him as one of the proprietors of the land, was overruled. Carpenter *v.* Garrett, 75 Va. 129. See also, Moore *v.* Gilliam, 5 Munf. 346; Pitzer *v.* Williams, 2 Rob. 241.

Annuity for the Support of Mother.—Testator by his will gave to his mother $1,000 in cash and a life interest in a certain house and lot; to his wife, besides what comes to her by right of dower, $2,000 in cash and his watch; to his daughter all the rest of his estate, real and personal. By codicil he revoked so much of his will as gave his mother the life interest, and in lieu thereof gave her $250 per annum (to be paid from the money for which the house is rented); and directed that his wife and daughter should occupy and control it, subject to said rental to be paid out of the personal or other estate of his wife. It was held, the wife and daughter were entitled to occupy the house and lot during the continuance of the annuity to testator's mother; upon the death of his daughter, living his wife, the wife is entitled to occupy it during the continuance of said annuity; after the cessation of the annuity by the death of his mother, the house and lot is to belong to the daughter under the will, or those claiming under her, subject by law to the dower right of the wife, until that has been satisfied in full by the assignment of dower, as the law directs, in this or other real estate of the testator. Fleming *v.* Kelly, 83 Va. 10, 1 S. E. 401.

2. No Right to Other Premises.

A plaintiff in ejectment may recover against a widow holding possession of the land of which her husband died seised, and having a right of dower, if it does not appear that the land in controversy was assigned her as her dower, or as a part thereof, or was attached to the mansion house of her husband at the time of his death. Moore *v.* Gilliam, 5 Munf. 346; Chapman *v.* Armistead, 4 Munf. 382.

3. Rights and Liabilities.

a. Liability for Taxes and Improvements.

A widow remained in the mansion house, having with her her infant children, whom she supported, and no dower was assigned to her. She paid a balance of the purchase money due for the property and secured by the vendor's lien. She also paid the taxes, and expended money in improvements. It was held, that, as against creditors of her husband, she had a prior lien on the property for the amount paid for taxes, and for the purchase money

paid by her, less the sum which she, as dowress, was liable to pay; that she was not entitled to be reimbursed for improvements, and that, as a sale was necessary before assignment of dower, she was to pay rent for two-thirds of the property until the sale, if she continued in possession. Simmons *v.* Lyles, 32 Gratt. 752.

Payment of Purchase Money.—A widow remains in the mansion house, having with her two infant children, whom she supports, and no assignment of dower is made to her. She pays a balance of the purchase money due for the property, and secured by the vendor's lien, and she pays the taxes due upon the property. As against judgment creditors of her late husband, it was held, it being necessary to sell the property, and therefore to fix the present amount chargeable to her on account of said interest, the annual interest is to be treated as an annuity, to be computed for so many years as she may be supposed to live, regard being had to the state of her health; and the sum so ascertained, in gross, is to be deducted from the amount of the purchase money paid by her. Simmons *v.* Lyles, 32 Gratt. 752.

b. Liability for Waste.

It is not waste for a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal; and she may penetrate through a seam already opened, and dig into a new seam that lies unler the first. Crouch *v.* Puryear, 1 Rand. 258.

Use of Timber.—A widow is in possession not as a trespasser, and may lawfully use so much of the timber growing on the land as may be necessary for the reasonable enjoyment thereof, and to keep the mansion house and curtilage in repair during the time she may lawfully hold or occupy the same, but she may not waste the substance of the inheritance by cutting, removing or destroying the timber growing on the land to any other or greater extent. Such destruction or removal of timber would be a lasting damage to the inheritance and a disherison of them in remainder which is the true definition of waste. Casto *v.* Kintzel, 27 W. Va. 750.

In the absence of any evidence that land has ever been used for other than agricultural purposes, or that the owner ever leased or used it as timber land, or derived revenue from the sale of timber thereon, his widow, upon his death, will not be permitted to cut and market timber on the portion assigned to her as dower. She is only entitled to the use of the growing timber so far as necessary for fire wood, and to keep and maintain the buildings and fences on the land in repair. Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554.

Land Incapable of Cultivation.—Nor is it waste for a tenant in dower of land incapable of cultivation to cut timber therefrom, where the land is only valuable for the production of timber. Macaulay *v.* Dismal Swamp Land Co., 2 Rob. 507.

Chargeable with Value of Timber.—Decedent having died intestate, seized of 296 acres of land, left surviving him his widow and also ten children, his heirs at law. The dwelling house upon the land having been destroyed in his lifetime, his widow, who became his administratrix, built a new dwelling house thereon and cut, sold and removed from the land large quantities of its most valuable timber. In a suit brought by some of the heirs against the others and the widow to have partition of the land, and also to charge the widow with the value of the timber so taken, sold and removed, she claimed that the estate was indebted to her for moneys paid by her as administratrix in discharge of the debts of the intestate, and also for the value of the dwelling house, which she had erected on the land; it was held, the widow was chargeable with the value

of the timber cut, sold and removed by her, and it was properly applied to extinguish pro tanto the amount due to her as such administratrix from the estate. Casto *v.* Kintzel, 27 W. Va. 750.

c. Right to Maintain Ejectment.

The interest of a widow in the real estate of her deceased husband, before assignment of dower, is an interest for which she may maintain an action of ejectment, or an action of unlawful detainer; and possession taken or continued by her, as widow, is in privity with the heirs or devisees of her husband. Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233.

d. Liability for Decedent's Debts.

After exhaustion of decedent's personalty, his lands in possession of his heirs or devisees are liable for his debts, but not his land in possession of his widow as her dower during her estate therein. Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577.

The personalty being first liable to the payment of a decedent's debts, it is true that there should be no distribution either to the widow or to the other distributees until the debts are paid, and there can be no resort for their payment to the realty until the personalty has been exhausted. But when that has been exhausted either by devastavit or distribution, the realty in the hands, not of the widow, because she takes and holds her life estate in one-third thereof by a title which is paramount to the rights of creditors, but that of the heirs, must be subjected to the payment of the ancestor's debts. They, and not she, are in possession of something to which the creditors have a better right, and must refund. Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577.

IV. Property, Estates and Interests Subject to Dower.

A. IN GENERAL.

The statutes provide that a widow shall be endowed of one-third of all the real estate whereof her husband or any other to his use was, at any time during coverture, seized of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished. See Virginia Code, 1904, § 2267; West Virginia Code, p. 99, ch. 65, § 1. Engle *v.* Engle, 3 W. Va. 246.

Until her dower is assigned, the widow is entitled to demand of the heirs or devisees of her husband one-third part of the issues and profits of the other real estate which was devised or descended to those of which she was dowable, and in the meantime she may hold, occupy and enjoy the mansion house and curtilage without charge. W. Va. Code, ch. 65, § 8. Casto *v.* Kintzel, 27 W. Va. 750; Sperry *v.* Swiger, 54 W. Va. 283, 46 S. E. 125; Engle *v.* Engle, 3 W. Va. 246.

And if deprived thereof may, on complaint of unlawful entry or detainer, recover the possession with damages for the time she was so deprived. Engle *v.* Engle, 3 W. Va. 246.

G. died in 1845 intestate leaving a widow and eight children, all but one infants. By the law as it then was (W. Va. Code, 1819, ch. 107, § 2) until dower was assigned to the widow she was entitled to remain in the mansion house, and the messuage and plantation thereto belonging, without being charged with paying the heir any rent for the same. Carpenter *v.* Garrett, 75 Va. 129. Engle *v.* Engle, 3 W. Va. 246.

B. LAND AS IT EXISTED AT HUSBAND'S DEATH.

A person having died intestate, seized of 296 acres of land, left surviving him his widow and also ten children, his heirs at law. The dwelling house upon the land having been destroyed in his lifetime, his widow, who became his administratrix, built a new dwelling house thereon and cut, sold and removed from the land large quantities of its most valuable timber. In a suit

brought by some of the heirs against the others and the widow to have partition of the land, and also to charge the widow with the value of the timber so taken, sold and removed, she claimed that the estate was indebted to her for moneys paid by her as administratrix in discharge of the debts of the intestate, and also for the value of the dwelling house, which she had erected on the land; it was held, the widow is entitled to be endowed of one full fair third of the land according to quantity and quality, as it was at the time of her husband's death, and in addition thereto with the use of the dwelling house which she erected thereon. Casto *v.* Kintzel, 27 W. Va. 751.

C. MINES AND QUARRIES.

A widow is dowable of coal lands, but only such as were opened and worked in her husband's lifetime. Crouch *v.* Puryear, 1 Rand. 258.

Power to Open New Mines.—"A widow is entitled to dower in mines belonging to her husband in fee, which may have been opened during his lifetime, whether with his own hand or that of another. * * * But though she may work an open mine, under her claim of dower, to exhaustion, she may not open new ones, even within the land set apart to her as dower." Haskell *v.* Sutton, 53 W. Va. 206, 44 S. E. 533; Stewart *v.* Tennant, 52 W. Va. 559, 44 S. E. 223. See also, Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781.

D. OIL WELLS.

Where, before assignment of dower, one claiming by purchase from certain heirs and the widow, drills oil wells upon the land and extracts large quantities of oil therefrom, without having obtained the consent of his cotenant to such development; and such nonconsenting cotenant brings his suit for an accounting, it is error to decree to him his entire interest in the oil produced and thereafter to be produced, free from any charge on account of the dower interest. Stewart *v.* Tennant, 52 W. Va. 561, 44 S. E. 223.

The holder of the dower interest is entitled to the interest on one-third of the proceeds of the oil going to the nonconsenting cotenant, until the death of the dowress, and until that date the fund upon which such interest is paid remains under the control of the court through its general receiver. Stewart *v.* Tennant, 52 W. Va. 561, 44 S. E. 223.

"'At all events, she would be entitled to dower in the profits in case the mines should be worked by the heir or owner of the fee, before assignment of dower.' The same reasoning applies here. The statute gives her the right to demand of the heir one-third of the rents, issues and profits, until her dower is assigned, and this court has decided that such rents, issues and profits arising from oil is measured by the interest on the fund arising from its production, called royalty." Wilson *v.* Youst, 43 W. Va. 826, 28 S. E. 781; Stewart *v.* Tennant, 52 W. Va. 561, 44 S. E. 223.

E. PROPERTY ANNEXED TO FREEHOLD.

As title to dower is consummated by the death of the husband, when the wife is endowed she is in from his death, and, like any other tenant of the freehold, takes upon recovery whatever is then annexed to the freehold, whether it be so by folly, mistake or otherwise. Engle *v.* Engle, 3 W. Va. 246.

F. SLAVES.

Where a widow holding slaves in right of dower marries again, the slaves belong to her second husband and his representatives until her death. McCargo *v.* Callicott, 2 Munf. 501. See the title SLAVES.

G. UNIMPROVED LANDS.

A widow is dowable of lands incapable of cultivation and only valuable for the timber thereon. Macaulay *v.* Dismal Swamp Land Co., 2 Rob. 507.

H. PARTNERSHIP REALTY.

See generally, the title PARTNERSHIP.

1. Virginia Rule.

Real estate purchased with partnership funds for partnership purposes is so far considered as personalty that the widow of a deceased partner is not dowable therein. Deering *v.* Kerfoot, 89 Va. 491, 16 S. E. 671; Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325; Davis *v.* Christian, 15 Gratt. 11; Pierce *v* Trigg, 10 Leigh 406. See article on "Dower in Partnership Realty," 4 Va. Law Reg. 310, et seq. See also, Hancock *v.* Talley, 1 Va. Dec. 433, 7 Va. Law Reg. 24 (May number, 1901), and note.

Two persons purchased a mill and 200 acres of land for the purpose of carrying on the business of milling in partnership. They took a conveyance of the property jointly and gave their joint bonds for the purchase money. Held, that, though such bonds were paid partly out of partnership funds, and partly by one partner after the death of the other, the real estate was not partnership property, but each partner was tenant in common with the other of an undivided moiety; and therefore the widow of the deceased partner is dowable of his moiety. Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

2. West Virginia Rule.

In West Virginia, it seems, the widow of a deceased partner is dowable of his interest in the partnership real estate, but the right does not attach until the partnership debts are paid. Martin *v.* Smith, 25 W. Va. 579.

I. DETERMINABLE ESTATES.

Where a devise of land is defeasible by the death of the devisee without lawful issue of his body, and the devisee so dies, his widow is entitled to dower in the land. Medley *v.* Medley, 27 Gratt. 568; Jones *v.* Hughes, 27 Gratt. 560; Taliaferro *v.* Burwell, 4 Call 321; Tomlinson *v.* Nickell, 24 W. Va. 148; Nickell *v.* Tomlinson, 27 W. Va. 697.

J. ESTATES IN EXPECTANCY.

Where a man dies entitled to a remainder in fee of real estate, expectant on an estate of freehold therein, his widow is not entitled to dower in the land, when the remainder falls in. Cocke *v.* Philips, 12 Leigh 248.

Reversion.—A husband dies entitled to reversion of lands; his widow is not entitled to dower thereof. Blow *v.* Maynard, 2 Leigh 29.

K. EQUITABLE ESTATES.

Prior to the act of 1785 a widow was not dowable of land in which her husband owned only an equitable estate. Claiborne *v.* Henderson, 3 Hen. & M. 322.

But under the act of 1785, giving a widow dower in trust estates, it seems that she is entitled to dower in an equitable estate in fee simple, contracted by verbal agreement to be conveyed to her late husband, provided the contract be proved to be such as would authorize a court of equity to decree the legal estate. Rowton *v.* Rowton, 1 Hen. & M. 91.

Contract of Purchase.—C. and W. purchased land to be divided between them by a designated line, W. to pay the whole purchase money, and C. to pay W. his part at a certain time; within the time, C. paid W. the greater part of the purchase money for his part of the land; and then, also within the time, the contract between C. and W. was rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. should have credit on another account, for the money he had paid; and C. died, never having been in possession of the land. Held, that, under 1 Rev. Code, ch. 99, § 31, as the contract between C. and W. was wholly executory, and was rescinded before C. had completed the payment of the purchase money, and as he had never had legal or equitable posses-

sion, he had no such equitable estate that his widow was dowable thereof. Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Incomplete Equitable Estate of Husband.—A husband who enters into an agreement for the purchase of land, takes possession of it, and pays part of the purchase price, is beneficially seized of the land to the extent that he has paid the purchase price, although he has not acquired the legal title; and his widow is entitled, under the provision of Va. Code, 1887, § 2429, to dower in the land, subject to the lien upon it for the unpaid purchase price, whether he died possessed of the land, or had aliened it during the coverture without her concurrence in the mode prescribed by law. If so aliened, however, the widow's right to dower is subject to the provisions of § 2278 of the Code of Virginia. James *v.* Upton, 96 Va. 296, 31 S. E. 255, 4 Va. Law Reg. 448.

Section 2429 of the Virginia Code of 1904 provides that "where a person, to whose use, or in trust for whose benefit, another is seized of real estate, has such inheritance in the use or trust as if it were a legal right, would entitle such person's husband or wife to curtesy or dower thereof, such husband or wife shall have curtesy or dower of the said estate." James *v.* Upton, 96 Va. 296, 31 S. E. 255.

Whether under that section the husband must have a perfect equity and have the right to call for the legal title before his widow can have dower in his equitable lands, has not been decided by this court in any reported case. In the cases of Rowton *v.* Rowton, 1 Hen. & M. 92, and Claiborne *v.* Henderson, 3 Hen. & M. 322, it seems to have been assumed that the husband must have a perfect equity to entitle his widow to dower, but that question was neither involved nor decided in either case. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

L. LANDS HELD IN TRUST BY HUSBAND.

A father, desirous of providing for his daughter, procured H. to purchase land in his own name, and have it conveyed to him, to be held by him a reasonable time, and then to be conveyed directly to the daughter. The father furnished the money to pay for the land, and the daughter entered into possession of the same. The father died shortly thereafter and H. sometime thereafter, without having made the deed. A bill was brought against the widow and infant heirs of H. to compel conveyance to the daughter. Held, that the widow of H. is not entitled to dower in the land, as her husband held the bare legal title without any beneficial interest. Hardman *v.* Orr, 5 W. Va. 71.

M. LANDS HELD IN ANOTHER'S NAME TO DEFRAUD CREDITORS.

Where land, purchased by a wife and deeded to her, is successfully attacked by her husband's creditors as being in fraud of their rights, he having paid the purchase money, the husband has no seizin, actual or constructive therein, out of which the wife is dowable under Va. Code, 1887, § 2267. Grant *v.* Sutton, 2 Va. Dec. 149. See Blow *v.* Maynard, 2 Leigh 29.

N. LANDS SOLD BEFORE MARRIAGE AND CONVEYED AFTERWARDS.

The widow of a vendor of real estate is not entitled to dower in the land of her husband, where it appears that the vendor sold the land before marriage, put the vendee in possession and received a part of the purchase money, and after the marriage conveyed the land to the vendee by his sole deed. And although the vendee may have been in default in the payment of the purchase money during the coverture, his mere default would not entitle the widow to dower under Va. Code, 1887, § 2268. Chapman *v.* Chapman, 92 Va.

537, 24 S. E. 225; Waller *v.* Waller, 33 Gratt. 83. See also, Braxton *v.* Lee, 4 Hen. & M. 376.

Executory Contract.—It is well settled that, if a man, before marriage, enters into a contract for the sale of land, upon certain terms and conditions, and the terms and conditions are performed, his widow is not entitled to dower in the land, although the husband dies without making a conveyance. This is upon the principle that the husband is regarded, in equity, as a trustee for the purchaser. Chapman *v.* Chapman, 92 Va. 537, 24 S. E. 225; Burdine *v.* Burdine, 98 Va. 515, 36 S. E. 992.

O. MORTGAGED LANDS.

See post, "Purchase Money Mortgage," VI, F.

1. In General.

For Purchase Money.—Where the husband, during coverture, purchases land and receives a conveyance for the same, and at the same time executes a mortgage to the vendor, or to a third person who advances the purchase money, to secure the payment of such purchase money, the widow is not, as against the mortgagee or his assigns, entitled to dower, although she did not join in the execution of the mortgage; but she is dowable of any surplus remaining after the satisfaction of such mortgage, and she is dowable of the whole land purchased as against all persons except the mortgagee and those claiming under him. Cowardin *v.* Anderson, 78 Va. 88; Hunter *v.* Hunter, 10 W. Va. 321; George *v.* Cooper, 15 W. Va. 666. See also, Wilson *v.* Davisson, 2 Rob. 405; Holden *v.* Boggess, 20 W. Va. 62; Bassell *v.* Caywood, 54 W. Va. 241, 46 S. E. 159; Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620.

Under § 3, ch. 65, of the West Virginia Code of 1899, it has been held, that a wife after her husband's death, may enforce her dower right in the land itself, although there has been a judicial sale thereof to satisfy a purchase money lien, and the surplus, after the satisfaction of such lien has been paid to the husband or to another judgment lien creditor against whose claim that of the wife is paramount. Holden *v.* Boggess, 20 W. Va. 62.

G. conveyed land to M., who on the same day, conveyed the same land to trustees to secure the purchase money. Held, that the two conveyances should be considered parts of the same transaction that the seizin of M. was instantaneous and transitory, and that M.'s widow is not entitled to dower in the land. Gilliam *v.* Moore, 4 Leigh 30, 24 Am. Dec. 704.

Where the husband and wife, grantees, pay only part of the purchase money, and such payment is applied to a prior deed of trust on the land, the wife is not entitled to dower therein. Robinson *v.* Shacklett, 29 Gratt. 99.

In 1853 W., before his marriage, sold a tract of land to B., taking a deed of trust to secure the unpaid purchase money. B. returned north during the war, and in his absence the land was sold by the trustee under the deed of trust and W. purchased it for more than his debt. He then married. After the war, B. returned and filed a bill to set aside the sale, and the court set the sale aside and decreed that the land be sold to pay W. the purchase money due him. Held, that the sale to W. having been decreed to be a nullity, his widow is not entitled to dower. Waller *v.* Waller, 33 Gratt. 83.

A. purchased land from G., N. advancing the purchase money. To secure the money thus advanced, A. executed a deed of trust upon the land and afterwards died. Held, that A.'s widow is not entitled to dower in the land. Spencer *v.* Lee, 19 W. Va. 179.

Purchase Subject to Mortgage.—Where a purchaser of land subject to a mortgage applies to equity for relief against a judgment in ejectment and the dower interest of the mortgagor's

wife has been relinquished to the complainant, but not to the mortgagee, the court in directing the sale ought to protect the complainants right to such dower interest. Davison *v.* Waite, 2 Munf. 527.

Subject to Deed of Trust.—Where a husband dies in possession of land, which he has conveyed by a deed of trust in which his wife did not join, she is entitled to dower in like manner as if the deed had not been made. Tracey *v.* Shumate, 22 W. Va. 474; Macaulay *v.* Dismal Swamp Land Co., 2 Rob. 507.

2. Equity of Redemption.

A widow is entitled to dower in property in which her husband has the equity of redemption. See Heth *v.* Cocke, 1 Rand. 344; Hoy *v.* Varner, 100 Va. 607, 42 S. E. 690; Iaege *v.* Bossieux, 15 Gratt. 83.

A wife has an inchoate right of dower in the equity of redemption only in land of the husband conveyed by husband and wife in trust to secure his debt. In the case in judgment, the land having been sold in the lifetime of the husband, §§ 2277, 2278, of the Virginia Code also apply. Land *v.* Shipp, 98 Va. 285, 36 S. E. 391; Hoke *v.* Jones, 33 W. Va. 501, 10 S. E. 775.

The Virginia act of 1785 (now § 2429 of the Code) "gives dower in equitable, in like manner as in legal estates; and in this, as in other respects, the rules and incidents of legal estates are now applied to trust and mortgaged property. The equity of redemption of a mortgage in fee descends to the heirs of the mortgagor; and though the widow is not entitled to dower as against the mortgagee where the mortgage was executed before the coverture, or during the coverture with her concurrence in the mode prescribed by law, yet in either case she is entitled to dower in the equity of redemption; for of that, or what is the same thing, of the estate subject to the mortgage, the husband is to be considered as having died seised." Heth *v.* Cocke, 1 Rand. 344; Swaine *v.* Perine, 5 John. Ch. 492; Hale *v.* James, 6 John. Ch. 258. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

Purchase Money Mortgage.—In lands mortgaged to secure the purchase money, the widow is entitled only to dower in the equity of redemption. Heth *v.* Cocke, 1 Rand. 344; Gilliam *v.* Moore, 4 Leigh 30, 24 Am. Dec. 704; Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654; Daniel *v.* Leitch, 13 Gratt. 195; Robinson *v.* Shacklett, 29 Gratt. 99; Coffman *v.* Coffman, 79 Va. 504; Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800; Hunter *v.* Hunter, 10 W. Va. 321; George *v.* Cooper, 15 W. Va. 666; Spencer *v.* Lee, 19 W. Va. 179; Holden *v.* Boggess, 20 W. Va. 62; Reinhardt *v.* Reinhardt, 21 W. Va. 76; Martin *v.* Smith, 25 W. Va. 579; Roush *v.* Miller, 39 W. Va. 638, 20 S. E. 663.

Land Mortgaged before Marriage.—Where a husband has mortgaged his property before marriage, the only claim his widow has therein is to dower in the equity of redemption. The same principle applies to mortgages after marriage, where the wife unites in the mortgage. Heth *v.* Cocke, 1 Rand. 344; Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

"The general rule is that when the husband has mortgaged his lands before coverture, or the wife during coverture has united with him in mortgaging land belonging to him, and such land is sold under the mortgage, the widow, if the sale takes place after the death of the husband, and the wife, if the sale takes place before his death, in jurisdiction where the inchoate right of dower is regarded as such an interest as must be protected, is entitled to have her dower assigned or reserved from the surplus only, after paying the whole amount of the mortgage indebtedness. The dower interest should be confined to one-third of the value of the excess of the land, after deducting the entire amount owing

upon the mortgage." Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

Delay in Executing Mortgage.—Two persons purchased real estate jointly, one of the terms of purchase being that on receiving a conveyance from the vendor they should, at the same time, execute a mortgage of the property to secure the purchase money. The vendor made the conveyance to the purchasers, but, owing to a disagreement as to its provisions, the mortgage was not executed till ten months thereafter. It was held that the rights of the mortgagee were paramount in equity to the dower rights of the purchasers' wives, and that, upon the death of one of the purchasers, his widow was only dowable of his equity of redemption in the land. Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Sale by Trustee.—Whether there has been an alienation by the husband in fee of the equity of redemption he holds in land subject to a lien or encumbrance thereon superior to his wife's right of dower therein, or a conveyance be made by the husband of his equity of redemption to a trustee, without the wife's concurrence, to secure a debt of the husband, in either event, if there is a sale of the land in his lifetime by the trustee, subject to the prior lien or encumbrance, or it is paid out of the proceeds of such sale, the widow of the deceased husband can only have dower in the equity of redemption in the land which dower the husband could not alien and defeat without her concurrence. Land *v.* Shipp, 100 Va. 337, 41 S. E. 742.

3. Dower in Surplus after Paying Mortgage Debt.

The widow is entitled to dower in the surplus arising from a sale of her husband's land under a deed of trust given to secure the purchase money; but the land is not liable in the hands of the purchaser for such dower interest, nor is the purchaser bound to see to the application of the purchase money. Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800; Coffman *v.* Coffman, 79 Va. 504; Robinson *v.* Shacklett, 29 Gratt. 99; George *v.* Cooper, 15 W. Va. 666. See Cowardin *v.* Anderson, 78 Va. 88; Hunter *v.* Hunter, 10 W. Va. 321; Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690. See also, Iaege *v.* Bossieux, 15 Gratt. 83.

Code Provision.—The statute, now § 2269 of the Code of 1904, is as follows: "Where land is bona fide sold in the lifetime of the husband, to satisfy a lien or encumbrance thereon, created by deed in which the wife has united, or created before the marriage, or otherwise paramount to the wife, she shall have no right to be endowed in the said land. But if a surplus of the proceeds of sale remain after satisfying the said lien or encumbrance, she shall be entitled to dower in said surplus, and a court of equity having jurisdiction of the case may make such order as may seem to it proper to secure her right." Land *v.* Shipp, 100 Va. 337, 41 S. E. 742.

If a wife unite with her husband in the conveyance of his land in trust to secure the payment of his debts, and the deed is duly acknowledged and recorded, upon the death of the husband before any sale under the deed, or satisfaction of the debt secured, his widow is only entitled to dower in the surplus of the land remaining after satisfaction of the lien. She is not entitled to have one-third of the value of the whole land assigned to her out of the surplus remaining after the satisfaction of the lien created by the deed of trust. If the heir redeems the land, as he may do, she must pay an equitable proportion of the liens and encumbrances thereon which are paramount to her dower before she can be endowed of the whole land. Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

Mortgage for Purchase Money.—A widow is dowable in the surplus which remains after paying a mortgage debt,

even though the land was mortgaged for the purchase money. Heth *v.* Cocke, 1 Rand. 344; Gilliam *v.* Moore, 4 Leigh 30, 24 Am. Dec. 704; Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654; Daniel *v.* Leitch, 13 Gratt. 195; Robinson *v.* Shacklett, 29 Gratt. 99; Coffman *v.* Coffman, 79 Va. 504; Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800; Hunter *v.* Hunter, 10 W. Va. 321; George *v.* Cooper, 15 W. Va. 666; Spencer *v.* Lee, 19 W. Va. 179; Holden *v.* Boggess, 20 W. Va. 62; Reinhardt *v.* Reinhardt, 21 W Va. 76; Martin *v.* Smith, 25 W. Va. 579; Roush *v.* Miller, 39 W. Va. 638, 20 S. E. 663.

A purchaser of a tract of land on which there was a deed of trust to secure a debt retained the amount of the debt out of the purchase money for the purpose of paying it, but died owing a much greater amount than could be paid out of his personal estate. Held, that the widow may institute a suit in equity to have the land sold and the debt paid, and to have her dower out of the residue of the purchase money. Daniel *v.* Leitch, 13 Gratt. 195.

Right to Redeem.—A married woman who has relinquished her dower may redeem a mortgage, and thus prevent a disastrous foreclosure and sale of the property including her dower interest. Gatewood *v.* Gatewood, 75 Va. 407.

Liens Paramount to Wife's Right.—Where land is bona fide sold in the lifetime of a husband to satisfy a lien or incumbrance thereon paramount to the wife's contingent right of dower and such land sells for more than enough to satisfy such paramount claim or claims and the necessary costs and expenses, such contingent right of dower in the surplus remains a charge (not assignable in kind) on such land, unless the same is sold free and acquit from such contingency. Bassell *v.* Caywood, 54 W. Va. 241, 46 S. E. 159. See also, Hoy *v.* Varner, 100 Va. 600, 42 S. E. 690.

Land Covered by Two Deeds of Trust.—If a wife unite with her husband in a deed of trust on his land to secure the payment of a debt due by him, and subsequently the husband gives a second deed of trust on the same land in which the wife does not unite, and the land is sold under the second deed, but the purchase money is applied so far as need be to the extinguishment of the debt secured by the first deed, a court of equity will subrogate the purchaser to the rights of the creditor in the first deed, and, upon the death of the husband, will allow his widow dower in the surplus only remaining after the payment of the debt secured in the first deed of trust. She is not entitled to dower of the whole to be taken out of the surplus. Va. Code, § 2269. Land *v.* Shipp, 100 Va. 337, 41 S. E. 742.

Priority between Trustees.—The wife of the grantor not having joined in the first deed conveying land to secure a debt; but uniting in a second deed conveying the same land to secure another creditor, the second incumbrancer is entitled to the value of the wife's contingent right of dower in the land, to be paid out of its proceeds, as against and in preference to the first incumbrancer. Lewis *v.* Caperton, 8 Gratt. 148.

Liens Prior and Subsequent to Deed of Trust.—Where a deed of trust is executed in which the wife joins, and there are liens on the land both prior and subsequent to the trust deed, the wife has no contingent right of dower except in the surplus, after the trust lien is paid in full, and on this contingent right of dower the trust lien creditor has the first and only lien, there being but one deed of trust; and in such case the decree ought to provide that the land should be sold clear of the wife's contingent right of dower, if it appears at the sale it is necessary to pay the full amount of the trust lien. If not, it should be sold subject

to the dower. Barbour *v.* Tompkins, 31 W. Va. 410, 7 S. E. 1.

P. CROPS.

Chief Baron Gilbert tersely said: "If Baron sows land, dies before severance, the wife shall have the third part of the land so sown for her dower, for she shall not stay for her subsistence a whole year till the corn be removed." Engle *v.* Engle, 3 W. Va. 246.

Crops Severed before Assignment.—Since the widow is entitled at the death of the husband to be endowed of one-third of the land with the crop growing on it, so if the crop be severed before the assignment of dower, she is entitled to be endowed of the land in like manner, and of one-third of the crop thus severed, for by the severance the estate has been diminished in value to the amount of the crop. Engle *v.* Engle, 3 W. Va. 246.

E. devised his lands, subject to the dower of his wife, and prior to his death a crop of wheat had been sown thereon, which was harvested by the executor before a decree was had assigning dower. It was held, that as the widow was entitled at the death of the husband to be endowed of one-third of the land with the crop growing on it, so if the crop be severed before the assignment of dower she is entitled to be endowed of the land in like manner, and of one-third of the crop thus severed, for by the severance the estate had been diminished in value to the amount of the crop. Engle *v.* Engle, 3 W. Va. 246.

V. Priority between Dower and Other Incumbrances.

See also, ante, "Mortgaged Lands," IV, O.

A. IN GENERAL.

"A wife's right of dower is an emanation from the ownership of her husband, and subject to all its qualifications; though not to his alienations or incumbrances during the coverature, without her consent declared in the mode prescribed by law. Her right is dependent upon his, as existing at the inception of the coverture, or as acquired by him during its continuance. If he mortgage his land before marriage, her claim to dower is subordinate to the mortgage, and, if that be foreclosed, is completely divested. So if she unite, with the requisite solemnity, in his mortgage made after the marriage, the effect of a foreclosure is the same. If, during the coverture, he purchased mortgaged land, her title, like this, is subject to the incumbrance, and the foreclosure of it destroys both. The result is the same where an incumbrance is created by the very act of purchasing; for if the purchase money be unpaid and not secured, an equitable mortgage is embodied in the transaction itself, and if that be foreclosed by a sale of the property under the decree of a court of equity, the wife's right of dower is completely extinguished." Baldwin, J., in Wilson *v.* Davisson, 2 Rob. 405.

The right of dower, provided by law in behalf of a widow, is paramount to all conveyances, incumbrances, contracts, debts or liabilities of the husband executed or incurred by him during the coverture. Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130.

A wife's right of dower, whether inchoate or consummate, is an existing lien, and a covenant against incumbrances is broken by its existence. This lien is inferior to all liens which attached prior to the marriage, but superior to those acquired thereafter without her consent. Ficklin *v.* Rixey, 89 Va. 832, 17 S. E. 325, 37 Am. St. Rep. 891. See also, ante, "Nature and Incidents," III.

Liens Incurred before Marriage.—Where the owner of a tract of land has allowed the same to be incumbered by deeds of trust and judgment liens, and while it is in that condition he intermarries, such liens are paramount to said wife's right of dower on the de-

cease of her husband. Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620.

Where the owner of land which is incumbered by trust liens, judgment liens, and liens for the original purchase money, which liens are paramount to the dower right of his wife in the event of his death, sells said land to a third party, who pays off and discharges these liens as a part of the purchase money, he is subrogated to the rights of said lienors, and, if said liens absorb the entire purchase money, said vendor's widow is not entitled to dower out of said purchase money. Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620.

B. ATTACHMENT BEFORE SUIT FOR DIVORCE.

An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditor to be satisfied out of the attached effects, in preference to the claim of the wife. Jennings *v.* Montague, 2 Gratt. 350.

C. CONTRIBUTION OF DOWER INTEREST TOWARDS PAYMENT OF CHARGES ON LAND.

Where the owner of land charged with a legacy dies leaving a widow, she is not entitled to have the heirs' shares subjected to its payment, but her dower interest is chargeable with a sum equivalent to the annual interest on one-third of the debt, at compound interest, for the probable period of her life, ascertained from the tables of mortality. Harper *v.* Vaughan, 87 Va. 426, 12 S. E. 785.

D. LIEN OF INSURANCE COMPANY.

Where a husband insures property in the Mutual Assurance Society and dies seised, his widow takes her dower interest subject to the lien of the society. Shirley *v.* Mutual Assurance Society, 2 Rob. 705.

E. MECHANIC'S LIEN.

A mechanic's lien does not override the dower interest of the wife, but where she has joined in a deed of trust to secure the building fund company, the property should be sold out and out, and first applied to the debt due the company. But she has a contingent dower interest in the equity of redemption and, being a party to the suit in which the property is sold and therefore bound by the decree in the cause, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, before any part of it is paid over to the assignee of the building contract. Iaege *v.* Bossieux, 15 Gratt. 83, 76 Am. Dec. 189.

F. PURCHASE MONEY MORTGAGE.

See ante, "Mortgaged Property," IV, O.

Where it was stipulated in a contract to sell land that the vendee should execute a purchase money mortgage to the vendor, but such mortgage was not executed until ten months after the delivery of the conveyance, the dower of the vendee's widow is subject to such mortgage. Wheatley *v.* Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Where land is conveyed upon condition that the grantee shall pay the grantor's debts, and, by deed executed later on the same day, the grantee conveys the land to secure money loaned him to pay such debts, the grantee's widow is not entitled to dower in the land until said debts are paid, though she did not join in the trust deed. Coffman *v.* Coffman, 79 Va. 504.

A conveyance of land to a husband, who, as a part of the same transaction, executes a deed of trust to secure the unpaid purchase money, does not give the husband such a seisin of the land as will entitle his wife to dower, as against the grantee in the deed of trust; and the fact that the latter is an assignee of the vendor of the land does

not affect the principle. Hurst *v.* Dulaney, 87 Va. 444, 12 S. E. 800.

A widow's dower in lands is subject to a mortgage thereon for the purchase money. Hunter *v.* Hunter, 10 W. Va. 321.

Where land is conveyed to a party, who, at the same time by deed of even date, conveys the same to a trustee to secure the unpaid purchase money, the two deeds will be regarded as parts of the same transaction, and the seisin of the grantee in the first deed will be held to be instantaneous and transitory, and his widow will not be entitled to dower in the land against the vendor, though she did not join in the deed of trust, but she will be entitled to dower in the surplus after the payment of the purchase money so secured. George *v.* Cooper, 15 W. Va. 666.

A husband conveyed real estate to a trustee to secure the payment of a debt, and the wife united in the conveyance. After his death, a creditor's bill was filed to subject his real estate to the payment of his debts, and the said trust property was sold under a decree in said suit. Held, that the widow is not entitled to dower in the property so conveyed, or in the proceeds thereof, unless there is a surplus after the payment of said trust debt and such costs as are properly chargeable to the fund arising from the sale of the property so conveyed. Reinhardt *v.* Reinhardt, 21 W. Va. 76.

Where a conveyance of the legal title is made to a purchaser in order that he may, by deed of trust made at the same time, pass the title to the trustee in the trust deed to secure the payment of such purchase money to the cestui que trust who has paid it for him, the two deeds are to be treated as parts of the same transaction, made to retain on the face thereof a lien on the land for such unpaid purchase money, and the right of dower of the widow of the purchaser is subordinate to the lien of the deed of trust. Roush *v.* Miller, 39 W. Va. 638, 20 S. E. 663.

G. VENDOR'S LIEN FOR PURCHASE MONEY.

See ante, "Mortgaged Lands," IV, O.

A widow is not entitled to dower in lands subject to a vendor's lien, except as to the residue after the satisfaction of such lien. Martin *v.* Smith, 25 W. Va. 579; James *v.* Upton, 96 Va. 296, 31 S. E. 255. Prior to the statute, Va. Code, 1849, p. 474, § 3; Va. Code, 1887, § 2269, a vendor of land conveyed the same to the vendee in fee simple and received a part of the purchase money, taking no security for the residue. On a bill against the vendee to enforce the implied equitable lien of the vendor, a sale was made of the land, and the proceeds were more than sufficient to satisfy the vendor's claim. Judgment creditors of the vendee claimed the surplus, and with his consent a decree was entered accordingly. After the vendee's death, his widow claimed dower in the land. Held, that she was not entitled to dower in such land. Wilson *v.* Davisson, 2 Rob. 384.

If land be conveyed to a husband who, as a part of the same transaction, reconveys it to a trustee to secure only two-thirds of the purchase money, although none of the purchase money is paid, and he subsequently sells the land to his grantor for the amount agreed to be paid by him and conveys the same to his grantor by a deed from himself and wife which is lost before being admitted to record, his widow has no claim on the land, whatever may be her claim on the one-third of the purchase price for which no lien was reserved. Building, L. & W. Co. *v.* Fray, 96 Va. 559, 32 S. E. 58, 4 Va. Law Reg. 838.

A husband who enters into an agreement for the purchase of land, takes possession of it, and pays part of the purchase price, is beneficially seised of the land to the extent that he has paid the purchase price, although he has

not acquired the legal title; and his widow is entitled, under the provisions of § 2429 of the Code, to dower in the land, subject to the lien upon it for the unpaid purchase price, whether he died possessed of the land, or had aliened it during the coverture without her concurrence in the mode prescribed by law. If so aliened, however, the widow's right to dower is subject to the provisions of § 2278 of the Code. James *v.* Upton, 96 Va. 296, 31 S. E. 255.

Suit by Vendor—Parties.—Where a vendor of land who has retained the title files a bill against the widow and infant children of the vendee for a sale of the land to satisfy his debt and the widow answers claiming dower in the land subject to the vendor's lien, judgment creditors of the vendee may make themselves parties to the cause and have the land, subject to the vendor's lien and the widow's dower, applied to the payment of their debts. Simmons *v.* Lyles, 27 Gratt. 922.

Lien Lost by Taking Security.—Where the vendee gives a bond and security for the purchase money for land, the vendor's lien is not retained, and the vendee's widow is entitled to dower in such land. Blair *v.* Thompson, 11 Gratt. 441.

It is error to decree the sale of the whole of a tract of land subject to the widow's dower, when it appears that there is a vendor's lien on one-twelfth interest thereof. The one-twelfth interest should have been sold free from dower. Sinnett *v.* Cralle, 4 W. Va. 600.

H. JUDGMENT RENDERED BEFORE MARRIAGE.

Judgments against a man before marriage are paramount to the claim of his widow to dower. Offield *v.* Davis, 100 Va. 250, 40 S. E. 910.

VI. How Dower Is Barred or Relinquished.

A. IN GENERAL.

Mode Pointed Out by Law.—"Dower being an institution of positive law, can only be defeated or barred by some of the modes pointed out by the law." Lewis *v.* Apperson, 103 Va. 624, 49 S. E. 978.

The title of a widow to dower in her husband's land being derived through the husband, is liable to be defeated by every subsisting claim or incumbrance existing before the inception of her right, and which would have defeated the husband's seizin. Burdine *v.* Burdine, 98 Va. 524, 36 S. E. 992.

B. BY DIVORCE.

A divorce a vinculo matrimonii, although for a supervenient cause, or for a cause which, while it existed at the date of the marriage, is yet by statute specially declared to dissolve the marriage only from the time of the sentence, operates as a bar to dower. Porter *v.* Porter, 27 Gratt. 599; Harris *v.* Harris, 31 Gratt. 13; Cralle *v.* Cralle, 79 Va. 182. See 2 Min. Inst. (4th Ed.) 137.

A divorce a mensa et thoro, where there is a decree for the perpetual separation of the parties, has the same effect upon the rights of property which either party may acquire after the decree as a divorce a vinculo matrimonii would have. Va. Code, 1887, § 2264; Marshall *v.* Baynes, 88 Va. 1040, 14 S. E. 978.

Upon decreeing the dissolution of a marriage, whether from the bond of matrimony or from bed and board, the court may make such further decree as it may deem expedient in regard to the estate, etc., of the parties. Va. Code, 1887, § 2263. See Cralle *v.* Cralle, 84 Va. 198, 6 S. E. 12; Cralle *v.* Cralle, 79 Va. 182; Francis *v.* Francis, 31 Gratt. 283; Harris *v.* Harris, 31 Gratt. 13; Porter *v.* Porter, 27 Gratt. 599; Carr *v.* Carr, 22 Gratt. 168; Bailey *v.* Bailey, 21 Gratt. 43.

Deed of Separation.—A deed between husband and wife alone, by which they attempt to dissolve their

marital relations, and the wife, who has no separate estate, releases directly to her husband her inchoate right of dower in his estate, for a money consideration paid by him, is void as to the wife, and, upon the death of the husband, she may recover dower in his lands, at law or in equity, without accountability for the money, all of which she had spent in his lifetime. Land *v.* Shipp, 98 Va. 284, 36 S. E. 391.

The contingent right of dower of a wife in her husband's lands is not a separate estate within the meaning of ch. 103, Va. Code, 1887, and the wife, having no other estate with reference to which she might contract, is not bound by the provisions of a deed of separation, whereby she released directly to her husband her dower in her lands. Sections 2501 and 2502 of the Code relate to deeds from husband and wife to third parties. Land *v.* Shipp, 98 Va. 284, 36 S. E. 391.

C. BY DESERTION OR MISCONDUCT OF WIFE.

The provision of W. Va. Code, 1868, ch. 65, § 7, declaring that "if a wife voluntarily leave her husband without such cause, as would entitle her to a divorce from the bond of matrimony, or from bed and board, and without such cause and of her own free will be living separate and apart from him at the time of his death, she shall be debarred of her dower and inheritance," is not restricted, but embraces the case of a widow, who, nine years before the passage of such act, had left her husband without such cause as is specified in the act, and which leaving or desertion continued for two years after the passage of the act until his death. Thornburg *v.* Thornburg, 18 W. Va. 522. For a similar provision in Virginia, see Va. Code, 1887, § 2273.

When Wife Justified in Leaving Husband.—If after marriage a husband become an habitual drunkard his wife is justified in leaving and living separate and apart from him, and will not be thereby barred of her dower in his estate. She need not wait until she loses her health, her limbs or her life. Stuart *v.* Neely, 50 W. Va. 508, 40 S. E. 441.

D. BY ANTENUPTIAL AGREEMENT.

By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money if she survived him, which were to be in full compensation for her dower. Held, that this agreement barred her of her dower in her husband's real estate. Findley *v.* Findley, 11 Gratt. 434. See McReynolds *v.* Counts, 9 Gratt. 242.

By an antenuptial contract, the wife agreed that she would relinquish all right, title or interest in her prospective husband's estate; that she would never claim at law, or otherwise, any part of his property by reason of the marriage; that she would never in the future acquire any property of her prospective husband further than he might convey to her by deed or will; and that he should at all times during his life have the right to convey any part of his real estate without her consent. Held, that this contract was no bar to her right of dower. Hinkle *v.* Hinkle, 34 W. Va. 142, 11 S. E. 993.

E. BY POSTNUPTIAL AGREEMENT.

The dower interest of the wife constitutes a valuable consideration which will support a postnuptial settlement; and such settlement, made in consideration of the surrender of such dower interest, may be supported against the claims of creditors. Nor will the fact that such settlement was fraudulently made affect this, because it would be a sufficient answer to the charge of fraud on the part of the husband and wife in executing the deed of settlement to say that if there was fraud, and she participated in it, still it will not be imputed to her by reason of her coverture. Strayer *v.* Long, 86 Va. 557, 10 S. E. 574; Lewis *v.* Caperton, 8 Gratt.

150; William & Mary College *v.* Powell, 12 Gratt. 372; Blanton *v.* Taylor, Gilmer 209; Taylor *v.* Moore, 2 Rand. 563; Harvey *v.* Alexander, 1 Rand. 219, 10 Am. Dec. 519. See also, Harrison *v.* Carroll, 11 Leigh 476; Lee *v.* Bank, 9 Leigh 200.

It is a settled doctrine, repeatedly recognized by this court, that a postnuptial settlement in favor of a wife, upon a valuable consideration, is good in equity, though void at common law; and the relinquishment of the wife's right of dower is a good consideration for such a settlement as against creditors of the husband, to the extent of the value of the dower. Harvey *v.* Alexander, 1 Rand. 219; Quarles *v.* Lacy, 4 Munf. 251; William & Mary College *v.* Powell, 12 Gratt. 372; Davis *v.* Davis, 25 Gratt. 587; Yates *v.* Law, 86 Va. 117, 9 S. E. 508; De Farges *v.* Ryland, 87 Va. 404, 12 S. E. 805. Indeed, as was said in Davis *v.* Davis, courts of equity view such settlements liberally in favor of the wife, and will not interfere at the instance of creditors, unless the estimated value of the dower interest relinquished be shown to be excessive. Ficklin *v.* Rixey, 89 Va. 832, 17 S. E. 325.

Therefore we may conclude that the rule of law with us is that a postnuptial settlement by the husband in favor of the wife, or wife and children made in pursuance of a fair and definite contract, by parol or otherwise, and for a valuable consideration, such as the relinquishment of dower actually made by the wife, will be held good against his general creditors. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

Time for Bringing Suit.—If a married woman relinquishes her contingent right of dower in land, under a definite promise, verbal or written, made at or about the time by her husband, that other property shall be settled on her in lieu of or as compensation for the interest thus relinquished, such settlement will be good against creditors having no specific lien, though made after such relinquishment. But if the value of the property settled exceeds the value of the dower relinquished, the deed should be set aside as to the excess, and supported as to the residue. Yet the impeaching creditor, in order to set it aside as to such excess, must, under our statute, bring his suit within five years, unless he shows that the settlement was fraudulent in fact, as distinguished from being merely fraudulent in law. Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

Wife's Declarations.—The declarations of a wife at the time she executes a deed or at other times, that she has executed or does execute the deed because her husband had promised that he would settle or because he had settled upon her certain property derived from her father's estate is not sufficient evidence of a contract between them for such a settlement in consideration of her relinquishment of her right of dower in her husband's land, and thus to support such settlement if made, against creditors or incumbrances, even to the extent of a reasonable compensation for the right of dower which she relinquished. Lewis *v.* Caperton, 8 Gratt. 148.

Rescinded Only as to Excess.—Where an insolvent husband, in consideration of the relinquishment by his wife of her inchoate right of dower, settles on her certain property, such settlement will not be disturbed in behalf of creditors, unless it appears to be grossly excessive; and then, only as to the excess. Burwell *v.* Lumsden, 24 Gratt. 443, 18 Am. Rep. 648.

Where Settlement Is Annulled.—Where a wife was induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain property be settled upon her in consideration of her thus parting with her rights, she has the right, if such settlement is set aside and annulled, to be placed in the same position and restored to the same rights with which she was invested by

law before she united in the deed of which the specific settlement was the consideration, provided this can be done without prejudice to the rights of creditors or purchasers. Davis *v.* Davis, 25 Gratt. 587.

Where a wife relinquishes her right of dower in certain land belonging to her husband in consideration of his conveying other property to her, the value of such dower, where the latter conveyance is held invalid, should be saved to her in opposition to the claims of her husband's creditors. Quarles *v.* Lacy, 4 Munf. 251.

Settlement Held Good.—In March, 1862, H. sells the farm on which he lives for $22,500, a confederate contract. His wife refuses to join in the deed, and he proposes to her to buy land and build on it, and have it conveyed in trust for her and her children; and upon that consideration she does execute the deed. H. does buy the land for $3,200, and builds on it; and they live on it and it is recognized as hers; but the deed to the trustee is not made until April, 1867. At the time of the contract H. is not indebted seriously, and these debts are paid off before April, 1867. In April, 1867, H. qualifies as administrator of D.'s estate and wastes it, and dies in 1871 insolvent. Upon bill by the distributees of D. to set aside the deed, it was held, at the time of the agreement in 1862, H. being forty years of age and his wife thirty-two, according to the tables of mortality, the land settled on his wife was at that time in excess of the value of her contingent right of dower in the farm sold; but H. having died before the suit was brought to set aside the deed, it is not in excess of her right of dower in the farm sold by H., after his death; and looking at all the facts in the case, the settlement is not more than a just equivalent for the interest relinquished by the wife. Payne *v.* Hutcheson, 32 Gratt. 812.

Power to Dispose of Settlement.—By postnuptial deed of settlement (reciting that husband had sold his wife's estate, and she had joined him in conveyances thereof, under a promise from him to settle an equivalent on her, therefore) husband conveys real estate to a trustee, 1. to the separate use of wife for life, unless she should, in writing under her hand, direct trustee to sell and convey the whole or any part of trust subject, in which case he should hold the proceeds of sale subject to the separate use and order of wife; 2. after wife's death, to the use of husband for life; and 3. after husband's death, to and for the use of the devisees or heirs of wife, to be divided and conveyed to them in such portions as she shall by will direct, or the law of the land in that case made and provided shall determine. By mortgage afterwards executed by husband and wife (the wife duly joining, but the trustee in the settlement nowise joining, in the same) the same real estate is mortgaged to creditors of husband to secure a just debt due from him. It was held, that under the deed of settlement, the wife has full power to dispose of the whole estate in the trust subject, by deed in her lifetime, duly executed by her husband and her according to the statute of conveyances, as well as by will; and, therefore, that the mortgagees are entitled to have the whole estate in the trust subject sold for satisfaction of their debt. Lee *v.* Bank of the United States, 9 Leigh 200.

Sale of Contingent Dower to Husband.—If a husband purchase his wife's contingent right of dower in his real estate, and secures the purchase price along with other debts by a deed of trust on his real estate, on the death of the wife intestate, the debt secured to her becomes extinguished, as the husband is her sole distributee, and the deed of trust stands as a security for the other creditors secured. The husband can not assign such debt to another person to the prejudice of the other creditors secured. Allen *v.* Pat-

rick, 97 Va. 521, 34 S. E. 451, 5 Va. Law Reg. 523.

"A wife parting with her dower right in real property forms a sufficient consideration for a subsequent deed conveying other property for her benefit." In Taylor *v.* Moore, 2 Rand. (Va.) 563 (1824), the question was fully considered and discussed. The court holds that "if a married woman relinquishes her dower in lands under a promise that other property shall be settled on her as a compensation, such settlement will be good, although made after the relinquishment," here five years after the verbal agreement; "but, if the value of the property settled exceeds the value of the dower relinquished, the deed should be set aside as to the excess and supported as to the residue." Glascock *v.* Brandon, 35 W. Va. 84, 12 S. E. 1102.

F. BY PARTITION SALE DURING COVERTURE.

A partition sale during coverture of land held by a woman's husband in common, made by order of court, bars the wife's contingent right of dower therein, although she was not a party to the suit. Va. Code, 1887, § 2564; Lee *v.* Lindell, 22 Mo. 202, 64 Am. Dec. 262; Weaver *v.* Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Washb. on Real Property (4th Ed.) 191, 199.

Widow Should Be Party to Suit.—Where the widow of the person who died seized of the lands of which partition is sought, is alive, and entitled to dower, she should be a party to the suit, and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the lands subject to her right of dower. Custis *v.* Snead, 12 Gratt. 260.

Heirs Excluded from Dower Lands.—Though there may be cases in which a court of equity would, in her lifetime, decree a division of the property assigned to the widow for dower; in a suit for partition brought during her life, in which some of the children refused to bring their advancements into hotchpot, the decree, though broad enough in its terms to exclude them from any share of the dower lands, will be restricted to their interest in the two-thirds then divided, unless the pleadings make a case for the division of the dower land. Persinger *v.* Simmons, 25 Gratt. 238. See also, the title ADVANCEMENTS, vol. 1, p. 195.

Division of Dower Property.—The dower of a widow in the land of her husband is assigned to her; and upon bill filed the other two-thirds of the land is divided among ten of the twelve heirs; the other two refusing to bring their advancement into hotchpot. Upon the death of the widow, the heirs who refused to come into the first division may come into the division of the dower property. Persinger *v.* Simmons, 25 Gratt. 238.

G. BY STATUTE OF LIMITATIONS.

The statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues. Smith *v.* Wehrle, 41 W. Va. 270, 23 S. E. 712; Morris *v.* Roseberry, 46 W. Va. 24, 32 S. E. 1019. See Mullan *v.* Carper, 37 W. Va. 215, 16 S. E. 527.

When Limitation Does Not Run.—But where the widow is in possession and taking rents and profits in common with the heirs, the statute does not run against her dower right while so in possession Sperry *v.* Swiger, 54 W. Va. 283, 46 S. E. 125.

Lapse of Thirty Years.—A bill for profits of dower was filed in 1829, and was pending in 1859, but was not prosecuted until 1881, with no excuse on record for such failure. The evidence showed that any decision must be conjectural, and the danger of injustice being almost certain, the original transactions being obscured by time, and

evidence having been probably lost; it was held, the bill should be dismissed. Dismal Swamp Land Co. *v.* Macauley, 85 Va. 16, 6 S. E. 697.

H. BY JOINTURE.

See also, the title WILLS.

1. In General.

Definition.—Jointure at common law consists of an estate or interest in land to take effect in possession or profit immediately on the death of the husband, in satisfaction of dower, and it must so appear in the deed. It is an absolute bar only when made before marriage. If made after marriage it only puts the wife to her election whether to accept the provision or claim dower. The only difference made by statute in Virginia is that the jointure may be of personal as well as real estate. Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 6 Va. Law Reg. 158.

Power to Bar Dower.—Before the enactment of a statutory provision upon the subject, it was held, that a widow could not be barred of her dower by a devise of an estate for years, and that a provision in personal estate, could not bar her dower in real estate. Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712. See also, Douglas *v.* Fray, 1 W. Va. 26. See also, Gregory *v.* Gates, 81 Va. 262.

But by the Revised Code of 1819, vol. 1, ch. 110, § 4, it was provided, that if any estate real or personal intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise thereof, either real or personal estate alone or both combined, could make a jointure. See § 2270, Va. Code, 1904. And see Craig *v.* Walthall, 14 Gratt. 518; Land *v.* Shipp, 98 Va. 284, 36 S. E. 391.

Essentials to Bar Dower.—If, after the husband's death, the widow accepts a provision made for her in lieu of dower, she bars herself of dower, but if she has received the provision during her husband's lifetime and has spent or wasted it, she may take her dower as if no provision had been made. It is necessary, in order to estop her, that she should have enjoyed the provision, or a part of it at least, after her husband's death. Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 6 Va. Law Reg. 158.

Whether Devise or Bequest Presumed to Be in Addition to Dower or in Lieu Thereof.—Prior to the act of 1866, the statute, Va. Code, 1860, ch. 110, § 4, provided that "if any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate or the residue thereof." This statute was construed in Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, where it was held, that a provision for the wife, to bar her dower, must not only have been so intended, but that such intent must appear from the conveyance or devise, either by express words or by necessary implication. See Bolling *v.* Bolling, 88 Va. 524, 14 S. E. 67; Craig *v.* Walthall, 14 Gratt. 518; Dixon *v.* McCue, 14 Gratt. 540; Nelson *v.* Kownslar, 79 Va. 468; Douglas *v.* Fray, 1 W. Va. 26; Shuman *v.* Shuman, 9 W. Va. 50.

Testator, after devising some real estate of apparently trivial value, and emancipating one slave, gave his wife, besides and above the use of one-third of his real and personal estate, two men slaves with the horses and carts they drove, to be her own proper estate and to be at her disposal, also his carriage and horses, and all his furniture; and then gave his son all the residue of his estate, real and personal, after payment of his just debts, to him and his heirs; with a limitation over to others, of the estate thereby given to the son, in case he should die before twenty-one years of age and without heirs of his body. It was held, that the wife was entitled to a third of testator's estate, real and personal, pre-

cisely as the law would have given it to her, and to the specific legacies bequeathed to her, in addition thereto. Newton *v.* Poole, 12 Leigh 112.

To change the rule of construction, as laid down in Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, the act of 1866 was passed, which amended the statute of 1860 by adding thereto these words: "And every such provision, by deed or will, shall be taken to be in lieu of dower, unless the contrary intention plainly appears in such deed or will, or in some other writing signed by the party making the provision." Acts, 1865-66, p. 160; Va. Code, 1873, ch. 104, § 4; Va. Code, 1887, § 2270; Bolling *v.* Bolling, 88 Va. 524, 14 S. E. 67; Nelson *v.* Kownslar, 79 Va. 468.

A marriage settlement of land and slaves for the wife's jointure, "in full satisfaction of her dower or thirds in any lands, tenements, and hereditaments, whereof the husband should, at any time during his life be seised of any estate of inheritance," is no bar to her right of dower in the slaves, though made before the act of 1792, declaring slaves to be personal property. Ball *v.* Ball, 3 Munf. 279.

By a marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed in lieu of dower; and if she survived and had no child by him, she was to have all the negroes which came by her in her absolute right. She did survive and had no child by him. Held, that she was entitled to the dower slaves in addition to her own before the marriage. Hearne *v.* Roane, Wythe 90.

Land Conveyed by Husband.—A husband, during the coverture, sold and conveyed land with general warranty, but his wife did not join in the deed. By his will he gave his whole estate, real and personal, to his wife for her life, remainder to his children. It was held that she was entitled to take under the will, and also to have her dower in the land sold. Higginbotham *v.* Cornwell, 8 Gratt. 83, 56 Am. Dec. 130. See also, Shuman *v.* Shuman, 9 W. Va. 50.

Intention to Create Jointure—When Parol Evidence Admissible. — Under the eleventh section of the act of assembly relative to dower, 1 Rev. Va. Code, p. 171, any estate conveyed by deed or will for a wife's jointure in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence dehors the deed or will is admissible as to the relative situation of the parties and circumstances of the testator from which such intention may be inferred. Ambler *v.* Norton, 4 Hen. & M. 23.

In construing a will to ascertain whether a provision in it is intended by the testator as in lieu of dower and in determining whether it be a jointure, the situation of the testator and the circumstances surrounding him when he wrote the will, may be looked to by the court. Tracey *v.* Shumate, 22 W. Va. 474; Dixon *v.* McCue, 14 Gratt. 540; Jarrett *v.* Johnson, 11 Gratt. 336; Ambler *v.* Norton, 4 Hen. & M. 23.

The intention of the testator to exclude the wife's dower may be either express or implied. But if not expressed in the will then, in order to ascertain the implied intention, it is not only proper but absolutely essential that the situation of the testator, the property owned by him, and the surrounding circumstances likely to influence him in the disposition of his property should be known. Atkinson *v.* Sutton, 23 W. Va. 197.

Real or Personal Estate May Constitute Jointure.—Under 1 Rev. Va. Code, 1819, ch. 110, § 4, providing that, "if any estate, real or personal, intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof," either real or personal estate alone or both combined

may make a jointure. Craig *v.* Walthall, 14 Gratt. 518. See also, Land *v.* Shipp, 98 Va. 284, 36 S. E. 391, 6 Va. Law Reg. 158. But it was held, before the enactment of the above statute, that a widow could not be barred of her dower by a devise of an estate for years, and that a provision in personal estate could not bar her dower in real estate. Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712.

Jointure Need Not Be Exempt from Incumbrances—Loss of Jointure.—It is not essential to the validity of a jointure that it should be exempt from any incumbrance; the widow, if evicted of her jointure, having still a right to claim her dower. Ambler *v.* Norton, 4 Hen. & M. 23.

Plea of Jointure in Bar of Dower—Necessary Allegations.—In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and indentity of the land be described with reasonable certainty. Ambler *v.* Norton, 4 Hen. & M. 23.

In averring a jointure in bar of dower, the failure to state in the plea that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, and is not sufficient to authorize the reversal of a judgment for the tenant, the defendant having failed to assign it is a cause of demurrer. Ambler *v.* Norton, 4 Hen. & M. 23.

Nor is it necessary in such plea to state expressly that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law, it being incumbent on the demandant to show in his replication that any intervening estate existed, or that the jointure was subject to any condition other than the law imposes on a dowress. Ambler *v.* Norton, 4 Hen. & M. 23.

Rights of Husband's Creditors.—Where a life estate in lands, given to a widow in lieu of dower is of less value than her dower would have been, it is not chargeable with any of the debts of her deceased husband. Gaw *v.* Huffman, 12 Gratt. 628.

When Provision Takes Effect.—Under the statute, as well as at common law, a provision in lieu of dower is to take effect at the death of the husband. See Land *v.* Shipp, 98 W. Va. 284, 36 S. E. 391.

2. Election of Widow to Waive Jointure and Demand Dower.

Under Va. Code, 1860, no question of election between dower and a provision in lieu thereof arises, unless the intention to bar is clear. But under Va. Code, 1873, unless the intention plainly appears not to bar dower, the election must be made by the widow between dower and the provision as prescribed by § 5, ch. 106. Nelson *v.* Kownslar, 79 Va. 468. See Va. Code, 1887, § 2271; Shuman *v.* Shuman, 9 W. Va. 50.

A husband, during the coverture, conveys a tract of land, by deed, in which his wife does not join, and afterwards makes his will, which is admitted to probate, in which will he makes a liberal provision for his wife, both in real and personal property; the widow does not renounce the provisions of the will within one year, but in fact accepts and approves of the provisions of the will in her behalf. It was held, that such provision and failure to renounce the provisions of the will does not necessarily exclude the widow's right to dower in the land conveyed by her husband. Shuman *v.* Shuman, 9 W. Va. 50.

The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower as to any other case. One entitled to a benefit under an instrument must, if he claims that benefit, abandon every right which, if

asserted, would defeat, even partially, the provisions of the instrument. If the widow's taking dower would interfere with any of the provisions of the will, she must elect. Rutherford *v.* Mayo, 76 Va. 117; Dixon *v.* McCue, 14 Gratt. 540.

When and How Widow Must Renounce—Effect of Renunciation.—When any provision for a wife is made in her husband's will, she may, within one year from the time of the admission of the will to probate, renounce such provision. Such renunciation shall be made either in person before the court in which the will is recorded, or by a writing recorded in such court, or the clerk's office thereof, upon such acknowledgment or proof as would authorize a writing to be admitted to record. If such renunciation be made, or if no provision be made for her in the will, she shall have such share of her husband's personal estate as she would have had if he had died intestate; otherwise, she shall have no more thereof than is given her by the will. Va. Code, 1887, § 2559; W. Va. Code, 1899, ch. 78, § 11, p. 713. See Noel *v.* Garnett, 4 Call 92; Blunt *v.* Gee, 5 Call 481; Taylor *v.* Browne, 2 Leigh 419; Dupree *v.* Cary, 6 Leigh 36; Kinnaird *v.* Williams, 8 Leigh 400, 31 Am. Dec. 658; Cocke *v.* Philips, 12 Leigh 248; Findley *v.* Findley, 11 Gratt. 434; Nelson *v.* Kownslar, 79 Va. 468; Douglas *v.* Feay, 1 W. Va. 26; Shuman *v.* Shuman, 9 W. Va. 50; Wallace *v.* Wallace, 15 W. Va. 722; McMechen *v.* McMechen, 17 W. Va. 683; Anderson *v.* Piercy, 20 W. Va. 282; Cunningham *v.* Cunningham, 30 W. Va. 599, 5 S. E. 139; McGlaughlin *v.* McGlaughlin, 43 W. Va. 226, 27 S. E. 378.

Where the widow renounces the will of her husband, who has no child alive, she is entitled to dower in his slaves and a moiety of his other personal estate in absolute property, although he left no grandchildren. Bernard *v.* Hipkins, 6 Call 101.

Where a widow, under a mistake as to her rights under the will of her husband, kept possession of the land for five years, cultivated it and took a legacy of $500 to aid her in managing the farm, it was held that she had not elected to take under the will but might still have her dower assigned to her. Dixon *v.* McCue, 14 Gratt. 540.

Renunciation Made in Open Court.—The renunciation of a will, by the widow, is equally as void when made in person, in open court, and no record made thereof, as if made in pais, or by writing not recorded, or before any other court than that in which the will is recorded. Douglas *v.* Feay, 1 W. Va. 26.

A widow can not effectually renounce the provision made for her by the will of her husband, so as to entitle herself as distributee, but by declaration made within one year after the husband's death, before the general court, or court having jurisdiction of the probate of the will, or by deed executed in the presence of two or more credible witnesses. Kinnaird *v.* Williams, 8 Leigh 400.

Election by Failure to Renounce Husband's Will.—Where the widow does not renounce her husband's will within the prescribed period, she is not entitled to dower in the undevised slaves. Noel *v.* Garnett, 4 Call 92.

Where a widow does not renounce her husband's will within one year after his death, she loses her distributive share of the personal estate and is confined to the provisions of the will; but is entitled to her dower in the lands. Blunt *v.* Gee, 5 Call 481.

A testator died in 1862, leaving a considerable estate in lands, slaves, choses in action, etc. He gave to each of his five children $1,000 in money or land, and to the widow all the residue, durante viduitate, or, if she married, one-half of the same. She did not renounce the will, but held the property under the will for thirteen years. Held, that the provision was intended as her jointure under the statute, Va.

Code, 1860, ch. 110, § 4, and that she had elected to take it in lieu of dower. Rutherford *v.* Mayo, 76 Va. 117.

By a will probated in 1873, a testator bequeathed $20,000 in bank stocks to his wife, directing that the residue, after the payment of his debts, should go to his wife and children. The value of the property was so much depressed by the financial panic of 1873 that the assets became less than the debts and the bank stock worthless. The widow never renounced the will and did not claim dower until 1877. Held, that the widow having declined for over four years to renounce the will and claim the provisions made for her by the law, and having with full knowledge of the facts elected to accept the provisions made for her by the will can not now —even though she has been lawfully deprived of her jointure—be allowed to revoke her election and have dower, especially after the realty has been sold to innocent purchasers under decrees in a suit to which she was a party. Cooper *v.* Cooper, 77 Va. 198.

To bar a widow's dower right for failure to renounce her husband's will, the will must make a provision for her use and benefit, and must be intended by the testator to be in lieu of dower. Sperry *v.* Swiger, 54 W. Va. 283, 46 S. E. 125.

In Findley *v.* Findley, 11 Gratt. 434, the court said: "The appellees can not assert her paramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. Having made her election to take the first, she must give up the last to indemnify the parties who are disappointed by her election. Mitchells *v.* Johnsons, 6 Leigh 461; McReynolds *v.* Counts, 9 Gratt. 242." See also, Cowan *v.* Epes, 2 Pat. & H. 520; Morriss *v.* Garland, 78 Va. 215.

An infant jointress may refuse the jointure after her husband's death, and take her dower; and though she may assent to a settlement of her personalty, yet that is because, without such settlement, it would at once vest in the husband in absolute property. 3 Atk. 612. Thomas *v.* Gammel, 6 Leigh 9.

Effect of Renunciation.—The renunciation of a will by a widow will not be allowed to break in upon the arrangements of the will, and to disappoint the interests of others under her husband's will, further than is absolutely necessary. In all other respects, but as regards her, the will ought to be executed as nearly as possible according to the wishes and intention of the testator. Anderson *v.* Piercy, 20 W. Va. 282; Findley *v.* Findley, 11 Gratt. 434.

Testator, after giving large pecuniary legacies to one son and three daughters, devised the land on which he lived to his wife for life; and bequeathed her absolutely, all slaves, furniture, plantation utensils and stock on the premises, that is, she should enjoy them during life, and then dispose of them among his lineal descendants as she should think proper; and then he directed all the residue of his estate, real and personal to be kept together for the benefit of his five sons till the youngest come of age, to be then divided equally between them; the widow renounced the will, and took her dower of testator's real and distributive share of the personal estate, and died without executing the power of appointment vested in her by the will. It was held, that the remainder of the real estate expectant on the life estate devised to the wife, is not subject to the power of appointment vested in her, and being undisposed of by that clause of the will, passes by the residuary clause to the five sons. Mitchells *v.* Johnsons, 6 Leigh 461.

Appropriation of Property Given Up to Indemnify Legatees.—The widow can not assert her peramount claim to distribution against the will, and also claim the provision, or any part of it, made for her by the will. If she elects to take the first, she must give up the

last to indemnify the parties who are disappointed by his election. Findley *v.* Findley, 11 Gratt. 434; Mitchells *v.* Johnsons, 6 Leigh 461; Kinnaird *v.* Williams, 8 Leigh 400, 31 Am. Dec. 658; McReynolds *v.* Counts, 9 Gratt. 242; Morriss *v.* Garland, 78 Va. 215; Nelson *v.* Kownslar, 79 Va. 468.

3. Conflict of Laws.

The provisions of Va. Code, 1887, § 2270, do not change the common-law rule that a will of personalty must be construed according to the lex domicilii in which it was made; and where one domiciled in New York bequeathed personal property to his wife, but made no disposition of real estate in Virginia, and there was nothing in the will incompatible with her claim to dower, the testator's intent must be measured by the common-law rule in New York, to the effect that the provision would not be in lieu of dower unless a different intent was expressed in words, or clearly shown on the face of the will. Bolling *v.* Bolling, 88 Va. 524, 14 S. E. 67.

I. BY WILL.

See ante, "By Jointure," VI, H. See generally, the title WILLS.

J. BY DEED.

1. Of Husband.

A husband has no power to alien property of which he was beneficially seized of an estate of inheritance to the prejudice of his widow's right to dower. For nothing is better settled than that after the right of dower has once attached the husband can not, without his wife's concurrence, defeat that right by an alienation of the land. James *v.* Upton, 96 Va. 296, 31 S. E. 255. See also, Gayle *v.* Hayes, 79 Va. 542.

A widow is entitled to dower in kind in lands of her husband aliened during the coverture by a conveyance in which she does not unite, or to the interest provided in lieu thereof by § 2278 of the Code. This right continues until it has been waived, released, or satisfied. The right to dower in kind is not absolutely merged in a mere personal decree for such interest, and an ineffectual effort, by execution or by a suit in chancery, to enforce such a personal decree, made in a prior suit to recover dower, is no bar to an independant suit against the heirs of the alienee to recover dower in kind, and damages for its detention. If, in the last-mentioned suit, the heirs of the alienee have the right to make a second election under § 2278 to pay the interest therein provided, they should be required to pay all arrears of interest remaining unpaid, but if the bill to recover dower in kind makes no mention of the previous proceedings, and dower in kind is directed, damages for detention thereof can only be allowed from the institution of the suit. Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298.

If the appellant had joined in the deed, she would have released her dower, and that she did not, tends to show that a release was not intended or considered. She joined in the deed for the two-thirds, and thus relieved it, but this does not relieve the other, in absence of intention to do so. It seems, therefore, apparent that the prima facie case is with the appellant, and the creditors have failed to rebut it. Gay *v.* Lockridge, 43 W. Va. 267, 27 S. E. 306.

Where a widow's dower is a charge on a certain tract of land, the burden is on the purchaser of the whole or a part thereof, or those claiming under him, to show that such purchase was made free and acquit from such dower. Gay *v.* Lockridge, 43 W. Va. 267, 27 S E. 306.

Section 2278 of the Code, allowing an alienee of a husband and those claiming under him to prevent recovery of dower in kind by the widow of the husband, upon payment of interest as therein specified, was enacted for the benefit of alienees, independent of the widow's wishes, but to have the

benefit of that section, the alienee must not only elect to pay the annual interest therein provided, but must actually pay it. Such payment is the condition and the consideration upon which an alienee's right to the continued possession of her interest in the land depends. Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298.

2. OF Wife.

A tract of land is conveyed to a husband and R., his wife, jointly; the husband dies intestate leaving children; and the said R., his widow, being his administrator, then executes a deed to a third party for said land, in the premises of which she is mentioned as "R., in her own right as widow, and also as administratrix;" the grant in the deed is of the land without qualification and the deed is signed, "R. in her own right, R. as administratrix." It was held, that said deed operates as a conveyance not only of the dower interest of the said widow in the land, but also as a conveyance of the moiety owned by her in fee. It conveys her entire interest in the land. O'Brien *v.* Brice, 21 W. Va. 704.

As the law stood in 1893, a deed from a commissioner, in which a married woman united for the purpose of conveying her contingent right of dower, but in which her husband did not unite, was not sufficient to convey her contingent right of dower, although the deed was signed and acknowledged by her and admitted to record as to her. And the fact that she received the commuted value of her contingent right of dower does not bar her from a claim against the purchaser, after the death of her husband, of the pecuniary value of her dower interest, where, as in this case, she has been guilty of no fraud, did not know of the sale of the land until after it was made, and the preponderance of evidence does not show that she received the money in lieu of her contingent right of dower, or, if she did, that she was advised with respect to her rights. The law favors dower, and will not, as a rule, bar it by anything short of the statutory requirements for that purpose. The doctrine of equitable estoppel does not generally apply to married women laboring under the common-law disabilities as to their rights. Lewis *v.* Apperson, 103 Va. 624, 49 S. E. 978.

Where the real and personal property of an intestate remained undivided between his widow, who was also his administratrix, and his only daughter, and, in view of the daughter's approaching marriage, a marriage settlement was executed conveying all the real estate by metes and bounds and the personal estate by description to trustees, of whom the mother was one, it was held that the mother did not, by becoming a party to the deed, relinquish her right to dower in the land. Wilcox *v.* Hubard, 4 Munf. 346.

Where Conveyance Induced by Threats.—Where a widow was induced to sell her dower interest in the land which was her home, by threats that her children's land was under the hammer and would have to be sold, that an iron furnace would be put up close to her house, and that she would be compelled to raise her children amid such surroundings, the sale was set aside by the appellate court, the sale of the children's land being set aside on other grounds. Peirce *v.* Graham, 85 Va. 227, 7 S. E. 189.

3. Of Husband and Wife.

At common law a wife was unable to unite with her husband in conveying land so as to relinquish her claim to dower. But the statute, by its inherent force, obviates the legal unity of husband and wife in the cases where it applies, and formerly did away with the husband's supposed influence by a privy examination. See Va. Code, 1873, ch. 117, § 4. But the Code of 1887 dispenses with even this requirement. Va. Code, 1887, § 2502. Mr.

Minor, in discussing the principle upon which the statute is to be construed, says that "it is an exception to the common law and so must be construed strictly. A substantial compliance with it is sufficient, but no requirement can be pretermitted, without invalidating the transaction. Thus, the statute until 1888 applies to no other transaction than a conveyance of lands or chattels; not to a power of attorney, nor to any executory contract (Shanks *v.* Lancaster, 5 Gratt. 111); the husband must be a party (Sexton *v.* Pickering, 3 Rand. 468); and both he and his wife must sign it (Tod *v.* Baylor, 4 Leigh 498); there must appear to have been a privy examination of the wife (Healy *v.* Rowan, 5 Gratt. 414); and an explanation to her of the conveyance (Hairston *v.* Randolphs, 12 Leigh 445; Harkins *v.* Forsyth, 11 Leigh 294); nor is any disability obviated, save that of coverture, e. g., not infancy (Thomas *v.* Gammel, 6 Leigh 9). But some important statutory changes in these requirements have been made by the Code of 1887, and subsequent statutes. Thus, the statute does now include a wife's contract to convey and power of attorney (Acts, 1889-90, p. 193, ch. 238), and the privy examination and explanation are dispensed with (Va. Code, 1887, § 2502)." 2 Min. Inst. (4th Ed.) p. 174.

The effect of a wife's uniting with her husband in a deed is not to vest in the grantee any estate, separate and distinct from that of the husband, but simply to relinquish a contingent right in the nature of an incumbrance upon the land conveyed, which, if not so conveyed, would attach and be consummate on the death of the husband. Corr *v.* Porter, 33 Gratt. 278; Nickell *v.* Tomlinson, 27 W. Va. 697.

Inchoate dower is not a vested estate or property in a wife until the death of her husband, and in a suit to sell the husband's land in his lifetime to pay liens no provision need be made out of the proceeds to meet the wife's dower when consummate. George *v.* Hess, 48 W. Va. 534, 37 S. E. 564.

Where it does not appear that the privy examination of the wife was taken as required by statute, she is entitled, on the death of her husband, to recover her dower in the real estate conveyed by the deed, or to recover its commuted value in money. First National Bank of Harrisonburg *v.* Paul, 75 Va. 594.

Where a married woman has regularly united with her husband in a deed, she is not entitled to dower in the land conveyed, though the consideration was confederate money. Henderson *v.* Alderson, 7 W. Va. 217.

Where Conveyance Made by Infant Wife.—A deed made by an infant feme covert in which she relinquishes her right of dower may be avoided when she becomes of full age and discovert. Then, being sui juris, she may ratify it expressly or impliedly, as by accepting a compensation allowed by a decree to which she or her counsel has consented. Darraugh *v.* Blackford, 84 Va. 509, 5 S. E. 542; Wilson *v.* Branch, 77 Va. 65; Thomas *v.* Gammel, 6 Leigh 9.

An infant feme covert, joining her husband in a deed of lands, and acknowledging the same before justices, upon privy examination, duly made, certified and recorded, according to the statute of 1792, 1 Old Rev. Code, ch. 90, § 6, is nowise bound by such deed. Thomas *v.* Gammel, 6 Leigh 9.

Therefore, she is entitled to dower of the lands conveyed; but, as her husband did not die seized, she is not entitled to damages. Thomas *v.* Gammel, 6 Leigh 9.

Where Conveyance Not Recorded.—An unrecorded deed from husband and wife conveying his land does not convey the wife's contingent right of dower in the land. The deed must be admitted to record as to the husband as well as to the wife in order to accomplish this result. Va. Code, § 2502; Building, Light, etc., Co. *v.* Fray, 96

Va. 559, 32 S. E. 58, 4 Va. Law Reg. 838.

Where Wife's Name Does Not Appear in Deed.—Though a deed be signed and sealed by a married woman and her husband, and the certificate of her acknowledgment is in due form, yet if her name does not appear in the body of the deed as one of the grantors therein, such deed is inoperative to convey any interest she may have in the real estate thereby conveyed, or to relinquish her contingent right of dower in the lands therein named. Laughlin *v.* Fream, 14 W. Va. 322.

Where Conveyance Set Aside as Fraudulent.—Where a husband fraudulently conveys real estate to the use of his children and contingently to the use of his wife, who did not execute the conveyance, and after his death the widow, in a creditors' bill to set the conveyance aside, claims under it, she is entitled to dower in the lands, although the deed is declared fraudulent and void. Blow *v.* Maynard, 2 Leigh 29. See Grant *v.* Sutton, 2 Va. Dec. 149, 22 S. E. 490.

Agreement to Convey—Specific Performance.—Specific execution of an agreement to sell and convey will not ordinarily be decreed against a vendor whose wife refuses to join in the deed, where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining. Graybill *v.* Brugh, 89 Va. 895, 17 S. E. 558; Clarke *v.* Reins, 12 Gratt. 98. See also, Dunsmore *v.* Lyle, 87 Va. 391, 12 S. E. 610, where specific performance was refused, though the bill offered to accept a deed subject to the wife's dower.

Who May Claim under Conveyance.—Where a vendor, seized of an estate in fee in land, determinable by an executory devise over, upon his dying without issue, conveys such land by a deed in which the wife regularly unites, the purchaser, upon the death of the vendor without issue, is entitled to have his widow's dower in such land cut off to him. Nickell *v.* Tomlinson, 27 W. Va. 697.

Protection of Wife's Interest as against Husband's Creditors.—A husband and wife agreed that in consideration of the husband's conveying a house and lot to a trustee for her and her children, she would unite in the conveyance of his other real estate when he should sell it. Held, that, to the extent of her dower interest in the husband's real estate, the husband's conveyance to the trustee was on valuable consideration, and to that extent the wife is entitled to satisfaction out of the proceeds of the sale of the house and lot, as against creditors of the husband, for debts contracted at the time of the deed. Johnston *v.* Gill, 27 Gratt. 587.

M., the owner of a large estate, being insolvent and having several judgments and executions against him, made a deed, in which his wife joined, by which he conveyed all his property for the payment of his debts. In this deed it was provided that the value of the wife's contingent right of dower should be ascertained in a mode specified, and in consideration of the sums so ascertained she joined in the deed releasing such right. The trusts of the deed were, that C. and S., who had undertaken to pay off the executions, and who were creditors of M., should be creditors of the first class, each for the amounts they should pay and the amount due them, and the wife for the value of her contingent right of dower, ascertained as prescribed in the deed; and all other creditors in the second class. The whole property did not sell for enough to pay the first class creditors in full, and a judgment rendered against M., and docketed before the deed was executed. Held, that the wife of M. must abate ratably with C. and S. for the payment of said judgment, and for any deficiency of the trust fund to pay the said C., S. and

the wife, in full of their claims. Miller *v.* Crawford, 32 Gratt. 277.

Conveyance by Husband for Benefit of Creditors.—Where a husband makes a deed of trust conveying land to trustees, with power to sell the same for payment of debts, and they allow the husband to remain in possession during his life, and make no sale under the deed until his death, the husband is to be considered as having died seized of the land subject to the deed of trust, so that his widow, if she did not join in the deed, is entitled to dower in the land, and may recover the rents and profits from the husband's death in like manner as if the deed had not been made; and if the widow dies before recovering such rents and profits, the same may be recovered to the time of her death by her administrator. Macaulay *v.* Dismal Swamp Land Co., 2 Rob. 507.

K. HOW DOWER OF INSANE WIFE BARRED OR RELINQUISHED.

The husband of an insane wife can not, by a proceeding on an ex parte petition, deprive his wife of her contingent right of dower in his real estate. The proceeding under Va. Code, 1887, § 2625, must be inter partes, the wife must be made a party thereto, and, after notice, have an opportunity of being heard, or else the proceeding is void. Hess *v.* Gale, 93 Va. 467, 25 S. E. 533.

L. MORTGAGE.

See ante, "Mortgaged Lands," IV, O.

VII. Assignment.

A. PROCEEDINGS FOR ASSIGNMENT.

1. In General.

A court of equity has jurisdiction to assign dower in land within the state, but not in lands lying in another state. Blunt *v.* Gee, 5 Call 481. As to the assignment of dower, see Va. Code, 1887, § 2274, as amended by Acts 1895-6, p. 309.

A widow can not, merely on her right to dower, file a bill to sell the heir's fee simple and get money from its sale in lieu of dower. Hoback *v.* Miller, 44 W. Va. 635, 29 S. E. 1014. See note on this case, 4 Va. Law Reg. 197.

An assignment of dower in lands and slaves, by order of the county court, by motion only, and without any suit for that purpose, will not be set aside after a great length of time, but the inequalities and excess only corrected. Fitzhugh *v.* Foote, 3 Call 13.

A writ of dower unde nihil habet can not be maintained against a mere tenant for years, but should be brought against a tenant of the freehold, having the inheritance, or an estate equal in duration to the life of the demandant. Miller *v.* Beverly, 1 Hen. & M. 368.

It is not error to decree a sale of the lands of a deceased husband without ascertaining in the suit in what lands, conveyed in his lifetime, the widow is entitled to dower, and assigning her dower therein, for she may herself bring suit against the proper parties for that purpose. Hunter *v.* Hunter, 10 W. Va. 321.

M., the widow of J., being in possession of a tract of land as her dower, entered into a written agreement by which the land was to be sold and the proceeds invested in another tract about to be sold by a commissioner, to be held by M. for life as she held the dower land. This agreement was duly carried out. Held, that as against her creditors M. has but a life estate in the land purchased, to the extent that it was paid for by the proceeds of the sale of the dower tract. Hughes *v.* Harvey, 75 Va. 200.

2. Parties.

In a bill in equity to recover dower in lands aliened by the husband during the coverture, without the consent of the wife evidenced by her privy examination and relinquishment, it is not necessary to make the heirs of the hus-

band, or any purchasers except the holders of the land, parties. Boyden *v.* Lancaster, 2 Pat. & H. 198.

In a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant. Blair *v.* Thompson, 11 Gratt. 441.

In a bill brought by a party to whom a widow has conveyed her dower interest in two tracts of land, to have dower assigned therein, where the parcels of land at the time said suit is brought are held and owned by different parties, the persons owning and holding said respective tracts of land are necessary parties defendant. Morgan *v.* Blatchley, 33 W. Va. 155, 10 S. E. 282.

Joinder of Parties.—A bill against several purchasers of separate and distinct tracts of land aliened by a husband during coverture, without the relinquishment of the wife, to recover dower in each tract is not multifarious. The plaintiff may elect to proceed against each separately or all together. Boyden *v.* Lancaster, 2 Pat. & H. 198.

3. Appointment and Proceedings of Commissioners to Make Assignment.

Where commissioners are appointed by an ex parte order to lay off and assign a widow's dower in the lands of her deceased husband, such order is not binding on the heirs, though the commissioners report an assignment of dower, and their report is confirmed. Raper *v.* Sanders, 21 Gratt. 60.

An assignment of dower, made by commissioners under order of court, at the instance of one of several coheirs, is binding on the widow, if it be a full and just assignment, and also on the coheirs, though infants, if it be not excessive. Moore *v.* Waller, 2 Rand. 418.

In a suit against the widow and heirs of a decedent to subject his lands to his debts, a commissioner was directed to inquire and report whether she elected dower in kind, or commutation. The commissioner reported that she elected commutation. His report was confirmed, and the lands were sold free of dower. With her consent, and by leave of court, a lot in town was assigned her for her dower, of which she continued in possession until her death. After her death a petition was filed to subject the lot to her husband's debts. Held, that the lot was the widow's property in fee, and passed to her heirs. Fisher *v.* Clements, 82 Va. 813, 1 S. E. 182.

4. Assignment before Sale of Lands.

Unless the widow of an intestate elects, in a proper manner, to take the value of her dower in the real estate of which her husband died seized, her dower should be assigned to her in the realty before a sale thereof for the payment of the intestate's debts. Laidley *v.* Kline, 8 W. Va. 218; Kilbreth *v.* Roots, 33 W. Va. 600, 11 S. E. 21.

It is error to order the sale of land to pay debts charged thereon, subject to the widow's dower, but a sale may be ordered without assigning dower in the land, provided the widow elects to take the value of her dower from the proceeds of the sale. Underwood *v.* Underwood, 22 W. Va. 303.

Where a widow is entitled to have her dower laid off in kind, unless she has made a valid arrangement waiving this right, it is the duty of the court before decreeing the sale of the land to have her dower laid off in kind; and if this be not done, it is error, for which such decree will be reversed. Tracey *v.* Shumate, 22 W. Va. 474.

Before Sale of Realty.—When the widow is defendant in a suit brought to subject the realty of a decedent to the payment of his debts, and she has not elected to take the value of her dower in money, her dower should be assigned before an out and out sale of the realty is decreed. McKittrick *v.* McKittrick, 43 W. Va. 117, 27 S. E. 303.

When Report Will Be Set Aside.—The object of dower is to afford the widow a sure and competent support, and it should be so assigned that she may enjoy one-third of the income arising from the estate; the probable rents and profits, and not the mere fee simple value, being the chief subject of consideration. While the report of commissioners to assign dower, and the action of the court in confirming their report, are entitled to much consideration, they are not conclusive, and, if they plainly depart from the above rule, the decree confirming the report will be reversed, and the report set aside. Fuller *v.* Conrad, 94 Va. 233, 26 S. E. 575.

5. Commutation—Re-Estimate.

Where the widow, in a suit to which the creditors and heirs were parties, agreed to sell her dower at a price approved by a decree of the court, a resale and re-estimate will not be decreed on the ground that the allowance was excessive, especially where the creditors do not complain. Scott *v.* Ashlin, 86 Va. 581, 10 S. E. 751.

6. Objections to Assignment First Made on Appeal.

Objection can not be made for the first time in the appellate court that an order confirming the assignment of dower does not appear to have been made at the instance of the heir or devisee. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325.

7. Evidence.

Widow a Competent Witness.—In a suit for the assignment of dower and the partition of the residue of the land among the heirs of a decedent, the decedent's widow is a competent witness to prove that she inherited a share in the land from her father. Taylor *v.* McDonald, 100 Va. 487, 41 S. E. 946.

B. TIME OF VALUATION.

Upon a bill in equity by a widow against the alienee of her husband, for dower in lands aliened by the husband in his lifetime, she is dowable of the lands as of the value thereof at the time of alienation, not at the time of the assignment of the dower; nor is she entitled to any advantage from enhancement of the value, either by improvements made by the alienee, or from general rise in value, or from any cause whatever. Tod *v.* Baylor, 4 Leigh 498.

Under W. Va. Code, ch. 65, §§ 10, 11, 12, where a husband in his lifetime has sold realty which was subject to dower, the value of the widow's dower is to be computed, as against the alienee, at the date of her recovery, if in kind, with lawful interest from her suit; but she can not insist that her dower shall be assigned in specie, nor can she refuse to receive the equivalent annuity, or a gross sum in lieu thereof, the option in this matter being lodged by the statute exclusively with the alienee; and when, under § 12, the alienee elects to pay an annuity, or a gross sum in lieu thereof, the value of the dower is computed as of the time of the alienation. Verlander *v.* Harvey, 36 W. Va. 374, 15 S. E. 54.

B. sold a tract of land with a mill on it to C. The mill was subsequently washed away, and another built on the same site. A third mill upon a more extensive plan was afterwards built. Held, that the widow of B. was entitled to dower in the land only, and not in the mill. Braxton *v.* Coleman, 5 Call 433, 2 Am. Dec. 592.

C. GROSS SUM IN LIEU OF DOWER.

Unless it is impracticable to assign a widow her dower in kind, a court of equity has no power, against her will, to decree a sale of the real estate and give her money in lieu of her dower. Wilson *v.* Branch, 77 Va. 65, 7 Va. Law J. 161, 46 Am. Rep. 709; White *v.* White, 16 Gratt. 264, 80 Am. Dec. 706.

It is error to decree a specific sum in lieu of dower without the assent of all the parties interested. Blair *v.* Thompson, 11 Gratt. 441; Wilson *v.*

Davisson, 2 Rob. 384; Jarrell *v.* French, 42 W. Va. 456, 27 S. E. 263.

Where, in a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien debts and an assignment of dower to his widow, the dower can not be assigned in kind, and it is necessary to sell the whole real estate and to satisfy the claim of dower out of the proceeds, the court can not, without the consent of all the parties, satisfy such claim by the payment of a gross sum out of the proceeds, but must securely invest one-third of the proceeds and direct the interest on such investments to be paid to the widow during her life in satisfaction of her claim of dower. Harrison *v.* Payne, 32 Gratt. 387. Compare Stimson *v.* Thorn, 25 Gratt. 278.

A widow entitled to dower in the real estate of her deceased husband is not a joint tenant, tenant in common or coparcener with the heirs at law, within the meaning of the statute concerning partition, so as to authorize a court of equity to sell the whole estate, against her will, and compel her to receive a money compensation out of the proceeds, in lieu of her dower. White *v.* White, 16 Gratt. 264, 80 Am. Dec. 706; Hull *v.* Hull, 26 W. Va. 1.

A widow is not entitled to money arising from a sale of land by her husband during his lifetime, in lieu of her dower. Fitzhugh *v.* Foote, 3 Call 13.

Where the widow brings a suit in chancery against the alienee, and the prayer of her bill is that "her dower in the said real estate be assigned, set out, and allotted to her, or a gross sum in lieu thereof given her," and the answer of the alienee denies that the plaintiff is entitled to a sum in gross for her dower interest, if she has one, and avers that, if she is entitled to anything at all, she is entitled to one-third interest in the realty, to the assignment of which the defendant is willing, and there is no replication to the answer, it is error in the court to commute the dower, against the wishes and election of the alienee, and to decree to the widow a gross sum, and charge the same as a lien upon the whole of the real estate of the husband which had been so aliened in his lifetime. Verlander *v.* Harvey, 36 W. Va. 374, 15 S. E. 54.

Where the dower was never assigned in kind, and the widow could not have it so assigned, it was held, that under the provisions of § 12, ch. 65, W. Va. Code, she must accept a money compensation therefor, which remained a charge on the land. Gay *v.* Lockridge, 43 W. Va. 267, 27 S. E. 306.

There may be cases in which it may be proper and right to sell the land with the consent of those in interest and with or without the consent of the doweress, free and acquit from such contingency, and in such cases it would be the duty of a court of equity having jurisdiction thereof to provide for the securing of such dower right, by a sequestration of a proper proportion of the proceeds of the sale. Bassell *v.* Caywood, 54 W. Va. 246, 46 S. E. 159.

How Purchaser May Relieve Himself.—A widow entitled to dower in land can not be compelled to commute it in money, but may have it set apart to her in kind, if practicable, even where there is an encumbrance on the land superior to her right of dower. But if the land be sold in the lifetime of the husband, the purchaser may relieve himself from a recovery in kind upon paying to the widow interest on one-third the value of the land as provided by § 2278 of the Virginia Code of 1899. Land *v.* Shipp, 100 Va. 337, 41 S. E. 742.

Construction of Statute.—It was not, we apprehend, the intention of the lawmaking power, in the enactment of § 2278 of the Virginia Code, to deprive the widow of her right to dower in kind by merely giving her a personal decree against the alienee for annual interest on its value. Dickenson *v.* Gray, 100 Va. 526, 42 S. E. 298.

D. ACTUAL ADMEASUREMENT OR ALLOTMENT.

In the assignment of dower to a widow, the assignment should be based upon both the annual and fee simple value of the property. Devaughn *v.* Devaughn, 19 Gratt. 556.

Where D. died seized of certain real estate on which he and his wife lived, his widow's dower should be assigned out of such land, in exoneration of other land sold by D. to H. Stimson *v.* Thorn, 25 Gratt. 278.

A widow is entitled, as against creditors of her husband by lien created since her marriage, to have her dower in his real estate assigned in kind, if it can be done, without regard to its effect upon the interest of his creditors. If from the nature of the property, or of the husband's interest in it, the dower can not be assigned in kind the court may sell the whole property and make her a money compensation. Simmons *v.* Lyles, 27 Gratt. 922.

Mansion House.—The widow is not entitled, as a right, to have the mansion house included in the dower assigned to her. Devaughn *v.* Devaughn, 19 Gratt. 556.

Lands Held in Common.—Where a husband held lands as tenant in common or, now that the jus accrescendi is abolished, as joint tenant, his widow may be assigned her dower in common with the other tenants. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325.

Distinct Lots or Parcels.—It is not error to assign dower in one of several lots or parcels of land. Alderson *v.* Henderson, 5 W. Va. 182.

Allotment by Metes and Bounds.—The common-law rule is that dower must be assigned by metes and bounds. But where the object is entire, as a house, the widow may be assigned a certain number of rooms; in which case, passages and stairways may be enjoyed jointly with others. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325.

A wife purchased at judicial sale lands of her husband subject to certain liens. The decree confirming the sale recited, in setting forth the terms: "For the sum of $12,000 subject to dower, and $15,000 without dower. This last price to apply to those creditors who are entitled to the sale without dower;" and the deed to the wife recited that the sale was so made to fix dower. The wife failed to pay her purchase money. It was held, in a controversy as to the balance due from her, that her dower in the equity of redemption should be determined by deducting from $15,000 the paramount liens and taking one-fifth of the residue. Miller *v.* Arthur (Va.), 46 S. E. 323.

The estate in which the widow was entitled to dower was valued at $69,750, and consisted almost entirely of highly improved city property. Of this $23,250, in fee simple value was assigned to the widow, in which assignment was included the only property without power to produce income belonging to the estate, valued at $6,250, thus imposing upon the widow a burden in taxes without the benefit of any income from more than one-fourth of the property assigned her, while all of the $46,500 worth of property reserved to the heirs has income producing capacity. It was held, that she did not receive her just portion of the estate. Fuller *v.* Conrad, 94 Va. 233, 26 S. E. 575.

E. DAMAGES FOR DETENTION.

It was formerly held, that damages for the detention of dower could not be recovered by the widow against the alienee of the husband. Thomas *v.* Gammel, 6 Leigh 9. But under Va. Code, 1887, § 2277, damages are allowed against the alienee of the husband from the commencement of a suit against him.

Though a widow has no seizin, right of entry or vested estate before assignment of dower, yet our Code, ch. 65, § 10, says that a widow entitled to

dower "may recover said dower and damage for its being withheld by such remedy at law as would lie on behalf of a tenant for life having a right of entry or by bill in equity." This gives her right to sue at once upon the husband's death. Sperry *v.* Swiger, 54 W. Va. 283, 46 S. E. 125.

F. RENTS AND MESNE PROFITS.

A widow obtained a decree against an infant heir, directing commissioners to assign dower, which she might have had executed immediately, but did not for a year, during which time she remained in the mansion house, and consented to the cultivation of the land by the agent of the heir. After her dower was assigned, she received one-third of the rents, which had accrued before assignment, claiming no more at the time. Subsequently, she brought an action to recover the other two-thirds. Held, that she was not entitled to recover them. Grayson *v.* Moncure, 1 Leigh 449. See Lee *v.* Stuart, 2 Leigh 76.

The object of dower is to afford the widow a sure and competent support, and it should be so assigned that she may enjoy one-third of the income arising from the estate; the probable rents and profits, and not the mere fee simple value, being the chief subject of consideration. While the report of commissioners to assign dower, and the action of the court in confirming their report, are entitled to much consideration, they are not conclusive, and, if they plainly depart from the above rule, the decree confirming the report will be reversed, and the report set aside. Fuller *v.* Conrad, 94 Va. 233, 26 S. E. 575, 3 Va. Law Reg. 51.

The widow is entitled, under the act of 1792, to occupy the plantation belonging to the mansion house of her husband, without responsibility for rent, until dower is assigned to her. Wiseley *v.* Findlay, 3 Rand. 361, 15 Am. Dec. 712.

Period for Which Recoverable.—Upon a bill in equity by a widow for dower in lands conveyed by her husband during his lifetime, she is not entitled to an account of profits from the death of her husband, but only from the date of the subpœna in the cause. Tod *v.* Baylor, 4 Leigh 498. See Va. Code, 1887, § 2277.

Division of Rents and Profits.—Where there has been a full and just assignment of dower, at the instance of one of several coheirs, and the widow keeps possession of the whole land under pretext that the assignment was not legal, she will be accountable to the heirs for the rents and profits of all but her dower lands. Moore *v.* Waller, 2 Rand. 418.

G. DECREE.

Where in widow's suit in county court, in 1862, for sole purpose of having her dower assigned, the court, after assigning dower, of its own accord decreed sale of residue of the land for division of the proceeds among the infant heirs, they being parties to the suit; the dividend of each heir exceeding $300, the county court transcended its jurisdiction, and its decree of sale was void. Va. Code, 1860, p. 581, § 3. Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36.

Where a man during the lifetime of his wife makes a deed of gift to his son, in which the wife does not join, and afterwards the wife makes a demand for dower in the property, which is included in the deed, the effect of this assignment is postponement to the grantee in the deed, the period of possession and enjoyment of the property during the lifetime of the widow. Gale *v.* Hayes, 79 Va. 544.

Down.

See the title BOUNDARIES, vol. 2, p. 591.

Draft.

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

Drainage.

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DRAINS AND SEWERS.

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See the titles DAMAGES, ante, p. 162; DEDICATION, ante, p. 350; MUNICIPAL CORPORATIONS; SPECIAL ASSESSMENTS; STREETS AND HIGHWAYS; WATERS AND WATERCOURSES.

As to the pollution of watercourses by sewers, see the title WATERS AND WATERCOURSES. As to condemnation of land for use as drain, see the title EMINENT DOMAIN. As to sewers constituting a nuisance, see the title NUISANCES. As to city's liability for repairs to culvert dedicated for use as part of city's sewer system, see the title DEDICATION, ante, p. 350.

I. Municipal Drains and Sewers.

A. NATURE OF MUNICIPAL DRAINS.

Whether or not a drain or ditch in a city is a natural watercourse, and whether the city has changed or altered its use, are questions for the jury under proper instructions from the court. Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

B. ESTABLISHMENT AND CONSTRUCTION.

See post, "Liability for Damages," I, F.

1. Power of Municipality to Construct.

"The right to provide for the drainage of streets and to construct and repair sewers is generally granted to cities in express terms by their charters, or by the statute governing their incorporation; but, without any express grant of such authority, the right to exercise it is regarded as incident to the general power to maintain and control streets. The authority of the municipality as to such matters may extend even beyond the city limits and, unless prohibited by charter or statute, the city has inherent power to contract for and construct works beyond the corporate limits for the discharge of sewage when the same is necessary." Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

A municipal corporation may acquire and maintain necessary sewers outside of its streets, alleys and public places as incident to its general powers to maintain and control its streets, without any express grant of authority for that purpose. This general power is not curtailed by an express grant in its charter of power to build bridges in and culverts under its streets, and to prevent and remove structures, obstructions and encroachments over, or under, or in any street or alley or any sidewalk thereof. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

"Town officers, in repairing highways, may construct drains and culverts within the limits of the highway." Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

A city has the right to construct ditches along its streets, and to drain its surface water into a ditch or drain which is its natural course, for the purpose of draining its streets, even though the quantity of water increases in time of rainy weather, and diminishes at other times. Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

2. Necessity for Construction.

Municipal corporations are given power by statute to construct drains and gutters. They may or may not, as they choose, exercise this power in any street, as the right to elect to do so or not to do so, is a matter of discretion, quasi judicial. Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

A city is not bound to furnish drains or sewers to relieve a lot of its surface water, whether its own or that flowing from other premises. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266.

3. Nature of Duty to Establish.

"The obligation to establish and open sewers is a legislative duty." Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

4. Power of Executive Officers to Appropriate Private Culvert.

Neither the mayor nor other executive officers, agents or employees of a municipal corporation have any authority to convert a private culvert into a public one, or to assume control of it for the corporation. Robinson *v.* Danville, 101 Va. 213, 43 S. E. 337.

5. Care Required in Constructing.

Where a city is constructing ditches along its streets to drain its surface waters, the only duty devolving upon the city is to exercise reasonable care and skill in doing the work. Miller *v.* Newport News, 101 Va. 432, 44 N. E. 712.

C. PRESUMPTION OF OWNERSHIP.

Where a city has had adverse, uninterrupted and exclusive use of a culvert as an essential part of its sewer system for over fifty years, has extended it under resolutions of its council, has appropriated money for its repair, and has exacted money for the use of it as of other sewers; it must be regarded as city property. Richmond *v.* Gallego Mills Company, 102 Va. 165, 45 S. E. 877.

D. MAINTENANCE AND REPRAIR.

See post, "Liability for Damages," I, F.

General Rule.—It is the duty of a city, from the time it acquires a sewer, to maintain it in a reasonably safe condition, without regard to what may have been the attitude of the former owner of the land through which it passes in respect to it. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

Nature of Duty to Repair.—The obligation resting on a municipality to keep the sewers in repair is a ministerial duty. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339; Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

Liability for Maintenance Incurred by Accepting Culvert.—The acceptance by a city of a culvert as a part of its sewer system renders the city liable for its maintenance in the same manner and to the same extent as if it had been originally built by the city. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

Extent of Liability.—When once the corporation constructs sewers or drains and gutters, the duty has become merely ministerial, and the town bound to keep them in fairly good condition to carry off the water ordinarily and naturally coming into the gutter or sewer in the section where the town is, so as not to overflow lot owners. Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

E. OBSTRUCTION OF DRAIN OR SEWER.

Where city authorities change the channel of a drain or sewer so as to throw the water flowing through it upon the land lying below, the proprietor of such land can not obstruct the channel so as to cause the water to flow back upon and injure the land of an upper proprietor. Amick *v.* Tharp, 13 Gratt. 564.

F. LIABILITY FOR DAMAGES.

1. Liability for Failure to Construct.

A city is not liable for failure to provide sewers to carry off surface water, or for failure to relieve a lot owner's property of burdens put upon it by nature. Miller *v.* Newport News, 101 Va. 432, 44 S. E. 712.

2. Injury Occasioned by Plan of Construction.

"Where the injury is occasioned by the plan of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily, if ever, any liability. This, also, is everywhere admitted as generally true; but, in the case last supposed, there will be a liability if the direct effect of the work, particularly if it be a sewer or drain, is to collect an increased body of water, and to precipitate it on to the adjoining private property, to its injury. There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of sewers, or the negligent failure to keep the same in repair and free from obstructions. The cases support this proposition with great unanimity." Dillon M. Corp. 1051, quoted in Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

3. Injury Occasioned by Mode of Construction.

"Courts of the highest respectibility have held that if the sewer, whatever its plan, is so constructed as to cause

a positive and direct invasion of plaintiff's private property, as by collecting and throwing upon it to his damage water which would not otherwise have flowed or found its way there, the corporation in liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles." Dillon M. Corp., § 1047, quotes in Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

A city is liable for an injury resulting from flooding property with water where such injury is due to the negligence or necessary results of the constructing of the sewer. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

4. Injuries Arising from Failure to Repair.

A city is liable for an injury to plaintiff resulting from flooding his premises with water, where such injury is caused by the neglect of the city to keep the sewer in proper repair. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

5. Alteration by City's Permission.

Where a person is permitted and aided by a city to alter the course of a sewer over which it has assumed control (it matters not by whom it was originally constructed), and such alteration is so negligently effected as to cause the water and filth to flow into the plaintiff's cellar; the city is liable for the damages resulting therefrom. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

6. Damages Arising from Improper Condition of Drain.

If a city or town negligently fails to keep its existing drains and gutters open and clear of obstructions, and in condition to carry off the water in them, and by reason thereof is injured from their overflow, the city or town is liable in damages, provided the overflow is not due to an unusual or extraordinary storm or rainfall. Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

Injuries Resulting from Unusual Floods.—"The town is not bound for great and unusual floods. If there comes a cloudburst or great rainfall, out of the ordinary experience, and it is too great for the capacity of the drain or gutter, or if it bring down rock, drift, sand, or other debris, choking up the drain, and overflowing, the town is not liable. It is the unexpected —out of the ordinary course of nature. But if the city allows those obstructions to remain—if it allows its drains or gutters to clog up—and damage ensue, it is liable." Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

7. For Discharging Water or Filth upon a Lot.

A city can not by ditches, drains, or other artificial channels collect surface water, and cast it in a body or mass upon a lot. If it does so, it is liable to the lot owner in damages. Jordan *v.* Benwood, 42 W. Va. 312, 26 S. E. 266; Clay *v.* St. Albans, 43 W. Va. 539, 27 S. E. 368.

Where a city in grading its streets by cutting ditches and drains collects surface water and casts it in a body upon the lot or ground of the proprietor below, unless it is so cast into a natural watercourse, the proprietor sustains a legal injury, and may recover in an action therefor. Gillison *v.* Charleston, 16 W. Va. 282.

A city is liable for a tort when it pours upon the premises, of a citizen, a flood of water and filth, or either, by a public sewer so constructed or altered that the flood must be the necessary result. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

In Gillison *v.* Charleston, 16 W. Va. 282, the court said: "Judge Cooley in his recent and most excellent work on Torts, page 580, after reviewing the authorities on this subject, comes to the following conclusion: 'Where the surface waters are collected and cast in a body upon the proprietor below, un-

less into a natural watercourse, the lower proprietor sustains a legal injury and may have his action therefor.' He says this is the rule that has been applied to municipal corporations; and he further says of municipal corporations: 'While they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface water from the public ways, yet if they actually construct such as must carry water upon adjacent lands, they are liable, as much as they would be if they had invaded such lands by sending in their servants or otherwise.' We think Judge Cooley reached a sound and just conclusion."

8. Where a Dangerous Excavation Is Made.

Where a dangerous excavation is made and negligently left open without proper railings, guards or covering in a traveled street, by a contractor under the municipal corporation for building a sewer or other improvements the corporation is liable to a person injured as the result of falling into such excavation, although such corporation may have no immediate control over the work. Wilson *v.* Wheeling, 19 W. Va. 323, overruled in Meyer *v.* Frobe, 40 W. Va. 246, 22 S. E. 58, on other grounds. See the title STREETS AND HIGHWAYS.

As to the nature of damages allowed for such injury, see the title EXEMPLARY DAMAGES.

9. Original Construction by State as a Defense.

Where a city makes an alteration in a sewer, over which it has assumed control, so as to cause the water to back up and damage plaintiff's property, the fact that the state may have originally constructed the sewer will not relieve the city from its liability for damages arising from the injury sustained. Chalkley *v.* Richmond, 88 Va. 402, 14 S. E. 339.

II. Private Drains and Sewers.

A. PERMISSION TO CONSTRUCT.

1. By Deed.

To entitle a party wishing to drain his lot under the surface of his neighbor's lot by a right not subjected to revocation at the will of such neighbor, the privilege of so doing must be acquired by deed. Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399.

2. By Parol License.

A parol license from one lot owner in a town to another to pass a tile drain under the former's lot for the purpose of draining the lot of the latter is revocable at the pleasure of such licensor. Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399.

3. Rights Acquired.

"A drain or ditch established by the acquiescence of two adjoining landowners can not be obstructed or abolished by the lower or servient owner alone without the consent of the upper or dominant owner, if the drain or ditch has been constructed in accordance with the natural flow of the water, and the quantity of the water has not been increased, nor its flow diverted, by the owner of the higher land. The rights and duties of the original parties in such case pass to their grantees with the land." Jones on Easements, § 768, quoted in Riverside Cotton Mills *v.* Lanier, 102 Va. 148, 45 S. E. 875.

B. EASEMENT OF A DRAIN.

See the title EASEMENTS.

One of two adjoining lots owned by the same parties is sold at auction under the decree of the court. At the time of the sale nothing is said of an easement running from the unsold lot through the one sold, for carrying the water from the former to the culvert in the street; and such easement was not to be seen on the lot sold, and was not known to the purchaser. The purchaser is entitled to have his lot free of the easement. Scott *v.* Beutel, 23 Gratt. 1.

Where one of two adjoining lots

owned by the same parties is sold at auction under the decree of court, there being a drain from the unsold lot through the one sold, for carrying water through the former to a culvert in the street; both lots having been owned by the same person, though he had constructed a drain or culvert for more than fifteen years before the sale for the benefit of both lots, there can be no right by prescription to the use of the easement by the owners of the unsold lot as there could be no adversary possession or use of it, while both lots were owned by the same person. Scott *v.* Beutel, 23 Gratt. 1.

Injunction to Prevent Interference with Easement. — "Woodlawn" and "Fairfield," separated only by public road, were owned by W., who drained former by ditches through latter to river. In 1811 he granted "Woodlawn" to A. (under whom plaintiff claims). In 1820 he devised "Fairfield" to D. (under whom defendant claims). Deed and will are silent about draining. In 1878 defendant undertook to stop up the ditches, and plaintiff obtained an injunction. When "Woodlawn" was granted, the ditches were open and visible, and except for a brief time, had been used continuously to drain it. It could be drained in no other way, except by heavy expenditure. They were necessary to the proper enjoyment of the premises. It was held, that the injunction was properly granted. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

C. LIABILITY FOR ARTIFICIAL DRAINAGE UPON LOWER LANDS.

A party who by cutting a ditch or drain collects surface water and casts it in a body upon the land of an adjoining owner, unless it is so cast in a natural watercourse, is liable to an action thereof by such adjoining owner. Knight *v.* Brown, 25 W. Va. 808.

D. LIABILITY OF MUNICIPALITY FOR PRIVATE CULVERT.

A municipal corporation is not liable for injuries to private property caused by an overflow of water from an obstructed private culvert, which the corporation is not bound to keep open and in repair, and over which it exercises no control. Robinson *v.* Danville, 101 Va. 213, 43 S. E. 337.

The mere fact that the mayor or other executive officers, agents or employees of a municipal corporation, upon complaint of a property owner, take steps to prevent the destruction of a private culvert, although it would in the absence of explanation tend to show that the corporation had taken charge of the culvert and was exercising authority over it, will not render the corporation liable for damages caused by such obstruction, where, in fact, the corporation has never, by resolution of its council authorized such action or assumed or exercised any control over the culvert. Robinson *v.* Danville, 101 Va. 213, 43 S. E. 337.

E. CONVERSION INTO PUBLIC SEWER.

For the conversion of a private culvert into a public one, see ante, "Power of Executive Officers to Appropriate Private Culvert," I, B, 4. See also, the title EMINENT DOMAIN.

Drawer and Endorser.

See the title BILLS, NOTES AND CHECKS, vol. 2, p. 401.

DREAM.—See Goodman *v.* Richmond, etc., R. Co., 81 Va. 585.

Dredging.

See the titles CONTRACTS, vol. 3, p. 415; OYSTERS.

Drift Property.

See the title SHIPS AND SHIPPING.

Drivers.

See the title LAW OF THE ROAD.

DRUGGISTS.

CROSS REFERENCES.

See the titles INTOXICATING LIQUORS; LICENSES; PHYSICIANS AND SURGEONS; POISONS AND POISONING.

The License or Business Tax.

State License Requirement Not Repealed by Pharmacy Acts.—In an indictment under § 1, ch. 107, acts of W. Va., 1877, requiring a license to carry on the business of a druggist, it was held, that § 8, ch. 52, acts of W. Va., 1881, W. Va. Code, 1899, ch. 150, § 29b, VIII, must be construed not to repeal § 1, ch. 107, acts of W. Va., 1877, on the ground that to repeal a former statute by implication in a later, there must be such a positive repugnancy between the new law and the old that they can not be consistently reconciled. Also the object of the two statutes are different, that regarding license being to produce revenue, while that regarding registration being to restrict the sale of drugs and poisons to those who are capable of dispensing them properly. State *v.* Enoch, 26 W. Va. 253.

In an indictment under § 1, ch. 107, acts of W. Va., 1877, requiring license to carry on the business of druggist, it was held, that although a registered pharmacist, the defendant must also have a license to carry on the business of a druggist, as the statute conferring the right to keep and sell, etc., on apothecaries registered as therein provided (Compare W. Va. Code, 1899, ch. 150, § 29b, VIII), does not repeal § 1, ch. 107, acts of W. Va., 1877, declaring that no person without a state license therefor should carry on the business of a druggist. "If it had been intended to repeal the law requiring license the legislature would have said so." State *v.* Enoch, 26 W. Va. 253.

Burden of Proof.—In prosecutions for carrying on the business of druggist without a state license, on the plea of not guilty, the burden of justifying under or proving license is on the defendant. State *v.* Horner, 52 W. Va. 373, 43 S. E. 89.

Form and Sufficiency of Indictment.—See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

In an indictment under § 1, ch. 107, acts of W. Va., 1877, requiring a license to carry on the business of a druggist, the form following was held good: "The grand jurors of the state of West Virginia in and for the body of the county of Jackson and now attending the said court upon their oaths present, that B. B. Enoch on the —— of May A. D. 1881, and on divers other days since that time did carry on the business of a druggist in said county without a license therefor. Against the peace and dignity of the state. Upon the information of ——— sworn in open court and sent to the grand jury to give evidence on this indictment." State *v.* Enoch, 26 W. Va. 253.

Language of the Statute.—In an indictment under § 1, ch. 107, acts of 1877, requiring a license to carry on the business of a druggist, the allegation "carries on the business of a druggist without a license therefor" being in the language of the statute, is sufficient. State *v.* Enoch, 26 W. Va. 253.

Name of Witness Omitted.—In an indictment under § 1, ch. 107, acts of W. Va., 1877, requiring a license to

carry on the business of a druggist, omission to state name of witness at foot of indictment is not fatal, the requirement of the Code (§ 8, ch. 157) being directory. State *v.* Enoch, 26 W. Va. 253.

Liability for Negligence.—See generally, the title NEGLIGENCE.

Degree of Care Required.—Apothecaries, druggists and all persons engaged in manufacturing, compounding, or selling drugs, poisons or medicines, are required to be extraordinarily skillful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds. Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am St. Rep. 909, 57 L. R. A. 428.

Privity of Contracts.—Where a merchant sells a harmful poisonous drug to one person for a medicine which is harmless, by mistake, and it is taken for medicine, without negligence, by a third person, the seller is liable to such third person for damage resulting to him therefrom, notwithstanding there is no privity of contract between the merchant and such third person. Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

The liability of a druggist for negligence in the sale of drugs, is not affected by the fact that the sale was not made directly to the plaintiff, but to an agent or messenger, and this even though the plaintiff did not send the actual purchaser, nor did he buy or pay for them. Only the parties to a contract can sue for damage from its breach; but where in executing it things of imminently dangerous character are used, from which injury may probably happen to others, the law places him who executes the contract under duty to so perform it as not to injure strangers to it, and such strangers may sue for damage coming to them from its negligent perfomance. Peters *v.* Johnson, 50 W. Va. 644, 41 S. E. 190, 88 Am. St. Rep. 909, 57 L. R. A. 428.

Drugs.

See the title DRUGGISTS, ante, p. 830.

DRUMMERS.

CROSS REFERENCES.

See the titles AGENCY, vol. 1, p. 240; BROKERS, vol. 2, p. 628; FACTORS AND COMMISSION MERCHANTS; HAWKERS AND PEDDLERS; INTERSTATE COMMERCE; INTOXICATING LIQUORS; LICENSES; SALES; WARRANTY.

Where Goods Are Shipped to Salesman at Place of Sale—Salesman Not a Peddler.—A traveling salesman for a broom manufacturer went from place to place, and his employer shipped him from the factory, by rail, to the freight stations along his route, brooms in such quantities as the employer thought would be sufficient to supply the trade at such points. The shipments were so timed as to reach the salesman on his arrival at each place. From the shipments so made the salesman would select one or two brooms, as samples, and with these go around and drum the town for orders, taking orders from merchants only, and never for less than dozen lots. After taking all the orders to be gotten in a town, the salesman would go to the depot, get the brooms, and fill the orders taken, by delivering the brooms. This method of selling brooms was an established feature of the business of broom manufacture, rendered necessary to avoid injury to the brooms by bending and breaking the straw when shipped in small lots from the factory.

The salesman had no license to peddle brooms. It was held, that the salesman was not within the spirit or letter of the act of assembly (Va. Code, 1904, pp. 2223'4), defining a peddler, and fixing a penalty upon him for doing business without a license. "The plaintiff did not carry the brooms from place to place for sale. He was merely the salesman of a manufacturer who had a regular place of business, and who shipped from the factory to each point the salesman visited goods to fill such orders as he secured at such place. The goods with which orders were filled at each place where the salesman took orders were shipped directly from the factory to such place, and not from one place along the salesman's route to another. The mere fact that brooms were shipped from the factory, the principal's place of business, so as to enable the salesman to fill the orders after they were taken by him, instead of having the goods shipped to him after the orders were taken, does not, it seems to us, work such a change in the character of the business as to make the plaintiff in error a peddler within the meaning of our statute, where such a method of business was adopted, not for the purpose of evading the revenue laws, but because that mode of delivery was an established feature in the business of manufacturing brooms." Kloss *v.* Com., 103 Va. 864, 49 S. E. 655. See the title HAWKERS AND PEDDLERS.

Authority to Receive Payment.—It is an established rule of commercial law that traveling salesmen, merely taking orders for, but not delivering, goods, have no implied authority to receive payment or make collections. Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516.

"An agent employed to make sales, and selling on credit, is not authorized subsequently to collect the price in the name of the principal, and payment to him will not discharge the purchaser unless he can show some authority in the agent other than that necessarily implied in a mere power to make sales." Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516. See the title AGENCY, vol. 1, p. 240.

Burden of Showing Authority.—The burden of showing that a salesman not in possession of the goods had authority to receive payment therefor is on the purchaser or the party making payment. Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516.

False Representations by Drummer as to Authority to Receive Payment.—Traveling salesmen, merely taking orders for, but not delivering goods, have no implied authority to receive payment or make collections; nor can such salesmen abrogate this rule by falsely holding themselves out as members of the firm they represent. The person who deals with them on such false representations, and pays money to them by reason thereof, does so at his own risk, and must bear the loss. Crawford *v.* Whittaker, 42 W. Va. 430, 26 S. E. 516.

Settlement of Accounts between Principal and Salesman.—As between a principal and his agent, a traveling salesman, if a current account be rendered and the agent receiving it retains it beyond such time as is reasonable under the circumstances, and according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiescence in its correctness, and he becomes bound by it as an account stated. On the contrary, if, within such reasonable time, he calls on the other party to explain it, or objects to such account, he is not so bound. Shrewsbury *v.* Tufts, 41 W. Va. 212, 23 S. E. 692. See the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 82.

Liability to Indictment for Receiving Orders for Intoxicating Liquors without License.—See the title INTOXICATING LIQUORS.

Commercial Brokers.

Definition.—A commercial broker is defined in the revenue statutes of Virginia to be one "who negotiates * * * the sale of merchandise, without having possession or control of it as commission merchants have." Acts, 1881-1882, pp. 523, 524; Acts, 1889-'90, p. 226. Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967; White *v.* Com., 78 Va. 484; Henderson *v.* Com., 78 Va. 488.

A person was engaged in selling, by sample, certain commodities on commission, which were shipped, as sales were made, from various firms in and out of the state. None of the goods sold were at any time in his possession or control, but were shipped directly from the owners to the purchasers; nor did he have any interest in the goods other than his commissions on the sales when made. It was held, that such person was engaged in negotiating the sale of merchandise without having possession or control thereof as commission merchants have, and was therefore a commercial broker. Henderson *v.* Com., 78 Va. 488.

Necessity for License.—See the title LICENSES.

"No person shall without a license as required by law, act as a commercial broker." Acts 1881-82, pp. 523, 524. White *v.* Com., 78 Va. 484; Henderson *v.* Com., 78 Va. 488.

Acting as Commercial Broker under Sample Merchant's License.—A license issued to one under acts, 1881, pp. 211-213, to do a sample merchant's business, does not authorize such person to do business as a commercial broker, which business is authorized by a license issued under acts, 1881-82, pp. 523, 524. Henderson *v.* Com., 78 Va. 488.

Commercial Broker Acting Solely for Nonresident Principals.—A resident of this state who solicits orders for the sale of goods by sample, solely for nonresident owners, and who forwards such orders and receives a commission for the sales negotiated by him, is a broker engaged in interstate commerce, and neither the state nor any municipal corporation can impose a license tax on him for such business. Congress alone can regulate such commerce, and the silence of Congress on the subject is equivalent to a declaration that such commerce shall be absolutely free. A license tax on such broker is not a police regulation, but a revenue measure, and imposes an unlawful burden on interstate commerce. Adkins *v.* Richmond, 98 Va. 91, 34 S. E. 967. See the title INTERSTATE COMMERCE.

Sample Merchants.

Definition.—"A sample merchant is one who sells, or offers to sell, any description of goods, wares, or merchandise by sample, card or description, or other representation, verbal or otherwise, or who acts as agent for the sale or collection of orders by sample or description list, such as is furnished by the C. O. D. supply company of America, or any similar company." White *v.* Com., 78 Va. 484.

License.—See the title LICENSES.

Authorizes Sales Only of Goods Belonging to Sample Merchant.—Under the acts, 1881-2, pp. 211, 213, a sample merchant's license authorizes sale by himself or his agents, only of his own goods. White *v.* Com., 78 Va. 484.

Criminal Liability of Agent of Sample Merchant—Necessity of Showing Guilty Intent.—Where at the trial of the agent of a duly authorized sample merchant, for selling goods not the property of his principal, the defendant asked the court to instruct the jury that even if they believed the principal had violated the law, yet they must acquit the defendant unless they also believed that he had participated in the violation with an unlawful intent; it was held, that the instruction was properly refused, as the intent of the defendant is not by the statute an ingredient of the offense, and need not be alleged or proved. White *v.* Com., 78 Va. 484.

Drunkards.

See the title DRUNKENNESS.

DRUNKENNESS.

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CROSS REFERENCES.

See the titles CARRIERS, vol. 2, p. 671; CONTRACTS, vol. 3, p. 307; EVIDENCE; HOMICIDE; INNS AND INNKEEPERS; INTOXICATING LIQUORS; MASTER AND SERVANT; NEW TRIALS; PUBLIC OFFICERS; RESCISSION, CANCELLATION AND REFORMATION; WILLS.

As ground for divorce, see the title DIVORCE, ante, p. 734. As affecting marriage, see the title HUSBAND AND WIFE. As affecting insurance contracts, see the title INSURANCE.

I. Definition.

In Halstead *v.* Horton, 38 W. Va. 727, 18 S. E. 953, the court said: "Intoxicated, within the meaning of the statute, is such as attracts observation, and becomes known to others, or gives them reason to believe the person is intoxicated; and of this a bystander would generally be a better judge than the party himself, whose opinion on the subject for obvious reasons is worth but little."

II. As a Defense to Contractual Liability.

A. DEGREE OF DRUNKENNESS.

Must Be Incapable of Business.—It seems that intoxication is not a sufficient ground for vacating a party's assent to a contract, unless he was so drunk as to be incapable of business. Arnold *v.* Hickman, 6 Munf. 15; Reynolds *v.* Waller, 1 Wash. 164.

To render voidable, he who sets up intoxication as a defense should have been so drunk as to have drowned reason, memory and judgment, and impaired his mental faculties to an extent that would render him non compos mentis for the time being, especially where there is no pretense that any person connected with the transaction aided in or procured his drunkenness. It is not the influence of liquor which avoids a contract, but it must be shown

to exist to such an extent as to seriously impair the reasoning faculties. At the time of making the contract the party seeking to avoid it must have been in such a state of drunkenness as not to know what he was doing. Loftus *v.* Maloney, 89 Va. 576, 16 S. E. 749, citing Wigglesworth *v.* Steers, 1 Hen. & M. 70, 11 Am. & Eng. Ency. Law (1st Ed.) 773. See also, Smith *v.* Elliott, 1 Pat. & H. 307.

Ground for Setting Aside Deed.—Drunkenness of so extreme a character that the donor did not know what he was doing has been held sufficient to set aside a deed made while in such condition. Samuel *v.* Marshall, 3 Leigh 567. See also, Mettert *v.* Hagan, 18 Gratt. 231.

Question of Fact.—It is a question for the jury as to whether a person is so intoxicated as to be unable to exercise ordinary care or prudence. Arthur *v.* Charleston, 51 W. Va. 132, 41 S. E. 171; Mettert *v.* Hagan, 18 Gratt. 231.

Habitual Drunkenness.—Where a person, proven to be such an habitual drunkard that he was incapable of attending to business, made a conveyance of his property, without consideration, to persons holding great influence over him, and the beneficiaries concealed the existence of the conveyance from grantor's family, it was held, that the deeds should be cancelled. Jones *v.* McGruder, 87 Va. 360, 12 S. E. 792, citing Samuel *v.* Marshall, 3 Leigh 567.

B. FRAUDULENT ADVANTAGE TAKEN.

See generally, the titles FRAUD AND DECEIT; FRAUDULENT AND VOLUNTARY CONVEYANCES; UNDUE INFLUENCE.

Void or Voidable.—As a general rule where a fraudulent advantage is taken of a person in a state of drunkenness, such advantage constitutes such a glaring fraud as to render the transaction voidable in all the courts, both of equity and law. Reynolds *v.* Waller, 1 Wash. 164; Samuel *v.* Marshall, 3 Leigh 567; Harvey *v.* Pecks, 1 Munf. 518. But it has been held, that where a person was induced to sign a contract while in a state of intoxication to such a degree as not to know the true intent and meaning of the same, such contract is not only voidable but absolutely void. Hunter *v.* Tolbard, 47 W. Va. 258, 34 S. E. 737, citing 3 Min. Inst., pt. 1, in which the author says: "Where the drunkenness is so total as to have deprived the party of his reason and of an agreeing mind: In this case, without any reference to any question of fraud, there being an absolute want of understanding, without which there can be no contract, the transaction, whatever it may be, is not, as in other cases, voidable only, but wholly void." Hunter *v.* Tolbard, 47 W. Va. 258, 34 S. E. 737.

Presumption of Fraud.—Fraud will be inferred from the circumstances when a person reduced to a state of imbecility by habitual drunkenness conveys his entire property, without consideration, to a cousin, reserving to himself only a life estate, to the judgments of four half-sisters. Samuel *v.* Marshall, 3 Leigh 567.

C. IN ABSENCE OF FRAUD.

Void or Voidable.—An express contract entered into when the obligor is in a state of intoxication so as to deprive him of his understanding is voidable, and the party may, for that cause, avoid it, although the intoxication was voluntary, and not procured through the circumvention of the other party. Loftus *v.* Maloney, 89 Va. 576, 16 S. E. 749. But in 3 Minor Inst., pt. 1, cited in Hunter *v.* Tolbard, 47 W. Va. 258, 34 S. E. 737, the author says: "Where the drunkenness is so total as to have deprived the party of his reason and of an agreeing mind: In this case, without reference to any question of fraud, there being an absolute want of understanding, without which there can be no contract, the transaction, what-

ever it may be, is not, as in other cases, voidable only, but wholly void."

Contract Avoided by Legal Representatives.—A contract may be avoided by the legal representatives of one of the parties to it, on the ground of his having been drunk when it was made, although such drunkenness was not occasioned by the procurment of the other party. Wigglesworth *v.* Steers, 1 Hen. & M. 70.

D. RATIFICATION.

A contract under seal, for valuable consideration, ought not to be avoided on the ground that a party was intoxicated at the time, if his assent was afterwards given, when not disabled by intoxication or otherwise. Arnold *v.* Hickman, 6 Munf. 15; Mettert *v.* Hagan, 18 Gratt. 231.

II. As a Defense to Criminal Liability.

A. NATURE AND DEGREE.

Drunkenness is not insanity per se nor does it answer to what is termed an unsound mind, unless the derangement which it leaves, become fixed and continued by the drunkenness being habitual and thereby rendering the party incapable of discriminating between right and wrong. State *v.* Robinson, 20 W. Va. 713.

Permanent Insanity.—If permanent insanity be produced by habitual drunkenness then like any other insanity, it excuses an act which would be otherwise criminal, since it is not the policy of the law to inquire into the cause of such insanity. Boswell *v.* Com., 20 Gratt. 860; State *v.* Robinson, 20 W. Va. 713.

B. DRUNKENNESS OF ACCUSED.

1. As Defense to Homicide.

See generally, the title HOMICIDE.

a. Affecting Malice and Motive.

(1) Rule at Common Law.

At common law the implied malice from an act of willful malicious and premeditated killing would doom a man to the scaffold, although he was too drunk when he committed the deed to harbor express malice. State *v.* Robinson, 20 W. Va. 713.

Drunkenness although carried to the extent that it overcomes the will and incapacitates from controlling the action of the mind is no excuse for crime, and voluntary intoxication, although amounting to a frenzy, does not exempt one who commits a crime without provocation from the same construction of his conduct and the same legal inferences upon the question of intent as affecting the grade of his crime which are applicable to a person entirely sober. State *v.* Robinson, 20 W. Va. 713; State *v.* Shores, 31 W. Va. 491, 7 S. E. 413.

Accident.—While voluntary intoxication is no excuse for crime, yet it does not convert a mere accident into a crime. State *v.* Cross, 42 W. Va. 253, 24 S. E. 996.

(2) Rule under the Statute.

The only change made in the stringent rule of the common law is, that where, under the statute, in order to constitute murder in the first degree, deliberation and premeditation are required, upon the question of whether there was on the part of the prisoner deliberation and premeditation, the jury may consider the fact that he was intoxicated at the time of the killing. State *v.* Robinson, 20 W. Va. 713.

It has been held, that "Where a statute establishes degrees of the crime of murder and provides, that 'all willful, deliberate and premeditated killing shall be murder in the first degree,' evidence that the accused was intoxicated at the time of the killing, is competent for the consideration of the jury upon the question whether the accused was in such a condition of mind as to be capable of deliberation and premeditation." State *v.* Robinson, 20 W. Va. 713.

On a trial for murder, no proof of intoxication at the time of the crime

which falls short of showing the defendant to have been utterly incapable of acting from motive, will shield him from conviction. State *v.* Robinson, 20 W. Va. 713; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419; Hite *v.* Com., 96 Va. 489, 31 S. E. 895; Davis *v.* Com., 89 Va. 132, 15 S. E. 388.

Temporary Insanity.—If a man is temporarily insane from the effect of intoxication, then existing, of course it is impossible for him while in such a mental condition to deliberate and premeditate; and being in such a condition of mind, not having formed a previous purpose to kill his victim and in a pursuance of such purpose, made himself voluntarily drunk to accomplish his design, he could not be convicted of murder in the first degree. State *v.* Robinson, 20 W. Va. 713.

Malice Implied.—Although a person may make himself so drunk that he is incapable of express malice yet the law will imply malice from the circumstances as the apparent willfulness with which a crime is committed and a lack of provocation. Boswell *v.* Com., 20 Gratt. 860, cited in State *v.* Robinson, 20 W. Va. 713; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

(3) Voluntary Drunkenness While Harboring Criminal Intent.

A person can not voluntarily make himself drunk and commit a crime and then claim immunity from punishment on account of his condition when he committed the crime; the law not permitting a man to avail himself of the excuse of his own vice as a shelter from the legal consequences of such crime. Great stress is put upon this doctrine since there are few cases of premeditated violent homicide in which the defendant does not nerve himself to the encounter by liquor. Boswell *v.* Com., 20 Gratt. 860; Willis *v.* Com., 32 Gratt. 929, cited in Honesty *v.* Com., 81 Va. 283; Reed *v.* Com., 98 Va. 817, 36 S. E. 399; Longley *v.* Com., 99 Va. 807, 37 S. E. 339; State *v.* Robinson, 20 W. Va. 713; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

b. As Affecting Degree of Crime.

See generally, the title HOMICIDE.

A person guilty of homicide may reduce his crime from murder in the first degree to murder in the second, by showing that he was so intoxicated at the time the offense was committed as to render him capable of doing a willful, deliberate and premeditated act, and that he did not voluntarily become intoxicated for the purpose of committing the offense. All this may be shown by his own and the state's evidence, and the facts and circumstances surrounding the case. State *v.* Davis, 52 W. Va. 224, 43 S. E. 99, citing State *v.* Robinson, 20 W. Va. 713; Boswell *v.* Com., 20 Gratt. 860; Willis *v.* Com., 32 Gratt. 929; Honesty *v.* Com., 81 Va. 283, citing Willis *v.* Com., 32 Gratt. 929; Longley *v.* Com., 99 Va. 807, 37 S. E. 339.

Murder or Manslaughter.—As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character, as would at common law reduce the crime to manslaughter; for which latter offense a drunken man is equally responsible as a sober one. State *v.* Robinson, 20 W. Va. 713.

c. Burden of Proof.

The onus rests on the accused to prove, if he relies on intoxication as a defense, that when he committed the offense his condition from intoxication was such as to render him incapable of doing a willful, deliberate and premeditated act. Honesty *v.* Com., 81 Va. 283; State *v.* Welch, 36 W. Va. 690, 15 S. E. 419.

d. Question for Jury.

Where a jury has found that the accused willfully, maliciously and pre-

meditatedly killed a person and has found him guilty of murder in the first degree, it has been held, that the court is powerless to disturb the verdict on the ground that accused was intoxicated at the time of the killing, since such intoxication is not for judicial consideration, but is a matter for executive clemency. State *v.* Davis, 52 W. Va. 224, 43 S. E. 99.

2. As Defense to Forgery.

Upon a prosecution for forging a check, the prisoner would be entitled to an instruction that, if the jury believe from the evidence that the prisoner at the time he made the said check did not in fact know what he was then doing, and that he was not capable of exercising criminal intent, they must find him not guilty. But he is not entitled to an instruction that if they believe from the evidence, that at the time of the alleged forgery he was laboring under a temporary diseased state of mind, the effect of a long-continued state of intoxication, and that while in such condition he did not know what he was doing, then he was not capable of exercising criminal intent and the jury must find him not guilty. State *v.* Poindexter, 23 W. Va. 805. See the title FORGERY AND COUNTERFEITING.

C. KILLING IN DEFENSE OF ANOTHER INCAPACITATED BY DRUNKENNESS.

Where accused is defending his brother who is threatened with death or great bodily harm, if the brother be so drunk as not to be mentally able to know his duty to retreat, or physically unable to retreat, the accused is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat. State *v.* Greer, 22 W. Va. 800.

DRY TRUSTEE.—In Bell *v.* Humphrey, 8 W. Va. 27, it is said: "What is a mere **dry** legal title, or estate, as applied to a **trustee?** 'Wherever the person who is equitably entitled to any property, takes, absolutely, the entire beneficial interest, the person in whom the legal estate is vested for his benefit, may be said to be a **dry trustee;**' as, for instance, where the legal estate in vested in A., his heirs and assigns in trust for B., his heirs and assigns." See the title TRUSTS AND TRUSTEES.

Duces Tecum.

See the title PRODUCTION OF DOCUMENTS.

DUE.—In Clarke *v.* Tyler, 30 Gratt. 139, it is said: "The word **due** is defined by Webster to be 'that which is owed,' 'that which custom, statute or law requires to be paid;' and by Worcester, 'that which any one has a right to demand, claim or possess,' 'that which can justly be required.'"

In Altmeyer *v.* Caulfield, 37 W. Va. 847, 17 S. E. 409, it is said: "Such positive statement of the amount, coupled with the words **due,** 'owing,' and 'wholly unpaid,' according to common acceptation and meaning, excludes the idea that there are any just payments, offsets, or counterclaims of any kind against the demand, and therefore, as strong as language can make it, show that the sum is stated at the amount at the least which affiant believes he is justly entitled to recover."

An affidavit under § 46, ch. 125, W. Va. Code, 1899, made by a plaintiff as to the amount **due** him, which says that there is **due** him a certain sum, instead of saying there is "**due** and unpaid," is not a sufficient affidavit to call for judgment under that section by reason of the absence of the words "and unpaid." The court said: "The word **due** has the meaning some-

times of merely owing, whether matured or not; sometimes it means 'mature.' Does it inevitably mean in that case that it is unpaid? It was intended to not leave that to a mental reservation. We say 'a note is due and unpaid.' Why do we use both words, except to say the note is both matured and unpaid." Marstiller *v.* Ward, 52 W. Va. 74, 43 S. E. 178, 182.

Due Diligence.

See references under DILIGENCE, ante, p. 654.

DUELING.

I. The Offense, 839.

II. The Indictment, 839.

III. Commitment of a Witness, 840.

IV. Self Incriminating Evidence, 840.

V. Aiders and Abettors, 840.

CROSS REFERENCES.

See the titles BREACH OF THE PEACE, vol. 2, p. 615; EVIDENCE; HOMICIDE; LIBEL AND SLANDER.

As to a motion from office of a party engaged or assisting in dues or for refusal to take the anti-dueling oath, see the title PUBLIC OFFICERS.

I. The Offense.

The Duel at Common Law.—At common law a breach of the peace committed by fighting a duel is an aggravated misdemeanor. But "fighting a duel" is not a distinct generic offense at common law. It may be assault and battery, or an affray, or, if death ensues, murder. Com. *v.* Lambert, 9 Leigh 604.

Challenge at Common Law.—At common law a challenge to fight a duel or the sending of letters to provoke a duel is a misdemeanor as tending to bring about a violent breach of the peace. Com. *v.* Lambert, 9 Leigh 604.

Statutory Offense.—The offenses of duelling and challenging to fight a duel are carefully defined by statute in Virginia and West Virginia. See Va. Code, 1904, §§ 3683-3693; W. Va. Code, ch. 144, §§ 19-27.

II. The Indictment.

See generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

Challenge in a Letter Need Not Be Set Out.—An indictment for sending a challenge in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. Brown *v.* Com., 2 Va. Cas. 516.

Charging Merely the Fighting of a Duel.—An indictment at common law charging that the defendant did fight a duel with pistols is bad on demurrer since it is uncertain whether he is proceeded against for a distinct offense independent of the results, or for any, or if any, for which, of the effects of the duel. In Com. *v.* Lambert, 9 Leigh 604, the court said: "Murder, felonious shooting or maiming, an affray, an assault with intent to kill, may result from a duel. For either offense the party might be indicted, and the indictment would apprize him for which of the specific results from the act of fighting the duel, he was prosecuted. And the consequences of a conviction or acquittal are ascertained by the law. But where the charge is for fighting a duel alone, it is uncertain whether he is pro-

ceeded against for a distinct offense independent of the results, or for any, or if any, for which, of the effects of the duel. And it is equally uncertain what would be the effect of a conviction or acquittal, in barring any other prosecution for an offense of a different grade, resulting from the act of fighting a duel. The charge to fight a duel is not therefore equipollent with the usual charge in an indictment for an affray or common assault. It does not ascertain with sufficient precision the act for which the party is prosecuted. It is uncertain what degree of evidence would be required to make it out, and the consequences of a judgment are not ascertained. None of these difficulties are encountered when the old and accustomed forms are adhered to; and there seems to be no necessity, for the more effectual prosecution of breaches of the peace committed by dueling, to sanction a departure from them in this instance."

Must Charge That a Duel Was Fought.—An indictment for aiding and abetting in fighting a duel, not charging with certainty that a duel was fought, has been held bad for that reason on general demurrer. Com. *v.* Dudley, 6 Leigh 613.

III. Commitment of a Witness.

A judge out of court (and a fortiori in court) has a right, when he has reason to suspect that a duel is about to take place, to commit a witness who may refuse out of court to give testimony by affidavit, even though the party accused is not before the judge, until he shall give testimony. Com. *v.* Jones, 1 Va. Cas. 270. See generally, the title WITNESSES.

IV. Self Incriminating Evidence.

It has been held, that "Even if a person might be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity, by discharging him from all prosecution for the offense, the act of October 7, 1870, amending § 1, ch. 12, Va. Code, 1860, does not afford that indemnity; and, therefore, in requiring any person engaged in a duel to testify against another prosecuted for having fought, etc., such duel, is unconstitutional." Cullen *v.* Com., 24 Gratt. 624. See the title WITNESSES.

V. Aiders and Abettors.

Under the principles of the common law and the statute against dueling, it may well be apprehended that the surgeon of a party to a duel would be regarded in law as being concerned in, or as aiding and abetting the duel. Cullen *v.* Com., 24 Gratt. 624. And see Va. Code, 1904, § 3694. See generally, the title ACCOMPLICES AND ACCESSORIES, vol. 1 p. 74.

Due Process of Law.

See the title CONSTITUTIONAL LAW, vol. 3, p. 207.

DULY ADVERTISE.—No general rule can be laid down as to the length of time property should be advertised for sale. Ordinarily, a direction to **duly advertise** is sufficiently complied with by advertising in accordance with the prevailing custom adopted by prudent men in the management of their own affairs, or by following the rule of courts in relation to sales of like property in the jurisdiction in which the property is situated. Wilson *v.* Wall, 99 Va. 353, 38 S. E. 181, disapproving Morriss *v.* Virginia, etc., Ins. Co., 90 Va. 370, 18 S. E. 843. See generally, the titles JUDICIAL SALES; SHERIFFS' SALES.

Dumb Persons.

See references under DEAF AND DUMB PERSONS, ante, p. 225.

DUP.—In Western Union Tel. Co. *v.* Virginia Paper Co., 87 Va. 423, 12 S. E. 755, it is said: "In the argument here the duplicate itself was exhibited for the inspection of the court, from which it appears that the three letters Dup were written in ink just above the first-mentioned date, and also across the printed form near the top of the paper. These letters are an abbreviation used in telegraphy for the word 'duplicate.'"

Duplicity in Pleading.

See generally, the title PLEADING.

DURESS.

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CROSS REFERENCES.

See the titles ACKNOWLEDGMENTS, vol. 1, p. 104; ASSIGNMENTS, vol. 1, p. 745; BILLS, NOTES AND CHECKS, vol. 2, p. 401; BONDS, vol. 2, p. 507; CONFESSIONS, vol. 3, p. 79; CONTRACTS, vol. 3, p. 307; CRIMINAL LAW, ante, p. 1; DEEDS, ante, p. 364; EXTORTION; PAYMENT; RESCISSION, CANCELLATION AND REFORMATION; THREATS AND THREATENING LETTERS; WILLS.

I. Definition.

Supreme court of the United States in Brown *v.* Pierce, 7 Wall. 214, reviews the authorities, ancient and modern, and thus states the law in reference to duress: "Duress in its more extended sense, means that degree of constraint or danger, either actually inflicted, or threatened and impending, which is sufficient in severity, or, in apprehension, to overcome the mind and will of a person of ordinary firmness." Cited in Simmons *v.* Trumbo, 9 W. Va. 358; Keckley *v.* Union Bank, 79 Va. 458.

Lord Deman says: "The fear must be such as deprives one of his free

agency, who possesses that ordinary degree of firmness which the law requires all to exert." Simmons *v.* Trumbo, 9 W. Va. 358.

Lord Coke says: "It must not be a vain fear, but such as may befall a constant man." Simmons *v.* Trumbo, 9 W. Va. 358.

Duress Per Minas and Duress of Imprisonment Distinguished. — In Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525, the court said: "Mr. Bishop, in his work on Contracts (§ 716), says: 'It is immaterial whether the duress is actual or only, in a serious and effectual manner, threatened. This idea is expressed in the older books by dividing it, in the words of Blackstone, into two sorts—duress of imprisonment, where a man actually loses his liberty, and duress per minas, where the hardship is only threatened and impending.'"

II. What Constitutes Duress.

A. DURESS PER MINAS.

Duress per minas, as defined at common law, is where the party enters into a contract: (1) For fear of loss of life; (2) For fear of loss of limb; (3) For fear of mayhem; (4) For fear of imprisonment, and some of the modern decisions restrict the operation of the rule within those limits. Simmons *v.* Trumbo, 9 W. Va. 358.

Fear of Imprisonment.—Where a person who accepted payment of a bond in confederate notes, the obligor having told him that if he refused to accept the notes he would be liable to imprisonment, testifying to such facts, the testimony of such person that he surrendered the bond, under such circumstances through fear of imprisonment, would not make it duress, as the real inquiry is whether there was that degree of danger threatened and impending as would be sufficient to overcome the mind and will of a person of ordinary firmness and not whether he was influenced by a secret and internal fear, for which there was no just cause. Simmons *v.* Trumbo, 9 W. Va. 358, overruling Mann *v.* McVey, 3 W. Va. 233 and Mann *v.* Lewis, 3 W. Va. 215.

A party in the latter part of 1861, or early in 1862, residing in West Virginia, accepts payment of a bond in confederate notes, and surrenders the bond, the obligor having first said to him, that "he dare not refuse payment in confederate notes; that if he did he would be considered disloyal, and would be liable to be put in prison and kept there during the war." Such surrender of the bond can not be regarded as procured by fraud or duress, in the absence of all other evidence. Simmons *v.* Trumbo, 9 W. Va. 359, overruling Mann *v.* McVey, 3 W. Va. 233 and Mann *v.* Lewis, 3 W. Va. 215.

Where a party residing in Greenbrier county, in 1863, is compelled by threats of arrest for disloyalty to the confederate government, to receive confederate treasury notes in payment of a debt created before the beginning of the rebellion, he is entitled to relief against such payment by a sale of the land involved in the transaction, to enforce his vendor's lien. Ludington *v.* Gabbert, 5 W. Va. 330.

Under § 5, ch. 141, W. Va. Code, a commissioner may in the manner prescribed by that section compel the debtor to convey his real estate lying out of this state to satisfy the creditor's judgment, but he is not authorized to compel the debtor to execute an assignment of his chose in action for such purpose. If he does compel in the manner prescribed by that section such an assignment of his chose in action by the debtor, the courts will hold that such assignment was made under duress, and it will be held either absolutely void or at least voidable. Spang *v.* Robinson, 24 W. Va. 327.

Under Military Compulsion.—Where defendant's machine was used by the confederate army for the purpose of threshing out the plaintiff's wheat, and the defendant fed the machine while

thus engaged in threshing and the defendant introduced evidence showing that the said machine and his own personal services were forcibly impressed into the confederate service; held, that such impression amounted to duress and constituted a defense to an action for trespass. Cunningham *v.* Pitzer, 2 W. Va. 264.

Instrument Executed to Stifle Prosecution.—It has been held, that a threat to prosecute plaintiff's son-in-law for forgery did not constitute duress, which would avoid payment of a note signed under the influence of such threat. Keckley *v.* Union Bank, 79 Va. 458.

Declaration.— W. H. B. filed his declaration against N. H. S. & G G. Co., for damages, alleging that defendant, N. H. S., by threatening to have R., the son of the plaintiff, arrested for a felony and have him sent to the penitentiary, forced and induced plaintiff to release the levy of an execution on certain property of said R., who was plaintiff's execution debtor and turn the property so released over to defendants, who took possession thereof; but failed to allege in the declaration on what felonious charge defendant S. claimed the said R. could be so arrested or prosecuted, and that R. was innocent of such charge. Held, declaration bad on demurrer for want of such allegation. Boggs *v.* Slack, etc., Grocery Co., 53 W. Va. 536, 44 S. E. 777.

B. DURESS OF IMPRISONMENT.

Where a person has paid money under influence of an attachment of his person, served to compel performance of an erroneous decree in chancery, such circumstances were held to constitute duress and the money was decreed to be refunded. Nelson *v.* Suddarth, 1 Hen. & M. 350.

Unlawful Imprisonment.—Under scire facias against bail upon recognizance in a case of felony, a plea that at the time of giving such recognizance the principal was unlawfully imprisoned by the state, and that such unlawful imprisonment continued until by the force of such imprisonment the recognizance was given, such plea does not raise a defense to the bail, as no issue of fact is tendered thereby, but a mere question of law is raised—did such circumstances constitute duress which would render the recognizance void? Archer *v.* Com., 10 Gratt. 627.

The jurisdiction and authority of the court by whose authority a person was detained in custody being shown, a recognizance entered into for his ease and to procure his enlargement from custody, could not be regarded as obtained by duress. Archer *v.* Com., 10 Gratt. 627.

C. DURESS AS TO PROPERTY.

There are many American decisions, of high authority, which adopt the rule that contracts procured by threats of destruction of property may be avoided on the grounds of duress. See Simmons *v.* Trumbo, 9 W. Va. 358; Mann *v.* Lewis, 3 W. Va. 215.

Threat to Bring Suit.—A threat to bring suit on a colorable or valid claim will not constitute duress of property sufficient to avoid a contract made under the influence of such threat. Whittaker *v.* Southwest Virginia Improvement Co., 34 W. Va. 217, 12 S. E. 507.

III. As Affecting Contracts.

A. THREATS OF INJURY TO PROPERTY.

The common law denied that contracts procured by menace of a mere battery to the person or of trespass to lands, or loss of goods, could be avoided on that account and the reason assigned for this qualification of the rule was that such threats were held not to be of a nature to overcome the mind and will of a firm and prudent man, because it was said that if such an injury is inflicted, sufficient and adequate redress might be obtained in a suit at law. Simmons *v.* Trumbo, 9 W. Va. 358.

"But there are many American decisions of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery, to the person or the destruction of property, may be avoided on the grounds of duress because in such case there is nothing but the form of contract without the substance." Simmons *v.* Trumbo, 9 W. Va. 358; Mann *v.* Lewis, 3 W. Va. 215.

B. THREATS TO BRING SUIT.

Where a party has a colorable and a fortiori, a valid, enforcible claim against another, if in endeavoring to secure his rights from his unwilling vendor he threatens suit in case of noncompliance with his claim, such threat does not constitute duress. Whittaker *v.* South West Virginia Improvement Co., 34 W. Va. 217, 12 S. E. 507.

C. THREATS OF PROSECUTION.

Previous to 1872, B. had made sundry notes held by plaintiff, and had forged thereon the names of the defendants, C. & K., the latter being his son-in-law. Plaintiff informed K. that B. would be prosecuted for the forgery, unless K. with C., as endorsers for B., as maker, gave a new note in lieu of the forged notes. The new note was accordingly given, and B. was not prosecuted. The note of 1872 was repeatedly renewed, and the note in suit was given by defendants (B. having been dropped off) for the balance, after sundry payments. Held, these facts do not amount to such duress as will avoid a contract. Keckley *v.* Union Bank, 79 Va. 458.

D. PROCUREMENT OF CONTRACT MUST BE THE OBJECT.

"The duress must have for its object the procurement of the contract. The threatening, beating or imprisonment must be to this end; and hereupon the deed must be made, for otherwise the deed shall not be said to be by duress. If I be imprisoned at one man's suit (be the cause just or not) and being in prison, I make an obligation or any other deed to a third man, this shall not be said to be by duress." Moncure P. in Talley *v.* Robinson, 22 Gratt. 888.

Illustration.—R. sets up the defense that the contract was made under duress; that he had been severely whipped by a mob and driven from the county. But it appears that T. was in no way implicated in that outrage, though he had heard of it, and he gave R. the price he asked for the land. The contract is valid. Talley *v.* Robinson, 22 Gratt. 888.

IV. Evidence.

In pleading fear the defendant must show some just cause of fear, the real question being, was there in fact just cause for fear, not, was the party influenced by fear. Simmons *v.* Trumbo, 9 W. Va. 258, overruling Mann *v.* McVey, 3 W. Va. 233, and Mann *v.* Lewis, 3 W. Va. 215.

In Countz *v.* Geiger, 1 Call 190, the court said: "It is not credible that a wife, whose husband had long been in the habit of ill-using her, * * * would voluntarily go to a justice of the peace and swear that she was desirous of transferring her estate to him to the prejudice of her own son."

But the court held, that the absence of a privy examination of the wife would cause it to entertain suspicion of duress. Countz *v.* Geiger, 1 Call 190.

One is not entitled to a divorce on the ground that the marriage was contracted under duress, where the only evidence of duress is the fact that, having been arrested on the charge of seduction, he married defendant to avoid prosecution. Copeland *v.* Copeland, 2 Va. Dec. 81.

An attachment of the person having been served to compel performance of an erroneous decree in chancery and

the defendant having been induced, under influence of the decree and force of the attachment, to pay a sum of money, the court held, that such circumstances constituted duress and decreed the refunding of the money. Nelson *v.* Suddarth, 1 Hen. & M. 350.

V. Defense.

A. AGAINST THIRD PERSON.

Duress is no defense as against the right of third persons, who have acquired such rights for value and without notice. Talley *v.* Robinson, 22 Gratt. 888.

B. DURESS OF PRINCIPAL.

A surety will not be allowed to avoid a contract by showing duress to the principal. Archer *v.* Com., 10 Gratt. 627. See the title SURETYSHIP.

C. LEGAL DURESS AS AFFECTING BONDS.

The doctrine of legal duress applicable to contracts extorted by officers under color of their office has no application to bonds required by law. Yost *v.* Ramey, 103 Va. 117, 48 S. E. 862.

It has been held, where the law requires a bond with certain conditions to be executed before an executor is allowed to qualify as such, and where such bond, with sureties, has in fact been executed, but contains several conditions not required by law, that the obligors will not be heard to say that they acted under legal duress. Yost *v.* Ramey, 103 Va. 117, 48 S. E. 862.

D. AS A DEFENSE TO TRESPASS.

It is a good defense to an action of trespass, for seizing and carrying away the property of another, that the defendant acted under duress; and that he did the act complained of involuntarily, and under reasonable apprehensions of serious bodily harm and injury if he declined to comply with the demands of the force compelling him to commit it; which demands he could not reasonably avoid. Cunningham *v.* Pitzer, 2 W. Va. 264.

But if the plaintiff offers evidence tending to show that the defendant might have avoided the committing of the trespass by any reasonable means, such as escape or concealment, it will then become incumbent on the defendant, in order to escape from liability, to show that he had no reasonable means of escaping from the force or fear after they were applied to him, and before the committing of the trespass. Cunningham *v.* Pitzer, 2 W. Va. 264. See the title TRESPASS.

E. AS A DEFENSE TO THE CHARGE OF CONTRIBUTORY NEGLIGENCE.

Where a person, having a ticket for passage upon a railroad, boards a freight train which does not carry passengers, believing his ticket good on that train and the conductor orders such person to get off the train while running at a speed which would endanger him in getting off, the conductor refusing to stop the train to allow him to get off, and in violent and insulting language threatens to eject the person from the train by force if such order is not obeyed, and has force at his command to execute such threat, and the person jumps from the train to avoid ejection by force; this is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train. Boggess *v.* Chesapeake, etc., R. Co., 37 W. Va. 297, 16 S. E. 525. See the title NEGLIGENCE.

DURING.—The true construction of the law, concerning the appointment and duties of the sheriffs, requires that they should be annually nominated, and commissioned, and should annually give bond for the faithful collection of the taxes, etc., therefore, in this case, the high sheriff having been nominated and commissioned for one year only, and having acted the second year, without a new nomination and commission, and not having renewed his bond; held, that the securities for the first year were not liable for the taxes collected by the high sheriff for the second. The court said: "On the whole, I am of opinion, that there ought to be an annual nomination, appointment, and bond. The expression in the bond '**during** the continuance in office,' must clearly have reference to the actual duration of the office by virtue of the appointment under which the bond was taken." Com. *v.* Fairfax, 4 Hen. & M. 208, 211.

A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty as deputy, "**during** his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only. Munford *v.* Rice, 6 Munf. 81. See also, the titles PUBLIC OFFICERS; SHERIFFS AND CONSTABLES; SURETYSHIP.

During Her Life.—The words (in 1775) "I give to my wife the use and profits of my whole estate, **during her natural life,** and after that is ended, my will is that the whole of my estate exclusive of that already given my wife, be equally divided betwixt whoever my wife may think proper to make her heir or heirs, and my brother, R. S.," create a fee simple in the wife to one-half the estate; just as if he had said, "I give one-half of my estate to her and her heirs, and I give the other half to her **during life** and after her death to my brother." Affirmed by court of appeals, Shermer *v.* Shermer, 1 Wash. 266. The court said: "In the devise to the wife, the words **during her natural life,** ought not to be applied to that moiety of his estate which the testator designed for her heir or heirs, because a power to dispose or to make an heir of the moiety, which she undeniably had, and an inheritance or property in the moiety, being synonymous terms, the words, **during her life,** can have no effect upon her right to that moiety, which was greater than an estate **during her life** but ought to be confined to that moiety, which was designed for his brother, and in which her interest would cease with her life, so that the devise ought to be expounded as if it had been written thus: 'I give one-half of my estate to my wife, and to whomsoever she shall think proper to make her heir or heirs; that is, I give one-half of my estate to her and to her heirs, and I give the other half of it to her **during her life** only, and after her death, to my brother, Richard Shermer.'" Shermer *v.* Richardson, Wythe 159, 162.

DWELLING HOUSE.—See the titles ARSON, vol. 1, p. 723; BURGLARY AND HOUSEBREAKING, vol. 2, p. 656.

S. occupies a house, the front room on the first floor as a store, the back room as a dining room, the upper rooms as sleeping apartments for her family; but the only mode of ascent to the upper rooms is outside the house. It was held, that the house in question was a **dwelling house,** within the meaning of the statute against riot. Samanni *v.* Com., 16 Gratt. 543. See generally, the title RIOT.

In Hooker *v.* Com., 13 Gratt. 765, it is said: "The facts that a building

has once been used as a **dwelling house** and is intended for the same use in future, do not of themselves make the building a **dwelling house** within the meaning of the criminal statutes of Virginia."

A statute required service of process to be made by posting a copy of the process on the front door of the party's usual place of abode. A return stated that process had been served by posting an office copy on the front door of the party's **dwelling house.** Upon the sufficiency of this return, the court said: "In other words, is **dwelling house** equivalent to 'usual place of abode,' as used in the statute? Usual place of abode, means the place at which the party usually stays at the time. Can a man have a **dwelling house** which is not his usual place of abode, and where he does not usually stay? If he can, the return is bad. A man might have a **dwelling house** and not dwell or stay in it at and about the time of the service or attempted service of process." Lewis *v.* Botkin, 4 W. Va. 536. To the same effect, see Lewis *v.* Botkin, 4 W. Va. 538. See generally, the title SERVICE OF PROCESS.

DYING DECLARATIONS.

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CROSS REFERENCES.

See generally, the titles CRIMINAL LAW, ante, p. 1; EVIDENCE; HOMICIDE.

I. Statement of General Rule.

Dying declarations are admissible when made under a sense of impending death without any hope or expectation of recovery. "When this is made to appear by proof, or by the circumstances of the case, dying declarations to identify the prisoner, or to establish the circumstances of the res gestæ, or to show transactions from which death results, are always admissible, to have the same weight as if made under the sanction of an oath. For it is considered that when an individual is in expectation of impending death, all temptation to falsehood, either of interest, hope or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to

truth as the most solemn obligation of an oath administered in a court of justice." Swisher *v.* Com., 26 Gratt. 964, cited in O'Boyle's Case, 100 Va. 785, 795, 40 S. E. 121.

Reason of the Rule.—The principle upon which in case of homicide the dying declarations of the deceased are admitted in evidence is that they are declarations made in extremity, under a sense of impending death, and, therefore, when every hope of the world is gone; when every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth—a situation so solemn and awful is considered by the law as creating the most impressive of sanctions. Swisher *v.* Com., 26 Gratt. 964; Hall *v.* Com., 89 Va. 177, 15 S. E. 517; Bull *v.* Com., 14 Gratt. 613.

Statements of deceased in articuto mortis, and in presence of accused that accused killed her with poison in whiskey given shortly previous is admissible as part of res gestæ—as dying declaration,—and as statement in presence of accused undenied by him. Puryear *v.* Com., 83 Va. 51, 1 S. E. 512.

II. Foundation for Admission of the Evidence.

In General.—It is a well-settled rule of law that to render dying declarations admissible evidence, they must be shown to have been made, when the declarant is under the sense of impending death and without any expectation or hope of recovery. Swisher *v.* Com., 26 Gratt. 964; Hill *v.* Com., 2 Gratt. 594; Bull *v.* Com., 14 Gratt. 613; Vass *v.* Com., 3 Leigh 786; Jackson *v.* Com., 19 Gratt. 656; King *v.* Com., 2 Va. Cas. 78; Gibson *v.* Com., 2 Va. Cas. 111; Puryear *v.* Com., 83 Va. 51, 1 S. E. 512; Hall *v.* Com., 89 Va. 171, 15 S. E. 517; O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121; Bowles *v.* Com., 103 Va. 816.

A. MUST BE SENSE OF IMPENDING DEATH.

In a prosecution for murder the offer of dying declarations should be preceded by evidence that they were actually made in expectation of impending death. It is not necessary that the injured person should have stated that they were made in that expectation; it is enough if it satisfactorily appears, in any way, that they were made under that sanction; whether it be directly proved by the express language of the declarant or be inferred from his conduct or other circumstances of his case. Hill *v.* Com., 2 Gratt. 594; Swisher *v.* Com., 26 Gratt. 964; Vass *v.* Com., 3 Leigh 786; Hall *v.* Com., 89 Va. 177, 15 S. E. 517.

Evidence that deceased was told of her dying condition and that she was fully conscious of her condition constituted a sufficient foundation for the admission of any declarations then made by her. O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

B. ALL HOPE OF RECOVERY MUST BE GONE.

In Jackson *v.* Com., 19 Gratt. 656, it was held that the declarations of one, who seemed impressed with the belief that he must soon die of the wound inflicted upon him, and so expressed himself and who in preparation for death made his will, but who after these declarations were made used an expression as to himself, which seemed to indicate that all hope of recovery was not gone from his mind, were not admissible as dying declarations.

In a case of murder, declarations of the deceased when made in extremis and when conscious of his situation, are admissible evidence against the accused although the witness who deposed to his declaration was rather of opinion that the deceased thought he would get well, other witnesses having deposed that he was conscious that he could not recover. Gibson *v.* Com., 2 Va. Cas. 111.

Subsequent Hope of Recovery.—A hope of recovery subsequently entertained will not affect the admissibility of a declaration made under the con-

sciousness of impending death. The question is, always, did the deceased, at the time the declarations were made, have the consciousness that death was impending, and have no expectation or hope of recovery? If the declarations were made under the sense of impending dissolution, and a consciousness of the awful occasion, the principle is not affected by the fact that on other days, when encouraged by others he may have expressed some slight hope of recovery, unless such expressions taken together with all the circumstances of the case, show that he had hope of recovery when the declarations offered were made. Swisher *v.* Com., 26 Gratt. 964.

C. HOW FOUNDATION LAID.

It is not error for the court in the presence of the jury to hear evidence to lay the foundation for admitting the dying declaration of the deceased, especially where the court admonishes the jury that the evidence is not for them but for the court alone. State *v.* Cain, 20 W. Va. 679.

D. INTERVAL OF TIME BETWEEN DECLARATION AND DEATH.

But the fact of the declarations not being made immediately previous to death, will not exclude them, provided the deceased was conscious at the time he made them that he was in a dying condition. It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Hill *v.* Com., 2 Gratt. 594; Swisher *v.* Com., 26 Gratt. 963; Hall *v.* Com., 89 Va. 171, 15 S. E. 517.

III. Competency and Admissibility.

A. IN GENERAL.

"Dying declarations, being a subsitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts which declarant could have thus testified to, they are admissible. Quoted by English, J., in State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983." Vass *v.* Com., 3 Leigh 786.

B. MUST BE RELEVANT.

A person while dying remarked to his sister that it was hard to die by the hand of another and leave his family. This statement was held inadmissible as a dying declaration, because the death of the deceased was not the subject of the charge and the circumstances of the death were not the subject of the dying declarations. Crookham *v.* State, 5 W. Va. 513.

C. BEST AND SECONDARY EVIDENCE.

Where parol evidence of a dying declaration is sought to be introduced where there is a written declaration in existence, since such written declaration constitutes the best evidence, the absence of such writing must be satisfactorily accounted for before any secondary evidence will be admitted to prove the declaration. See O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121.

But when a signed dying declaration has been excluded on the motion of the prisoner, he will not be heard to object to the introduction of evidence of a verbal declaration for which a proper foundation has been laid. O'Boyle *v.* Com., 100 Va. 785, 40 S. E. 121. See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 355.

D. OPINION EVIDENCE.

Dying declarations in the nature of an expression of a belief of the declarant as to the identity of his assailant are not admissible. State *v.* Burnett, 47 W. Va. 731, 35 S. E. 983. See the title EXPERT AND OPINION EVIDENCE.

E. STATEMENTS MUST BE DISTINCT AND COMPLETE.

A person, having received a mortal wound, and being unable, in consequence of the wound, for the greater

part of the interval that elapsed before his death, to speak at all, and when able to speak, only able to utter a short word or two, yet retaining his perfect senses and understanding, and being under apprehension of his approaching death,—is asked, Did P. V. strike you first? to which he answered, yes, sir; Did P. V. stab you? to which he also answered, yes, sir; Do you think you are going to die? to which he again answered, yes, sir; and is asked a fourth question, which he is unable to answer, but it does not appear what this fourth question was, or whether it had any relation to the subject, or at what interval after the first three it was put to the dying man. Held, these are such deathbed declarations, being distinct and complete in themselves, as were competent evidence on the trial of P. V. on an indictment for the homicide. Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695.

Partial Declarations.—If it had appeared that the declarations were designed by the dying man, to be connected with and qualified by other statements, and with them to form an entire complete narrative, and before the purposed disclosure was fully made, it had been interrupted, and the narrative left unfinished; such partial declarations would not have been competent evidence. Vass *v.* Com., 3 Leigh 786, 24 Am. Dec. 695; Jackson *v.* Com., 19 Gratt. 656; Finn's Case, 5 Rand. 701.

F. BURDEN OF PROOF.

It is incumbent upon the party offering the dying declarations of a deceased person in evidence to show that they were made under sense of impending death without expectation or hope of recovery. Hill *v.* Com., 2 Gratt. 594.

IV. Witnesses.

See generally, the title WITNESSES.

A. LEADING QUESTIONS.

Dying declarations are properly admissible although they may have been answers in response to leading questions. Vass *v.* Com., 3 Leigh 786. Hopper *v.* Com., 6 Gratt. 684.

B. CONSTITUTIONAL RIGHT OF CONFRONTATION.

Dying declarations are not contrary to that provision of the Bill of Rights, —that the accused has a right to be confronted with the witnesses against him. Hill *v.* Com., 2 Gratt. 594. See the title CONSTITUTIONAL LAW, vol. 3, p. 140.

V. Questions of Law and Fact.

The court can determine only as to the admissibility of dying declarations. Their weight or credit must be left to the jury. Vass *v.* Com., 3 Leigh 786. See generally, the title QUESTIONS OF LAW AND FACT.

It is the function of the court to decide whether the dying declarations sought to be introduced were made under a sense of impending death without any expectation or hope of recovery; and it is the usual practice for the court to decide this question before allowing the declarations to go to the jury as evidence. To establish the prerequisite facts, it is not necessary that the declarant shall express a belief or conviction that he must or will die. They may be reasonably inferred from attendant facts and circumstances, as any other fact of judicial ascertainment. Swisher *v.* Com., 26 Gratt. 963; Hill *v.* Com., 2 Gratt. 594; Bull *v.* Com., 14 Gratt. 613; Vass *v.* Com., 3 Leigh 786; State *v.* Cain, 20 W. Va. 679.

And if the court permits the dying declarations of the deceased to be given in evidence to the jury, reserving the question whether they are made under an expectation of death, and it appears from the testimony that they were made in expectation of death, and were therefore competent testimony, this is no error of which the prisoner can complain. Hill *v.* Com., 2 Gratt. 594. See generally, the title QUESTIONS OF LAW AND FACT.

Dying without Issue.

See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Dynamite.

See the titles EXPERT AND OPINION EVIDENCE; EXPLOSIONS AND EXPLOSIVES.

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I. Definition.

An easement is: "A privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person; by reason whereof the latter is obliged to suffer, or refrain from doing something on his own tenement for the advantage of the former." Stevenson *v.* Wallace, 27 Gratt. 77; Tardy *v.* Creasy, 81 Va. 556.

II. Tenements Necessary.

There must be two distinct and separate tenements, which are implied in the existence of an easement; the one, in favor of, or for the benefit of which, it exists, is called the dominant and the other, over, or upon which it is exercised, is called the servient tenement. If at any time these estates are united under one ownership and possession, the easement is at once extinguished. Washb. E. & S. p. 10 cited in French *v.* Williams, 82 Va. 462, 4 S. E. 591.

"A man can not have an easement over his own land." Scott *v.* Beutel, 23 Gratt. 1.

So long as the tenements are owned and occupied by one and the same person, no easement is created, or begins to be created, in favor of the one, and operating as a service or burden upon the other. Scott *v.* Beutel, 23 Gratt. 1.

So long as two parcels of land belong to the same person there can be no easement in favor of one parcel, or servitude upon the other, for a man can not have an easement over his own land and of course there can be no claim by prescription to the use of an easement under such circumstances, because there can be no adverse user or possession. Scott *v.* Beutel, 23 Gratt. 1; Standiford *v.* Goudy, 6 W. Va. 364.

Between Joint Tenants.—One joint tenant can not create an easement or servitude upon the common estate injurious to the interests of his cotenant, but if such cotenant does not object, no one else can; a grantee of such cotenant can not. Lowenback *v.* Switzer, 1 Va. Dec. 141.

"A surrender to one of two joint tenants is a surrender to both; the possession of one is the possession of both; the entry of one is the entry of both, and so an act for the benefit of both is equally for the benefit of each. As against the plaintiff, the defendant may claim the protection of every

estoppel or waiver he would be entitled to as sole grantee in the deed." Lowenback *v.* Switzer, 1 Va. Dec. 141.

"So long as such unity of possession exists, no right of easement is annexed to one tenement or charged on another; and it is quite immaterial how long the drain or use of the culvert has subsisted, during such ownership no rights are acquired by such use." Scott *v.* Beutel, 23 Gratt. 1.

III. Classification and Distinction.

A. CLASSIFICATION.

1. Easements Appurtenant.

a. What Constitutes.

M. owned the tract of land which had been conveyed to his ancestor, W., over which, from the east back street of the town of Woodstock, and across the said tract of land to the back mill road was a roadway, fenced on either side, through its entire course, the termini of which roadway were on the land thus owned by him, and so owning same, he sold and conveyed part thereof to the plaintiff in error, F., retained the residue which, after his death, was sold and conveyed to the defendant in error, W., who still owns the same, the roadway as designated traversing in part the land conveyed to F., and in part that retained by M., and now owned by W.; and the way thus designated is reserved to "Moreland, his heirs or assigns." It is, therefore, clear upon both principle and authority, that the right of way reserved was not of a right in gross, but of a right appurtenant to the land retained by M. when he sold to F. and which has come to the defendant in error, W., by purchase. French *v.* Williams, 82 Va. 462, 4 S. E. 591.

b. Meaning of "Appurtenant" and "Appendant."

The word "appurtenant" has a broader meaning than "appendant," not being limited to easements acquired by prescription in its technical sense but including rights founded on the presumption of a grant from enjoyment for a limited period, or from necessity or on an express grant. Standiford *v.* Goudy, 6 W. Va. 364.

c. Presumption in Favor of Easements Appurtenant.

"A way is never to be presumed to be in gross when it can fairly be construed to be appurtenant to land." Washb. E. & S. p. 79, cited with approval in French *v.* Williams, 82 Va. 462, 4 S. E. 591.

The fact that a well was placed conveniently for the use of the owners of the lots and that it is provided that the easement was not to be disposed of apart from the lots, annexes the servitude to the respective lots, as an easement appurtenant. Warren *v.* Syme, 7 W. Va. 474.

2. Easements in Gross.

See ante, "What Constitutes," III, A, 1, a.

B. DISTINCTIONS.

1. "Natural Rights" and Easements.

The right to support of soil from adjacent soil is a natural right, arising ex jure naturæ, as distinguished from the easement for support of buildings which in this country can be obtained by grant only, express or implied. Tunstall *v.* Christian, 80 Va. 1; Stevenson *v.* Wallace, 27 Gratt. 77; Salamone *v.* Keiley, 80 Va. 86; Stearns *v.* Richmond, 88 Va. 992, 12 S. E. Rep. 847.

2. Licenses and Easements.

A provision in an agreement that a partnership should have the exclusive privilege of working any ore on a certain tract of land, is a mere license and not an easement. Barksdale *v.* Hairston, 81 Va. 764; Hodgson *v.* Perkins, 84 Va. 706, 5 S. E. 710. See the title LICENSE (REAL PROPERTY).

3. Corporeal Hereditaments and Easements.

A conveyance of a tract of land reserving the right of the vendors to

raise ore from a bank or banks on said tract is the reservation of a corporeal hereditament and not of a mere easement, Lee *v.* Bumgardner, 86 Va. 315, 10 S. E. 3, and can not pass as appurtenant to a conveyance of land. Barksdale *v.* Parker, 87 Va. 141, 12 S. E. 344.

4. Personal Covenant and Easement.

Covenant.—A conveyance of a parcel of land with covenant by the grantor to abstain from all business on remainder of tract remaining in his possession is a covenant personal, binding the grantor, but it is not an easement. Tardy *v.* Creasy, 81 Va. 553. Lewis, P., dissented, holding that it was an easement, the court saying: "Besides such well known easements (as a right to light, to a right of way, etc., attempts have been made to establish other easements which the law does not recognize and to annex them to land; but the law will not permit a landowner to create easements of every novel character and attach them to the soil. * * * And although some novel right has been granted by a landowner to another person which may be valid and binding upon him personally so long as he continues owner of the quasi servient tenement, so that on disturbance, he may be sued for breach of covenant, yet if such right be of such kind that the law does not recognize as capable of being annexed to the soil, that right, good against the grantor, is void as against other persons than the grantor, and will not entitle the grantee to sue for the benefit in his own name, on the one hand, nor annex to his premises the burden on the other." Tardy *v.* Creasy, 81 Va. 553. See also, West Virginia Transp. Co. *v.* Ohio Riv. Pipe Line Co., 22 W. Va. 600.

5. "Apparent and Continuous Easements" and "Discontinuous Easements."

"A technical distinction * * * has in some cases been recognized between what are called 'apparent and continuous easements' and 'discontinuous easements,' the former being defined to be those constant and visible; and the latter, those which are only visible in their exercise." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

IV. Creation and Termination.

A. CREATION.

1. By Express Grant or Reservation.

a. Grant.

(1) In General.

An easement may be acquired by express grant. Richmond *v.* Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

(2) How Conferred.

The right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which can not be conferred except by deed or conveyance in writing. Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399. See also, Powell *v.* Sims, 5 W. Va. 1.

(3) Construction of Deed of Grant.

When Equivalent to a Present Grant.—A deed, by which the owner of a lot on which a well is situated binds himself that the other parties shall forever have the use of the said well, recognizing that each of the parties takes an interest that he may dispose of, and not indicating that any further assurance is contemplated, is to be construed as a present grant of the right to use the water. Warren *v.* Syme, 7 W. Va. 474.

As to construction of deeds generally, see the title DEEDS, ante, p. 364.

"The statute declaring that a deed, unless an exception be contained in it, shall be construed to include appurtenances, does not apply to the creation of easements, but to the transfer of those already existing." Standiford *v.* Goudy, 6 W. Va. 367; Warren *v.* Syme, 7 W. Va. 474.

Not a Conveyance of the Soil.—The grant of a right of way is not a con-

veyance of the soil, it gives merely the privilege of designating a convenient right of way. Home *v.* Richards, 4 Call 441, 2 Am. Dec. 574. See also, Western Union Tel. Co. *v.* Williams, 86 Va. 700, 11 S. E. 106; Bolling *v.* Mayor, 3 Rand. 563.

Admissibility of Extrinsic Evidence.—"Intrinsic certainty, in a deed relative to specific property, is simply impossible. The description can be made certain only by proof or recognition of the identity of the subject to which it refers, or other objects or things that, more or less directly and distinctly, indicate and determine it. And, in the application of deeds and documents to lands and lots, extensive latitude is allowed for the discovery and proof, not only of visible monuments or objects mentioned, but of mathematical lines of other lands and lots, and various classes of facts to which the description or suggestions in the deed apply." Warren *v.* Syme, 7 W. Va. 474. See also, French *v.* Williams, 82 Va. 462, 4 S. E. 591; Diffendal *v.* Va., etc., R. Co., 86 Va. 459, 10 S. E. 536. See the title EVIDENCE.

Disabilities of Married Women.—The grant of an easement to run a tramway over defendant's land can not be regarded as either a sale or conveyance of said tract of land and for that reason it is not necessary that her husband should join her. Tufts *v.* Copen, 37 W. Va. 623, 16 S. E. 793. Equitable estoppel will apply in the last case to married women since their disability in such cases has been removed by statute. "A married woman is sui juris to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. To this extent the old restrictions of the doctrine of estoppel, as applied to married women, are not in force, because, the reason of the rule ceasing with the removal of the incapacity, the rule falls." Bodine *v.* Killeen, 53 N. Y. 93, cited with approval in Tufts *v.* Copen, 37 W. Va. 623, 16 S. E. 793.

(4) Parol Grants and Statute of Frauds.

Where one conveys a tract of land to another, no evidence can be received to prove an oral agreement between the parties that a private way over the land conveyed should exist in favor of the grantor. Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

Executed Parol Contract.—"As a court of equity will take a parol contract for the sale of lands out of the statute of frauds, where it is partly performed, it will, on this same principle, treat an executed parol contract for an easement as equivalent to a grant under seal, where the parties can not be restored to their original position." Rindge *v.* Baker, 57 N. Y. 221, cited with approval in Tufts *v.* Copen, 37 W. Va. 623, 16 S. E. 793. Full discussion and citations in Brewing Co. *v.* Morton, 47 N. J. Eq. 158.

(5) Covenant Operating as a Grant.

A covenant purporting to confer an exclusive right of way will operate as a grant of a right of way but not an exclusive one, since that would be an unreasonable restraint of trade and is not such a covenant as runs with the land. West Virginia Transp. Co. *v.* Ohio Riv. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Lucas *v.* Smithfield, C. & H. F. Turnpike Co., 36 W. Va. 427, 15 S. E. 182.

b. By Reservation.

See post, "Implied Reservation," IV, A, 2, b.

2. By Implication.

a. Implied Grant.

(1) In General.

Implication or presumption of a grant will only arise in the absence of an express contract on the subject between the parties. Hardy *v.* McCullough, 23 Gratt. 251; Burwell *v.* Hobson, 12 Gratt. 322; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

The question whether an easement or servitude will be created, as incident to the property granted, is a matter of contract, and must of course depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus expressed, the construction will be controlled by the use and condition of the property at the time of sale, and certain implications or presumptions of law arising thereon. Hardy *v.* McCullough, 23 Gratt. 251.

(2) Severance of Unity of Possession.

(a) In General.

The doctrine of the grant of an easement by implication seems now to be well settled. "The ground (says Washburn on Easements) upon which this doctrine both of the French and common law rests seems to be, that where the owner of two heritages, or of one heritage consisting of several parts, has arranged and adapted these so that one derives a benefit or advantage from the other of a continuous and obvious character, and he sells one of them without making mention of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these advantages and burdens, respectively, shall continue as before the separation of the title." Washburn on Easements, ch. 1, § 3, pp. 54, 55. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

The court, in Scott *v.* Beutel, 23 Gratt. 7, says: "In certain cases, by implication of law, when one owner of two tenements has so arranged them that one derives a benefit from the other, and sells one of them, the purchaser of the tenement sold takes it with all the benefits and burdens which appear at the time of sale to belong to it, as between it and the property which the vendor retains. The parties are presumed to contract in reference to the condition of the property at the time of the sale. Washburn on Easements (2d Ed.) 76, mar. 49. Deacons *v.* Doyle, 75 Va. 258; Hardy *v.* McCullough, 23 Gratt. 251; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Burwell *v.* Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Patton *v.* Quarrier, 18 W. Va. 447.

There is an implied grant to the grantee of all those continuous and apparent easements which are necessary for the reasonable use of the property granted, and which have been, or are at the time of the grant, used by the owner of the entirety for the benefit of the part granted. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(b) Simultaneous Alienation of Distinct Parts of Estate.

If an estate, part of which enjoys an easement in the other is conveyed, the two parts simultaneously to different persons, they will be presumed to have taken the parts subject to such burdens or benefits as may have been apparent at the time of the alienation and in a division of an estate such obvious burdens and benefits are presumed to have been taken into consideration. Burwell *v.* Hobson, 12 Gratt. 322; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

If the owner of two adjacent lots sells both lots at the same time to different purchasers, each grant carries all the apparent and continuous easements which are necessary for the reasonable use of the property granted, and which have been or are at the time of the grant used by the grantor for the benefit of such property. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

"If he sells both lots at the same time, each grant carries all the apparent and continuous easements which are necessary for the reasonable use of the property granted, and which have been or are at the time of the

grant used by the grantor for the benefit of such property." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(c) Partition.

Easements sometimes arise by implication, in case of partition among heirs. Burwell *v.* Hobson, 12 Gratt. 322, 65 Am. Dec. 247.

"There is no difference in this respect between a partition by suit, and a partition by mutual agreement and the interchange of deeds. In each case the heirs are in effect purchasers of their respective lots, and entitled to hold them as any other purchaser would be." Burwell *v.* Hobson, 12 Gratt. 322.

(3) Easements Which Pass by Implication.

(a) General Rule as to Notice.

Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any such claim, he takes the property without the burthen of any claim, either from the grantor or any person claiming under him. Scott *v.* Beutel, 23 Gratt. 1; Deacons *v.* Doyle, 75 Va. 258; Patton *v.* Quarrier, 18 W. Va. 447.

"Where the deed conveys, without reservation, the grantee takes all conveyed (by the deed) unincumbered, unless in some way notice is brought home to him that the land is sold subject to the incumbrance of some easement or privilege in another person, or in the public. Washburn on Easement, 72-81." Deacons *v.* Doyle, 75 Va. 258; Patton *v.* Quarrier, 18 W. Va. 447.

"Where, at the time of the purchase of real estate, there is a road, or right of way, used by the public, such as a public highway, or a road used so long that there may be a presumption of a dedication to the public, the purchaser takes this land subject to such right; and he is not protected even by a deed of warranty against incumbrances. See Jordan *v.* Eve, 31 Gratt. 1, and cases there cited." Deacons *v.* Doyle, 75 Va. 258; Patton *v.* Quarrier, 18 W. Va. 447.

(b) Character of Easement.

aa. Continuous and Apparent.

(aa) In General.

"Having adverted to the rule of the French law, he remarks that, 'the same principle has been adopted, by analogy, to a greater or less extent, by different courts, as a basis of construing grants, though it is believed that the common law, in order to give this effect, requires that what is thus claimed as a servitude or easement should be * * * continuous and apparent.' Idem, ch. 1, § 3, pp. 56, 57." Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

"Apart from all considerations of time, there is implied, upon the severance of a heritage, a grant of all those continuous and apparent easements which have in fact been used by the owner during its unity, though they have no legal existence as easements." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

"But whether the estate sold be the dominant or servient estate, it is well settled (by numerous cases in England and in the states of the union) that the easement or other incident of property in order to pass by implication must be open, visible, apparent and continuous." Hardy *v.* McCullough, 23 Gratt. 251; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Burwell *v.* Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Deacons *v.* Doyle, 75 Va. 262; Lowenback *v.* Switzer, 1 Va. Dec. 144; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Patton *v.* Quarrier, 18 W. Va. 447.

"In Scott *v.* Beutel, 23 Gratt. 1, cited by appellee, one of two adjoining lots owned by the same parties was sold at auction under the decree of court. At the time of the sale nothing was said of an easement running from the unsold lot through the one sold, for carrying water from the former to a

culvert in the street; and such easement was not to be seen on the lot sold, and was not known to the purchaser, hence it was held, that the purchaser was entitled to have his lot free of the easement. This decision was upon the ground that the easement or servitude which was claimed was not obvious or apparent to view. 2 Minor's Inst. (4th Ed.) 27." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(bb) What Constitutes.

It was held, in Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165, that open ditches constitute apparent and continuous easement.

A well defined alley way is an apparent and continuous easement although it has been contended that a mere right of way is not so. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

A purchaser is presumed to have contracted with reference to the condition of the property at the time of the purchase. If the condition of the premises shows plainly and unmistakably that an alley way over the premises purchased has been used, was in use, and was intended for the use of the owner or occupant of an adjacent lot, the purchaser will take subject to the rights of the adjacent owner or occupant. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

S. and others were the owners of two wharves and a small dock between them, fronting on Elizabeth river at Norfolk; which dock was used in connection with both wharves. In 1851 they sold to W. the eastern wharf with its appurtenances, with general warranty, making the logging on the west line of the dock the boundary; and in their deed they covenant to allow W. to have the common use with themselves or their tenants of the said dock for the purpose of landing goods on his wharf from vessels or boats which may enter therein, as long as the said dock and adjoining premises are owned by them, or until they may choose to fill up the dock, W., in consideration thereof, hereby undertaking to clean out from time to time, the said dock at his own expense. In March, 1854, they sell the other wharf and the dock to B. Held, if there had been no special covenant for the use of the dock by W., the right to use it in connection with and for the benefit of the wharf, as it had been openly used by the grantors, would have passed to the grantee by implication of law, as an easement, or as part of the property granted. Hardy *v.* McCullough, 23 Gratt. 251.

Pollution of Stream. — Where the plaintiff knew at the time of his purchase from the defendant, who was a joint tenant with another, that the stream running through the land had been partially polluted by a tannery upon the lands of the defendant and also that a new and enlarged steam tannery was being erected, and with such knowledge, he proceeds with the execution of his contract, by continuing in possession of the property, making all of the payments, and finally, after the lapse of three years receives a deed for the land, he can not afterwards complain that said tannery is a nuisance and thereby obtain compensation in damages from the defendant. In such a case the existence of the tannery and the pollution of the stream created an easement over the servient lot, bought by the plaintiff, in favor of the dominant tenement retained by the defendant, and an action for nuisance will not lie where the nuisance complained of is an easement. Lowenback *v.* Switzer, 1 Va. Dec. 141.

bb. Necessity.

"In case of a division of an estate, consisting of two or more heritages, whether an ease or convenience which may have been used in favor of one, in or over the other, by the common owner of both, shall become attached to the one or charged upon the other, in the hands of separate owners, by a

grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in such deed or partition, upon whether such easement is necessary for the reasonable enjoyment of the part of such heritage as claims it as an appurtenance." Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

"'Where the servient estate is granted and the dominant reserved, the easement reserved by implication must be, not only one that is apparent and continuous and such as is indicated by the condition of the premises at the time of the sale, but the easement claimed must be one strictly of necessity, so that another can not be substituted at a reasonable expense.' Washburn on Easements, 2d Ed. 71-78, and cases there cited; 10 Allen R. 366; 7 Allen R. 369; 2 Metc. R. 234; 2 Cush. R. 327; 31 Law J. Ch. 610; 2 Eq. Cases 508; 33 L. J. Ch. 249; and Russell *v.* Harford, L. R. 2 Eq. 507; Scott *v.* Beutel, supra 1." Hardy *v.* McCullough, 23 Gratt. 251.

All easements which are necessary to a reasonable enjoyment of the premises granted, and which have been, or are at the time of the grant, used by the owner of the entirety for the benefit of the part granted, will pass to the grantee under the grant. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Scott *v.* Beutel, 23 Gratt. 1.

Drainage an Easement of Necessity.—"Sanderlin *v.* Baxter, 76 Va. 299, is also relied on by appellee. In that case 'Woodlawn' and 'Fairfield,' separated only by a public road, were owned by Anthony Walke, Sr., who drained the former by ditches through the latter to a river. In 1811 he deeded 'Woodlawn' to his son, A., who conveyed it to appellee, Baxter. In 1820, he devise 'Fairfield' to his son, D., who conveyed it to appellant Sanderlin. The deed and will were silent about draining. In 1878, appellant undertook to stop up the ditches, and appellee obtained an injunction. When 'Woodlawn' was granted, the ditches were open and visible, and, except for a brief time, had been used continuously to drain it. It could be drained in no other way, except by heavy expenditure. They were necessary to a proper enjoyment of the premises. This court, in an opinion by Burks, J., affirmed the decree of the lower court perpetuating the injunction." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

cc. Elements to Be Considered in Determining.

Whether an easement is continuous and permanent, or merely temporary, will depend on the facts of the particular case, but the clear intention and purpose of the common owner in establishing the easement will be considered of much importance in determining its character. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

"What was clearly the intention and purpose of the owner of the entire property is to be considered as of much importance in determining whether or not an easement which he has established for the benefit of one portion of the property over, through or under the other is to be regarded as continuous and permanent, or a necessary easement without which the enjoyment of the several portions could not be fully had. Davis *v.* Sear, L. R., 7 Eq. Cases 427; Huttemeir *v.* Albro, 18 N. Y. 48; 2 Bosworth Repts. 546; Vorhees *v.* Burchard, 55 N. Y. 98; Doyle *v.* Lord, 64 N. Y. 432; Thompson *v.* Minor, 30 Iowa 386; Washburn on Easements, 103." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

"After reviewing the case of Scott *v.* Beutel at length, Bouldin, J., in Hardy *v.* McCullough, 23 Gratt. 259, 260, said: 'We understand from the decision, that the question whether an easement or servitude will be created, or pass as incident to or part of the property granted, is a matter of contract, and must of course depend on

the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus expressed, the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon.'" Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(c) Instances.

aa. Lateral and Subjacent Support.

An easement for the support of an artificial building on land can only be acquired by grant express or implied and not by prescription. Powell *v.* Sims, 5 W. Va. 1. See the title ADJOINING LANDOWNERS, vol. 1, p. 176.

bb. Rights to Light, Air and View.

The English common-law doctrine of "ancient lights" is disapproved of as unsuited to the conditions in this country. "The prevailing doctrine here would seem to be, that an implied grant of an easement of light will be sustained only in cases of real and obvious necessity, and will be denied or rejected in cases when it appears that the owner of the dominant estate can, at a reasonable cost and expenditure, have or substitute other lights to his building, so that he may continue and have the reasonable enjoyment of the same; leaving the owner of the servient estate also to the enjoyment or his own property free from the restriction and burden that would otherwise be imposed upon it. In the application of this principle, doubtless, some embarrassment will sometimes be realized in determining the degree of necessity that ought to be required to support the right to the easement, and each case must necessarily be settled on the facts and circumstances surrounding it." Powell *v.* Sims, 5 W. Va. 1, 13 Am. Rep. 629; Cunningham *v.* Dorsey, 3 W. Va. 293; Standiford *v.* Goudy, 6 W. Va. 364; Stevenson *v.* Wallace, 27 Gratt. 77.

"There is also a manifest tendency to reject altogether the doctrine of implied grants of easements of light, and limit and confine such rights to express grants, so that the rights of the parties would be determined by the face of the deed under which they hold. 2 Washburn on Real Estate, 316, 18, top; Myres *v.* Gemmell, 10 Barbour, 537; Parker *v.* Foot, 19 Wendell 309; Morrisson *v.* Marquaidth, 24 Iowa R. 35; Haverstick *v.* Sipe, 33 Pa. St. 368; Mullen *v.* Strickler, 19 Ohio (state) R. 135; Rogers *v.* Swann, 10 Gray R. 376; Carrig *v.* Dee, 14 Id. 583." Powell *v.* Sims, 5 W. Va. 1.

cc. Private Ways.

See the title PRIVATE WAYS.

dd. Easement of Access.

As to rights of abutting lot owners to access to the streets, see Kehrer *v.* Richmond, 81 Va. 745; Page *v.* Belvin, 88 Va. 985, 14 S. E. 843. See generally, the title ABUTTING OWNERS, vol. 1, p. 60.

b. Implied Reservation.

(1) Necessity for Notice of Easement.

"Where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of any such claim, he takes the property without the burthen of any such claim either from the grantor or any person claiming under him. Scott *v.* Beutel, 23 Gratt. 1. Where the deed conveys without reservation, the grantee takes all conveyed by the deed unincumbered, unless in some way notice is brought home to him, that the land is sold subject to the encumbrance of some easement or privilege in another person or in the public." Patton *v.* Quarrier, 18 W. Va. 447; Deacons *v.* Doyle, 75 Va. 258; Diffendal *v.* Virginia, etc., R. Co., 86 Va. 459, 10 S. E. 536; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(2) Nature and Character of Easement.

Where the servient estate is granted and the dominant reserved, the easement reserved by implication must be

not only one that is apparent and continuous, and such as is indicated by the condition of the premises at the time of the sale, but the easement so claimed must be one strictly of necessity so that another can not be substituted at a reasonable expense. Hardy *v.* McCullough, 23 Gratt. 251; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Burwell *v.* Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Deacons *v.* Doyle, 75 Va. 258; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664; Patton *v.* Quarrier, 18 W. Va. 447; Lowenback *v.* Switzer, 1 Va. Dec. 141; Scott. *v.* Beutel, 23 Gratt. 1.

"It must be reasonably necessary to the enjoyment of the part which claims it, and where that is not the case, it requires descriptive words of grant or reservation in the deed, to create easement in favor of one part of a heritage over another." Id., ch. 1, 3, pp. 88-9. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

"Property conveyed passes in its existing state subject to all existing easements and burdens of a similar nature in favor of the other lands of the grantor which are apparent, and which result naturally from the relative situation of the land, and from the natural construction and intended use of the buildings, mills, etc., upon it, and their situation and connection with other property, as they were usually enjoyed at the time of the conveyance. Tibert *v.* Teran, 8 Penn. St. Rep. 353, 357." Lowenback *v.* Switzer, 1 Va. Dec. 145.

c. Prescription.

See the title PRESCRIPTION.

3. By Operation of Law.

a. Decree of Court.

In suits for partition, the court has the same powers over easements as over the land itself. It may assign an easement, appurtenant to an entire estate, to one tenant alone, and it may create easements among the cotenants upon each other's parcels. Henrie *v.* Johnson, 28 W. Va. 190. See also, Springer *v.* McIntire, 9 W. Va. 196; Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325; Martin *v.* Martin, 95 Va. 26, 27 S. E. 810.

In assigning dower in a house, the court may create such easements in passages, stairways, etc., as may be essential to the beneficial enjoyment of the property by the assignees of the several rooms. Parrish *v.* Parrish, 88 Va. 529, 14 S. E. 325.

b. Condemnation Proceedings.

Under § 14, ch. 42, W. Va. Code, commissioners may make provision for the construction of easements upon property which has been condemned. Railroad Co. *v.* Halstead, 7 W. Va. 301.

No easement is acquired in land which has been finally and validly condemned for a public road at the application of a party, merely by an agreement between said party and the former landowner to submit their differences, touching the public road, to arbitration. Norfolk, etc., R. Co. *v.* Rasnake, 90 Va. 170, 17 S. E. 879.

B. TERMINATION.

1. Abandonment.

a. Basis of Doctrine of Abandonment.

Equitable estoppel is the ground upon which the doctrine of abandonment of easements rests, and the representation or conduct relied on must have been intended to influence the other party to act. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Warren *v.* Syme, 7 W. Va. 474. See generally, the title ESTOPPEL.

Abandonment of easements by matters in pais is founded upon the doctrine of estoppel, but to establish such estoppel it is necessary that the representation or conduct relied upon as such should have been intended to influence the other party to act; and, if there was no such intention, the estoppel is not made out. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

b. Necessity for Deed.

A party entitled to a right of way or other mere easement in land, may abandon and extinguish such right by acts in pais and without deed or other writing. Vogeler *v.* Geiss, 51 Md. 408, cited with approval in Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

c. Acts Amounting to Abandonment.

(1) In General.

"Acts of the owner of the dominant estate relied upon to constitute an abandonment must be voluntary, and must be of such decisive and conclusive a character as to indicate and prove his intention to abandon the easement. * * * But nothing short of an intention so to abandon the right would operate to that effect." Washburn on Easements, § 5, subsec. 1. Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

Thus only abandonment, not the length of time fixed by the statute of limitations, can destroy a public easement. That statute has nothing to do with the subject; abandonment is the only way, unless it is by release or merger of estate, by which the servient estate can be released from the easement. Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

On Part of Municipality.—"A private individual owning an easement might much more readily lose his right of nonuser and abandonment than a city or town. How can you show acts by a town amounting to an abandonment? It must be, in the language of the law above quoted, 'acts of so decisive and conclusive a character as to prove his intention to abandon the easement.'" Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

"Mere inaction by its officers would not, should not, work such public detriment. If its acts are to be resorted to to establish abandonment, they could only be recorded acts of its council, and that attempt would be met by the inflexible rule that a town council can not grant away the public right in a street without legislative authority. It would be an ultra vires and void act, not binding on the public. Therefore, I am unable to realize how you fix a binding act of abandonment upon a city or town, though you may do so to an individual." Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

(2) Acts or Declarations Incompatible with Existence of Easement.

In Warren *v.* Syme, 7 W. Va. 474, it is held that in order to constitute abandonment by acts or declarations incompatible with the existence of an easement, one of the following combinations of facts must occur: Proof of act or declaration of owner indicative of renunciation or abandonment, followed by nonuser for a period long enough to bar an action of ejectment to recover possession of land, which period, when the defendant is not under disability, is ten years, when he is, twenty years. Or proof of a claim by the owner of the corporeal estate or by another in his stead, known to the owner of the easement or evinced by acts that in the exercise of ordinary vigilance he would have learned, followed by nonuser by the owner of the easement for such period. Or an act or declaration of the owner of the easement, clearly demonstrative of actual abandonment, that in fact promotes some action on the part of another, by which, if the easement were not held to be determined, the latter would be seriously injured. And such proof may conclude the extinguishment of the easement, but certainly nothing less than one or the other of these combinations of facts will have such effect. See also, Scott *v.* Moore, 98 Va. 668, 37 S. E. 342; Wooldridge *v.* Caughlin, 46 W. Va. 345, 33 S. E. 233.

(3) Mere Nonuser.

Mere failure to use an easement unaccompanied by proof of an intention on the part of the owner of the premises or of some act done or per-

mitted which is inconsistent with the future enjoyment of the right, and which clearly indicates an intention to abandon the easement, is not sufficient. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

A cessation of use, coupled with any act indicative of an intention to abandon, would have the same effect as an express release, without regard to time. But such easement is not extinguished by the habitual use by its owners of another way equally convenient instead of it, unless there is an intentional abandonment of the former way. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

"It is well established that mere nonuser will not destroy an easement where its owner sets up a continuous claim, or protests against a use of the locus by the other party that is inconsistent with such claim to an easement. Field *v.* Brown, 24 Gratt. 74. 'Nonuser of a highway by the public for many years is prima facie evidence of abandonment, but the abandonment must be voluntary and intentional.' Hartford *v.* N. Y. & N. E. R. Co. (Conn.), 37 Am. & Eng. Corp. Cas. 182; Chafee *v.* City of Aiken (57 S. Car., 507), 35 S. E. 800." Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

"No length of nonuser bars a right granted by deed. Washburn on Easements, § 6, p. 550." Town of Weston *v.* Ralston, 48 W. Va. 170, 37 S. E. 446.

"Washburn on Easements, speaking of nonuser in § 6, subsection 1, uses this language: 'Here, as in case of acts of abandonment, the nonuser must be of such a character and duration as to show an intent to abandon the easement, or it must have induced another to expend money upon the supposition of such abandonment, which is known and acquiesced in by the one who might otherwise claim it, and where to enforce the right of easement would work injustice upon an innocent party." Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446.

"It appears that one or more of the tenants of No. 402 for a short term did not use the alley way in question, and it may be conceded that appellant, or her immediate grantor, during the period from the latter's purchase from Mrs. Burfoot to the time when appellee disclosed her purpose to destroy it, did not use the alley way, still this, unaccompanied by proof of an intention on the part of the owner of the premises, or of some act done or permitted which is inconsistent with the future enjoyment of the right, and which clearly indicated an intention to abandon the easement, is not sufficient. Simmons *v.* Cloonan, 81 N. Y. 557; Ballard *v.* Butter, 30 Me. 94; 4th Amer. & Eng. Decs. in Eq. 340-41." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

(4) Acts of Abandonment Not Amounting to Nonuser.

"There are many acts of abandonment, short of a nonuser for twenty years, which, if done by the owner of the dominant tenement, and acquiesced in by that of the servient, may amount to a surrender of such an easement, provided such acts of abandonment have been done with such intention." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

d. Burden of Proving Abandonment.

"The burden of proof was upon appellee to show an abandonment on the part of appellant or her husband, or Mrs. Burfoot, under whom appellant claims, of the right of an easement in the alley way, and her proof fails to show it." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

2. Statute of Limitations.

"The statute of limitations never applied to an easement. Jones on Easements, § 161, says: 'The statute of limitation does not directly apply to actions in which incorporeal hereditaments, such as easements, are involved, but only to actions for the recovery of land.'" Town of Weston *v.* Ralston, 48 W. Va. 170, 37 S. E. 446.

"Consistently with this view we find that in the late great work, Am. & Eng. Ency. L. (2d Ed.) vol. 10, p. 432, where the modes in which easements may be lost are given 'limitations' is not mentioned. 'Abandonment' is mentioned as a means by which the public may lose its highway. So, Washburn on Easements does not give limitations as a means of loss of a public easement, but does give 'abandonment' as the cause of loss of such easement. You will find the books treat abandonment as a cause of such loss, but they do not apply the statute of limitations to easements. The books do treat non-user as working, under certain circumstances, the destruction of a public easement; but they say that such non-user must amount to an abandonment, and mere silence, mere inaction by municipal authorities, unattended with circumstances displaying and plainly manifesting an intentional abandonment, will not prejudice the right to the easement." Town of Weston *v.* Ralston, 48 W. Va. 182, 37 S. E. 446.

3. Division of Dominant Estate.

The division of the dominant estate does not destroy the easement. Linkenhoker *v.* Graybilll, 80 Va. 835.

4. Release or Merger.

Thus only abandonment, not the length of time fixed by the statute of limitations, can destroy a public easement. That statute has nothing to do with the subject; abandonment is the only way, unless it is by release or merger of estate, by which the servient estate can be released from the easement. Town of Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446. See also, French *v.* Williams, 82 Va. 462, 4 S. E. 591.

5. Reviving Easement Terminated by Merger of Estates.

Where an easement is terminated by the merging of the two estates in a common owner, the same rule applies to reviving it as applies to the creation of the easement in the first instance by a severance of the unity of possession, and conveyance to of either dominant or servient estate. Thus, "If it be the dominant, the easement on the other passes as appurtenant to it. If it be the servient, the easement is created in favor of the dominant, remaining in the grantor's hands by reservation. See 101 Eng. C. Law. Rep. 586; Note to Pearson *v.* Spencer; Washburn on Easements, 73-4, 80; Rawle on Covenants of Title, 112, 113." Lowenback *v.* Switzer, 1 Va. Dec. 141.

V. Transfer of Easements.

A. IN GENERAL.

When property is conveyed, everything which belongs to it or is used with it, and which is reasonably essential to its enjoyment, if not specifically mentioned impliedly passes as incident to the principal thing, or as a part of it. Scott *v.* Moore, 98 Va. 668, 37 S. E. 342. See also, Bond *v.* Willis, 84 Va. 796, 6 S. E. 136. See the title PRIVATE WAYS.

The question whether an easement or servitude will pass as incident to or part of the property granted, is a matter of contract, and must, of course, depend on the intention of the parties, as expressed in the contract. If thus expressed, the terms of the contract must control its construction. When not thus expressed, the construction will be controlled by the use and condition of the property at the time of the sale, and certain implications and presumptions of law arising thereon. Burwell *v.* Hobson, 12 Gratt. 322; Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Scott *v.* Beutel, 23 Gratt. 1; Hardy *v.* McCullough, 23 Gratt. 251.

"Where there is a grant of some estate described generally, and not by specific metes and bounds, as a mill or dwelling house, all parts or parcels of the mill or dwelling house pass with the mill or dwelling house as a portion of the same, although such portions may extend into, over and under

the remaining land of the grantor. The privileges pass rather as a part and parcel of the land conveyed, and so would equally pass, though there were used in the deed no such words as 'with all easements,' or 'with all privileges and appurtenances.' This is upon the principle that, when property is conveyed, everything which belongs to it, or is used with it, and which is reasonably essential to its enjoyment, passes as incident to the principal thing, or as a part of it; that is, where such privileges or quasi easements are necessary for the reasonable and convenient enjoyment of the granted premises. Goddard on Easements, 120-21; Elliott *v.* Rhett, 57 Amer. Decs. 750 and notes; Washburn on Easements, pp. 85, 86." Scott *v.* Moore, 98 Va. 668, 37 S. E. 342.

B. APPURTENANT TO EVERY PART OF TENEMENT.

It is well settled that where land is granted with a right of way over other lands, the right is appurtenant to every part of the land so granted, and the grantee of any part, no matter how small, is entitled to it; provided it impose no additional burden on the servient estate. Henrie *v.* Johnson, 28 W. Va. 190; Linkenhoker *v.* Graybill, 80 Va. 835.

C. TRANSFER TO ASSIGNEE.

The transfer of property to an assignee in bankruptcy, to which an easement is appurtenant and a part from which the easement can not be transferred, implies the transfer of the easement, though it be not necessary to the enjoyment of the property nor even, at the time, used in connection therewith. Warren *v.* Syme, 7 W. Va. 474.

D. PROVISION IN DEED AGAINST DISPOSING OF EASEMENT APART FROM PROPERTY.

Restraints on Alienation.—A provision in a deed that the grantee of the easement shall not dispose of it apart from the property to which it is annexed, is not an objectionable restraint upon alienation. Warren *v.* Syme, 7 W. Va. 474. See the title RESTRAINT ON ALIENATION.

VI. Rights, Duties and Liabilities.

A. IN GENERAL.

Where one has an easement in another's land, he must be allowed to enjoy it in such a manner as will secure him all the advantages contemplated by the grant, but he must so use his own privileges so as not to do any unnecessary injury to the grantee. McKell *v.* Collins Colliery Co., 46 W. Va. 625, 33 S. E. 765.

B. INCREASING SERVITUDE.

1. In General.

Additional Servitudes. — Where a telegraph company has only an easement of a right of way, the erection of telegraph poles and wires constitutes an additional easement and entitles the owner of the fee to additional compensation. Western Union Tel. Co. *v.* Williams, 86 Va. 696, 11 S. E. 106. See the title TELEGRAPHS AND TELEPHONES.

Where a decree of partition or deed gives a private way to one tract of land over another, the owner of the tract entitled to such way can not add to his right by using the way for still another tract owned by him. Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

"As shown by Judge Edmiston in Springer *v.* McIntire, 9 W. Va. 196, where a decree of partition gives to one lot a right of way out, the owner of that lot can not use that right of way for the use of another lot. He said: 'It has been held, that if a man has a right of way to a close called A, he can not justify using the way to go to A, and from thence to another close of his own, adjoining A.' One owning one tract of land having an easement to it, for it, can not use that easement over another man's land to

subserve the purposes of another tract. 'One having a right of way appurtenant to certain land, can not use it for the benefit of other land to which the right is not attached, although such other land is within the same enclosure with that to which the easement belongs. Except for this rule the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate.' Jones on Easements, §§ 360-61-62." Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

2. User Unconnected with Dominant Tenement.

Where, under a decree of court, an estate has been divided up into a number of lots and rights of way created over some for the benefit of others, the owner of the dominant tenement will have the use of the right of way for all purposes connected with it; but he can not further burden it for the benefit of other tenements which are entitled to no right of way over it. But such claim of a greater use than he was entitled to under his easement will not cause a forfeiture of such right as he has, but only gives a right of action of trespass against him. Springer *v.* McIntire, 9 W. Va. 196; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664.

C. EASEMENTS FOR SUPPORT.

See the title ADJOINING LANDOWNERS, vol. 1, pp. 175, 178.

VII. Protection of Easements.

A. IN EQUITY.

1. Injunction.

a. In General.

Where easements or servitudes are annexed by grant, convenant or otherwise to private estates, the due enjoyment of them will be protected against encroachments by injunction. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165; Berkeley *v.* Smith, 27 Gratt. 892; Brooke *v.* Barton, 6 Munf. 306.

"In Kerr on Injunctions (page 231) it is said: 'The court will not interfere by way of mandatory injunction without taking into consideration the comparative convenience and inconvenience which the granting or withholding the injunction would cause to the parties. If the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party from granting an injunction would be serious, the court will not interpose by mandatory injunction; but will either direct an inquiry before itself, in order to ascertain the measure of damages that has been actually sustained, or will, on dismissing the bill, reserve to the plaintiff his right to proceed at law." Berkeley *v.* Smith, 27 Gratt. 892.

Upon a convenant to make a good title to certain lots of land (according to a plat for extending the streets of a town), including the use of the streets, and appurtenances therein mentioned, and that the covenantee, his heirs and assigns, may, at all times thereafter, enter into possession and enjoy the said lots, with the streets, etc., without the let, hindrance or molestation of the covenantor, his heirs and assigns; a court of equity, by injunction, will compel the covenantor, his heirs and assigns, to remove all obstructions by them put in said streets, and open the same to the free and full use of the covenantee, his heirs and assigns, and permit him and them ever thereafter to use the same, without let, hinderance or molestation. See Trueheart *v.* Price, 2 Munf. 468; Brooke *v.* Barton, 6 Munf. 306.

b. Necessity to Establish Right at Law.

"Ordinarily, where the existence of a nuisance (and in a general sense every violation of an easement may be considered a nuisance, High on Injunctions, ch. 12, § 544) is controverted, the party seeking the interference of a court of equity will generally be required first to establish his right at

law. But it is said that in cases (like the present) where the plaintiff has been long in the exercise of his right, or where delay would be disasterous, the court will not require the right to be first established at law. 2 Story's Eq. Juris. (11th Ed.), § 925f, and cases cited in note. See also, what is said by Judge Staples in Manchester Cotton Mills *v.* Town of Manchester, 25 Gratt. on pp. 831, 832. An issue to try the right was not regarded as indispensable in Pruner & Hubbles *v.* Pendleton and others, 1 Matthews 516 —a case in which a bill was filed to restrain the use of a building in a town as a slaughter house." Sanderlin *v.* Baxter, 76 Va. 306, 44 Am. Rep. 165.

J., by his will, in 1845 gives to his son, S., a storehouse and lot, together with the east side or half of the privy situate on the adjoining lot west; and by a codicil he gives to his son, W., the said adjoining lot; and in 1848 W. sold his lot to B. subject to the rights of the owner of the lot given to S. to the east side or half of the privy. The storehouse of S. extended back 70 feet to his back line; that of W. extended only about 55 feet, leaving a vacant space, on which the privy was located; and there was a door in the side of S.'s house entering into this vacant space with lights in the door. B. being the tenant of S. and on the death of his children shut up the said door, extended his storehouse to his back line, one story high, with a flat roof, and built a privy upon the roof. Held, the title of the children of S. to the door in the wall of their store and to the east half of the privy being unquestionable, they may, without proceeding at law to establish their right, go at once into equity to compel the removal of the obstructions. Berkeley *v.* Smith, 27 Gratt. 892.

c. Where Legal Remedy Inadequate.

Though the plaintiff have a remedy by action at law, if it is inadequate and repeated suits would not compensate him, the injury is irreparable and calls for a preventive remedy, which equity alone can provide. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

"Woodlawn" and "Fairfield," separated only by public road, were owned by W., who drained former by ditches through latter to river. In 1811 he granted "Woodlawn" to A. (under whom plaintiff claims). In 1820 he devised "Fairfield" to D. (under whom defendant claims). Deed and will are silent about draining. In 1878 defendant undertook to stop up the ditches, and plaintiff obtained an injunction. When "Woodlawn" was granted, the ditches were open and visible, and, except for a brief time, had been used continuously to drain it. It could be drained in no other way, except by heavy expenditure. They were necessary to the proper enjoyment of the premises. Held, in this case injunction lies. Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

"In Kerr on Injunctions (page 50) the author says: 'The jurisdiction has been questioned, but its existence must be admitted as beyond all doubt. It must, however, be exercised with caution, and is strictly confined to cases where the remedy at law is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case." Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

Meaning of Term "Irreparable Injury."—"By the term 'irreparable injury,' says a learned author, 'it is not meant that there must be no physical possibility of repairing the injury; all that is meant is, that the injury would be a grevious one, or at least a material one, and not adequately reparable in damages.' Kerr on Injunctions, ch. 15, § 1, p. 199." Sanderlin *v.* Baxter, 76 Va. 299, 44 Am. Rep. 165.

d. Want of Sufficient Interest in the Easement.

If plaintiff's interest in the easement is insignificant, a court of equity will

not interfere in his behalf. McCue *v.* Ralston, 9 Gratt. 430.

e. Preventing Threatened Injury.

If a stream has been diverted, but has been restored to its former channel before recourse is had to equity, equity has no jurisdiction, but the remedy is an action at law for damages. Coalter *v.* Hunter, 4 Rand. 58; Trueheart *v.* Price, 2 Munf. 468; Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632.

f. Necessary Allegations.

It is not sufficient that a bill contain general allegations of irreparable injury; the facts constituting such injury must be set forth. Cresap *v.* Kemble, 26 W. Va. 603. But if it is set forth that occupants of land can have no other ingress or egress except over defendant's land and that the defendant has obstructed such way, this is sufficient. Rogerson *v.* Shepherd, 33 W. Va. 307, 10 S. E. 632. See, on general right to injunction, Lucas *v.* Smithfield, C. & H. F. Turnpike Co., 36 W. Va. 427, 15 S. E. 182; Boyd *v.* Woolwine, 40 W. Va. 282, 21 S. E. 1020; Woods *v.* Early, 95 Va. 307, 28 S. E. 374; Switzer *v.* McCulloch, 76 Va. 777; note, 6 Va. Law Reg. 191.

2. Bill for Specific Execution of Contract—Laches.

A bill for specific execution of a contract between parceners to keep open a right of way through their lands, filed nearly 20 years after the contract was made, will be dismissed when the plaintiff has stood by and allowed the land to be twice sold and the way to be obstructed or closed for years and the alienees had no notice of his claim; since it has become too stale, and, if not lost, has become a mere personal right. McCue *v.* Ralston, 9 Gratt. 430. See the titles PRIVATE WAYS; SPECIFIC PERFORMANCE.

3. Compensation.

If a just compensation may be made to the plaintiffs for the injury done to their property and rights, the court may ascertain and decree such compensation. Berkeley *v.* Smith, 27 Gratt. 892.

"An action at law could not afford an adequate remedy for the permanent and continuing injury. Whilst in the proceeding in equity, he may be awarded compensation, not only for past injuries, but also for the permanent and continued anticipated injury caused by the appellant's acts of aggression upon their rights, already accomplished, and thus avoid a multiplicity of suits at law to recover damages from time to time, for the continuing injury, after the damage has been actually sustained; the pecuniary compensation to be awarded in lieu of all damages actually incurred, or which may thereafter be incurred, by the appellee, from the acts and doings of the appellant complained of, and the appellees perpetually enjoined from the prosecution of other suits or actions against the appellant therefor. In a recent case of Isenberg *v.* The East India House Estate Co., decided in England (The Jurist, 1864, part 1, page 221), the lord chancellor suspended the order of the master of the rolls, awarding a mandatory injunction, and directed an inquiry before him for the purpose of ascertaining what damage had been sustained by the plaintiff, by reason of the buildings erected by the defendants, and what would be the proper amount of compensation to be paid by the defendants to the plaintiff as satisfaction for such damages." Berkeley *v.* Smith, 27 Gratt. 892.

B. DECLARATION.

Form of Declaration.—The form of declaration prescribed by Mr. Chitty and approved by Mr. Robinson, 2 Chit. P. C. 808-10; 3 Rob. Pr. 795, alleging generally the plaintiff's right and the defendant's violation of it is good. Standiford *v.* Goudy, 6 W. Va. 364.

Allegations.—A count not alleging any necessity for a way over tract re-

tained, in order to the enjoyment of the tract granted or any fact that would imply the grant of such a way or any express grant is bad. A demurrer to the whole declaration should be overruled when one of the counts is good and the other bad. When a count purports to state not merely that the plaintiff had a right of way, but to set forth the facts that constitute his title, it indicates negatively, that, if these facts do not make his right, he has none. Standiford *v.* Goudy, 6 W. Va. 364.

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See the title HOSPITALS AND ASYLUMS.

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See the title RELIGIOUS SOCIETIES.

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See the titles COLLEGES AND UNIVERSITIES, vol. 2, p. 848; SCHOOLS.

EDUCATIONAL APPLIANCE.—See APPLIANCES, vol. 1, p. 682.

EFFICIENT.—See COMPETENT, vol. 3, p. 36.

EITHER.—The word **either** taken by itself signifies one or another of any number. Dew *v.* Barns, 1 Jones Eq. (N. C.) 149, quoted in Graham *v.* Graham, 23 W. Va. 43.

In Henderson *v.* Peachy, 3 Leigh 68, it is said: "The event upon which the estate was limited over, was 'the death of **either**' daughter; a phrase of well-understood and definite signification, meaning the death of the one or the other; therefore, the death of the one first dying, was the event on which the remainder was to take effect."

A testator, after directing that all his estate shall be equally divided among his seven children, adds: "It is my will and desire that if any of my children should die before they attain to legal age, or without a lawful heir, in **either** case, that all such property as they may receive in the division of my property, return to my surviving children, or their lawful heirs." The court said: "The court is of opinion, that though according to a series of decisions, it would be competent to construe the word 'or' conjunctively, instead of disjunctively, in the limitations of a will, where such a construction is necessary to carry out the intent of the testator as manifested on the face of the will, such construction could not be made in the present case without disregarding the other words, 'in **either** case,' immediately following the word 'or' in the preceding clause, referring to it as its next antecedent, and clearly manifesting the intent that the limitation over was to take effect upon the happening of **either** contingency, the dying before attaining twenty-one years of age, or without lawful heir." Brooke *v.* Croxton, 2 Gratt. 506, 510.

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I. Nature and Object of Action.

In General.—The object of the action of ejectment is to try the possessory title to corporeal hereditaments. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

In the present action of ejectment the right of the parties to the property, as well as the right to the possession thereof, may be tried and determined. Board of Education *v.* Crawford, 14 W. Va. 790.

Where a case was decided by the court under agreement of the parties, that the cause should be submitted to the court "for the determination of the question of title to the land as between the plaintiff and the defendants, and all other matters and questions in controversy in the case," it was doubted whether such proceeding was to be regarded as an action of ejectment, or as a chancery proceeding and injunction, by which the determination of the question of the title as between the plaintiff and the defendants was submitted to the court, without reference to the question as to there being an outstanding title in a third party. Basore *v.* Henkel, 82 Va. 474.

Ejectment a Substitute for Writ of Right.—By statute the action of ejectment has been enlarged by embracing all cases which were formerly covered by the writ of right, and if the party was entitled to recover in a writ of right before the enactment of the statute, he is entitled to recover in the present action of ejectment, under the provisions of the Code. Va. Code, 1849, ch. 135; Va. Code, 1904, § 2723; W. Va. Code, ch. 90, § 2; Mitchell *v.* Barratta, 17 Gratt. 445; Oney *v.* Clendenin, 28 W. Va. 42; Low *v.* Settle, 22 W. Va. 396. See the title WRIT OF RIGHT.

Distinguished from Forcible Entry and Detainer.—There is a material difference between an action of ejectment and an action of forcible or unlawful entry. The title or right of possession is always involved in the trial of an action of ejectment. The plaintiff can not recover without showing that he is entitled to the possession; and the defendant, without having any right to the possession himself, may generally prevent a recovery by the plaintiff, by showing an outstanding right of possession in another. The remedy for a forcible or unlawful entry was designated to protect the actual possession, whether rightful or wrongful, against unlawful invasion, and to afford summary redress and restitution. The entry of the owner is unlawful if forcible, and the entry of any other person is unlawful, whether forcible or not. If the defendant enters unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession. His actual possession, of itself, gives him a right of possession against any person not having a right of entry. Olinger *v.* Shepherd, 12 Gratt. 462; Power *v.* Tazewells, 25 Gratt. 786; Davis *v.* Mayo, 82 Va. 97. See the title FORCIBLE ENTRY AND DETAINER.

II. For What Ejectment Lies.

Incorporeal Hereditaments.—"**By the common law,** and the general rule, an ejectment will not lie for anything wherever an entry can not be made, or of which the sheriff can not deliver possession. It would follow, therefore, by this rule, that ejectment is only maintainable for corporeal hereditaments. Ejectment will not lie for an incorporeal hereditament." Chapman *v.* Mill Creek, etc., Co., 54 W. Va. 193, 46 S. E. 262.

The right to take water from a spring, or of watering stock at a stream on the lands of another, is an incorporeal hereditament, for which the action of ejectment will not lie. Chapman *v.* Mill Creek, etc., Co., 54 W. Va. 193, 46 S. E. 262.

A grant of a right to quarry and remove limestone for certain specific pur-

poses, has been held to be an interest in or a right arising out of land, and as such, to constitute under the Va. Code of 1873, ch. 131, § 5, the foundation for an action of ejectment. Such a right is clearly an incorporeal hereditament, first, because it is not a mere license; and secondly, because it is not the grant of an exclusive right. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710; Carrington *v.* Goddin, 13 Gratt. 587. But see Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227, where it was said that the object of the action is to try title to corporeal hereditaments.

Use of Lands.—An action of ejectment does not lie to recover the mere use of unemployed lands for an uncertain and indefinite period. Va. Code, §§ 2730, 2748. King *v.* Norfolk, etc., R. Co., 99 Va. 626, 39 S. E. 701.

According to the terms of a covenant annexed to a deed, the grantor of a tract of land had a right to its use, when it was not required or needed for the purposes of the grantee. It was held, that under the Virginia Code, §§ 2730, 2738, ejectment would not lie to recover the mere use of unemployed or unoccupied lands for an uncertain and indefinite period, where the same were unemployed by the grantee. King *v.* Norfolk, etc., R. Co., 99 Va. 626, 39 S. E. 701.

Land Subject to Dower.—A plaintiff in an action of ejectment may recover land which is subject to the dower of a widow, if such dower has not been assigned; for, until the dower is assigned she has no right to the possession of any of the land. The plaintiff's recovery in such case, however, is subject to the title of the widow. Chapman *v.* Armistead, 4 Munf. 382; Moore *v.* Gilliam, 5 Munf. 346.

Land Subject to Easement of Street or Highway.—The owner of the fee of a highway or public street or square may maintain ejectment against one who takes exclusive possession of the grounds. Warwick *v.* Mayo, 15 Gratt. 528; Bolling *v.* Petersburg, 3 Rand. 563. See the title STREETS AND HIGHWAYS.

The owner of the soil, has a right to all remedies for the freehold subject to the easement. Bolling *v.* Petersburg, 3 Rand. 563.

A recovery of a judgment in ejectment is subject to any easement in the public to use the land as a street or highway, and the right of the public to the easement is not drawn in question or in any way affected by the controversy between the plaintiff and the defendant as to the ownership of the fee. Warwick *v.* Mayo, 15 Gratt. 528; Bolling *v.* Petersburg, 3 Rand. 563.

Public Highways.—Where an act directed the public engineer to lay off a road and sites for bridges thereon, and declared that upon the return of the plats thereof to the clerks' offices of the county courts in which the road located lay, the land should be vested in the commonwealth for the use of the road; it was held, that on compliance with the law, the title to the land on which the road was located, and the sites of the bridges were fixed, was vested in the commonwealth, and that the commonwealth or her grantee might maintain ejectment therefor against the former owner. James River, etc., Co. *v.* Thompson, 3 Gratt. 270. See the titles BRIDGES, vol. 2, p. 623; STREETS AND HIGHWAYS.

III. Title to Support the Action.

A. IN GENERAL.

In an action of ejectment, unless both plaintiff and defendant claim title from a common source, the plaintiff must connect himself by an unbroken chain of title with the state or commonwealth. Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. 128.

The plaintiff must make out a perfect title showing a grant from the state. Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Witten *v.* St. Clair, 27 W.

Va. 762; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922.

The evidence should disclose a claim of title running back from the plaintiffs through those under whom they claim to the original source of title, or to a common source of title of the plaintiff and the defendant, or that the plaintiffs or those through whom they claim had held possession of the land under a claim or color of title for fifteen years. Atkinson *v.* Smith, 2 Va. Dec. 373.

The plaintiff in an action of ejectment may show title in himself either by showing a grant from the crown or the commonwealth and connecting himself therewith by a regular chain of title, or by showing such a state of facts as will warrant the jury in presuming a grant. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

B. PLAINTIFF MUST RECOVER ON STRENGTH OF HIS OWN TITLE.

1. General Rule.

It is a general rule that the plaintiff in ejectment must recover, if at all, on the strength of his own title, and must not rely on the weakness of the title of his adversary. One in possession of real estate may rest upon the fact that he will be maintained in its possession until some one comes forward and shows a better title. Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Nelson *v.* Triplett, 81 Va. 236; McKinney *v.* Daniel, 90 Va. 702, 19 S. E. 880; Voight *v.* Raby, 90 Va. 799, 20 S. E. 824; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895; Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Rhule *v.* Seaboard, etc., R. Co., 102 Va. 343, 46 S. E. 331; Virginia Coal, etc., Co. *v.* Keystone Coal, etc., Co., 101 Va. 723, 45 S. E. 291; Carter *v.* Wood, 103 Va. 72, 48 S. E. 553; Atkinson *v.* Smith, 2 Va. Dec. 373; Rudd *v.* Farmville, etc., R. Co., 2 Va. Dec. 346; Tapscott *v.* Cobbs, 11 Gratt. 172; Olinger *v.* Shepherd, 12 Gratt. 462; Atkins *v.* Lewis, 14 Gratt. 30; Miller *v.* Williams, 15 Gratt. 213; Alderson *v.* Miller, 15 Gratt. 279; Tabb *v.* Baird, 3 Call 475; Bradley *v.* Ewart, 18 W. Va. 598; Witten *v.* St. Clair, 27 W. Va. 762; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499; Ronk *v.* Higgenbotham, 54 W. Va. 137, 46 S. E. 128; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262.

The action of ejectment in this state is not simply a comparison of titles. The general rule is, that the right of the plaintiff to recover rests upon the sufficiency of his own title, and not only upon the weakness of that of the defendant. Witten *v.* St. Clair, 27 W. Va. 762.

No infirmity in the defendant's title can supply a defect of proof upon the part of the plaintiff. Carter *v.* Wood, 103 Va. 68, 48 S. E. 553.

Where defendants in ejectment claim title by adverse possession, it is error to refuse an instruction for defendant that plaintiffs can recover only on the strength of their own title. Atkinson *v.* Smith, 2 Va. Dec. 373.

When the jury in an action of ejectment has been instructed distinctly and fully upon the doctrine that the plaintiff must recover on the strength of his own title and can not be aided by the weakness of the title of his adversary, it is unnecessary to again give such instruction in connection with an instruction asked by plaintiff expounding the law as to what is necessary to be shown by the defendant who relies on adverse possession of land under color or claim of title to defeat the legal title of the plaintiff. Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

2. Exceptions.

a. In General.

The rule is thus broadly stated by the authorities without qualification, but there are exceptions to the rule thus announced as well established as the rule itself. Rhule *v.* Seaboard, etc., R. Co., 102 Va. 346, 46 S. E. 331; Tapscott *v.* Cobbs, 11 Gratt. 172; Olinger *v.* Shepherd, 12 Gratt. 462; Atkins *v.* Lewis, 14 Gratt. 30; Miller *v.* Williams, 15 Gratt. 213; Witten *v.* St. Clair, 27 W. Va. 762; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

These qualifications rest upon the principle of estoppel for the most part. Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

b. Action by Landlord against Tenant.

A tenant let into possession under a lease is estopped to deny the title of his landlord, and this estoppel may be relied on in ejectment. Here again, the estoppel is founded on a permissive possession, and is admitted to be a departure from the strict rule of law, which requires that the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. Miller *v.* Williams, 15 Gratt. 213; Alderson *v.* Miller, 15 Gratt. 279; Suttle *v.* Richmond, etc., R. Co., 76 Va. 289; Witten *v.* St. Clair, 27 W. Va. 762.

The general rule that tenant can not deny landlord's title, is not varied when tenant is in actual possession at the time he accepts the lease. Locke *v.* Frasher, 79 Va. 409; Emerick *v.* Tavener, 9 Gratt. 223, 224.

In ejectment by the landlord against his tenant where neither fraud nor mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord. Voss *v.* King, 33 W. Va. 236, 10 S. E. 402.

When the defendant in an action of ejectment sustains such relation to the plaintiff as estops him from denying the title of the latter, the general rule, that the plaintiff must recover on the strength of his own title, and make out a chain of title from the state, is inapplicable. Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154. See the title LANDLORD AND TENANT.

c Action against Intruders of Trespassers.

A person in peaceable possession of land which is entered upon, and who is ousted by a stranger without title, may recover in ejectment upon the strength of his mere previous possession. The reason is, that actual seisin is evidence of title against all the world, except the true owner, and the law will not permit that seisin to be wantonly invaded by one who himself has no title. Lee *v.* Tapscott, 2 Wash. 276; Suttle *v.* Richmond, etc., R. Co., 76 Va. 289; Witten *v.* St. Clair, 27 W. Va. 762; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Rhule *v.* Seaboard, etc., R. Co., 102 Va. 346, 46 S. E. 331; Tapscott *v.* Cobbs, 11 Gratt. 172; Olinger *v.* Shepherd, 12 Gratt. 462; Atkins *v.* Lewis, 14 Gratt. 30; Nelson *v.* Triplett, 81 Va. 237; Ushers *v.* Pride, 15 Gratt. 190; Carter *v.* Ramey, 15 Gratt. 346; Miller *v.* Williams, 15 Gratt. 213; Barton *v.* Gilchrist, 19 W. Va. 228; Postlewaite *v.* Wise, 17 W. Va. 1; Elliott *v.* Sutor, 3 W. Va. 37; Low *v.* Settle, 22 W. Va. 387; Gorman *v.* Steed, 1 W. Va. 12.

And the right of the person in possession to recover in such case can not be defeated by the intruder showing that there is or may be an outstanding title in a third person. Witten *v.* St. Clair, 27 W. Va. 762.

Where an ancestor dies in possession of land, the presumption of law is that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession, against one who has entered upon the land without title, or authority to enter un-

der the title outstanding in another. Tapscott *v.* Cobbs, 11 Gratt. 172.

A person having held actual possession of land for more than fifteen years under color of title, and being then ousted by another who is a mere trespasser without pretence of title, may recover in ejectment against such trespasser, though it does not appear that the land has ever been granted by the commonwealth. Middleton *v.* Johns, 4 Gratt. 129.

In ejectment, where it appeared from the evidence that the land in controversy was vacant when the defendant came to the possession of it peaceably and quietly, without any privity between him and the lessor of the plaintiff or those under whom they claimed, it was held that the plaintiff could not recover, upon the ground of the prior possession of the lessors, without proving twenty years uninterrupted adverse possession on their part or on the part of those under whom they claimed; or showing a right to the possession by the death and seisin, in the manner prescribed by the act of assembly, of some person under whom they claimed. Moody *v.* McKim, 5 Munf. 374.

C. LEGAL TITLE.

There can be no recovery in an action of ejectment, except under special circumstances, unless the evidence shows that the plaintiff was the owner of the legal title to the land in controversy at the time his action was instituted. Leftwich *v.* Richmond, 100 Va. 164, 40 S. E. 651; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Nelson *v.* Triplett, 81 Va. 237; Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393; Rudd *v.* Farmville, etc., R. Co., 2 Va. Dec. 346; Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763; Chapman *v.* Mill Creek, etc., Co., 54 W. Va. 193, 46 S. E. 262.

The principal exception to the general rule which requires the plaintiff in ejectment to have the legal title in order to sustain his action, is where the plaintiff is in the possession of the land, from which he is ousted, under circumstances from which the jury may infer a conveyance of the legal title. Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393.

D. EVIDENCES OF TITLE.

1. Paper Title.

a. In General.

"No length of claim of paper title which does not reach the sovereignty of the soil is sufficient of itself to constitute prima facie evidence of title." Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154, citing 10 Am. & Eng. Ency. Law, 2 Ed. 484; Newell on Eject. 585.

b. Grant or Patent from State.

A grant from the commonwealth confers constructive seisin sufficient to enable the patentee, or those claiming under him, to maintain an action of ejectment. Actual seisin is not necessary. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491; Clay *v.* White, 1 Munf. 162; Dawson *v.* Watkins, 2 Rob. 259, 268; Carter *v.* Hagan, 75 Va. 557.

In an action of ejectment, a valid patent from the commonwealth to the plaintiff is prima facie evidence of title in the plaintiff, with the right of immediate actual possession, and can only be defeated by an adversary possession under color or claim of title for the statutory period, or by showing a previous valid grant by the commonwealth to the defendant or to a third person, or a state of facts from which such patent may be presumed. Holleran *v.* Meisel, 91 Va. 143, 21 S. E. 658.

Where a patent contained a reservation in favor of a prior claimant who relied only on his entry and survey, and under these circumstances, a patent including the land so claimed and without a reservation, was issued to a junior patentee, the latter acquired the legal title, and his title prevailed in an action of ejectment. Carter *v.* Hagan, 75 Va. 557.

In an action of ejectment, the plaintiff rested his title on a grant dated in 1796 of 20,000 acres; defendant relied on a patent dated in 1795, for an equal tract adjoining the plaintiff's tract, and a resurvey by order of court in 1835, for the purpose of more certainly establishing the lines of the original grant. The resurvey contained 26,650 acres, the difference being within plaintiff's tract. The lines of the resurvey, however, did not correspond with those of the original grant. It was held that the title to the 6,650 acres was founded on new rights acquired subsequent to the plaintiff's patent, and could not affect the plaintiff's title. Randolph *v.* Longdale Iron Co., 84 Va. 457, 5 S. E. 30.

Land Granted with Reservations.—A grant from the commonwealth of Virginia upon an inclusive survey issued under act of June 2, 1788, including within its bounds prior claims therein reserved, passes no right or title whatever to the lands covered by such prior claims. Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531.

A plaintiff in ejectment, to recover under such a grant, must, in addition to showing the exterior boundaries of the grant, locate the specific reservations, if any, therein, and, as to a general reservation, must show and locate prior claim or claims in quantity sufficient to equal such general reservation, excluding the land of the defendant. The burden is then on the defendant to show that his land is within the reservation of the grant. Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531.

The commonwealth, by patent granted a tract of land containing 70,202 acres, within specified metes and bounds, by a survey containing a surplus of 42,000 acres, held by titles having legal preference to the warrants and rights, upon which the grant was founded. A reservation was therefore made in favor of those titles in general terms. It was decided that under the terms of this patent, the grantee was entitled to recover in ejectment all the land within the metes and bounds thereof, except such as the defendants might show themselves entitled to, under the said reservation. Hopkins *v.* Ward, 6 Munf. 38. See the title PUBLIC LANDS.

c. Deed from United States Marshal for Forfeited Land.

A deed from the marshal of the federal court, to the purchaser of land sold for nonpayment of the direct tax imposed by the congress of the United States, is not sufficient evidence to support the title of the purchaser, on a trial in ejectment; but other proof is requisite, of the authority of the marshal to make such conveyance, under the several acts of congress recited therein. Christy *v.* Minor, 4 Munf. 431. See the title TAXATION.

d. Deed of Life Tenant Whose Seisin Is Barred.

The deed of a life tenant, whose seisin is barred by the statute of limitations, is inoperative, and conveys no title. The reversioner or remainderman who takes such deed from the life tenant can not maintain a suit for the possession of the property involved during the continuance of the life tenancy. Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121.

e Release Deed Confirming Title Acquired under Sale in Confiscation Proceeding.

At the sale under the decree of confiscation, T. becomes the purchaser, and there is a conveyance of the property by the marshal to T. Afterward T. obtains from M., the original owner of the land, a conveyance by which he releases to T. all his interest of every kind in the land, and covenanted against the claims of all persons claiming under him. It was held, that this conveyance is valid to convey the fee in the land, and the heirs of M., after his death, can not recover it. Mason *v.* Tuttle, 75 Va. 105.

f. Lost Deed.

If a plaintiff in ejectment claims title under a lost or destroyed deed, the proof of its former existence, contents, and loss or destruction must be strong and conclusive before the court will permit a title to be established by parol evidence. A bare copy of an order of a county court, showing that a deed of bargain and sale from the plaintiff's alleged grantor to him had been admitted to record, accompanied by proof of the destruction of the deed book in which the deed should have been recorded, and of the fact that the grantor owned no other land in that county than that sought to be recovered, and an unauthenticated copy of the alleged lost deed, without proof of the genuineness of the original form which the copy was made, is not sufficient to establish the existence of the deed alleged. Carter *v.* Wood, 103 Va. 68, 48 S. E. 553. See the title LOST INSTRUMENTS AND RECORDS.

g. Decree Requiring Execution of Conveyance.

A decree requiring the execution of a conveyance to complainant, does not, of itself, vest any legal title in him. And such decree should not be received as evidence of legal title in an action of ejectment. Nelson *v.* Triplett, 81 Va. 236; Aldridge *v.* Giles, 3 Hen. & M. 136. See the titles JUDGMENTS AND DECREES; SPECIFIC PERFORMANCE.

The deed must be executed in order to pass the title. Nelson *v.* Triplett, 81 Va. 236.

Where in suit in chancery a special commissioner was directed by decree to make a deed of conveyance to "the purchasers or their vendees," one of whom was dead at the time, and in pursuance thereof the deed was executed, and, in action of ejectment the deed was admitted in evidence in behalf of one claiming under the deceased grantee, it was held, no error. Pugh *v.* McCue, 86 Va. 475, 10 S. E. 715.

In such action, if the record of the suit wherein the decree was rendered directing the deed to be made be introduced, the recitals in the deed are admissible and unassailable evidence of title in the collateral action. Pugh *v.* McCue, 86 Va. 475, 10 S. E. 715.

2. Adverse Possession.

See the title ADVERSE POSSESSION, vol. 1, p. 199.

In General.—The statute of limitations confers a legal title, enabling one not only to defend but to maintain ejectment or other action on its strength. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121; Middleton *v.* Johns, 4 Gratt. 129; Norfolk *v.* Cooke, 27 Gratt. 430; Thomas *v.* Jones, 28 Gratt. 383.

"The statute itself confers and invests title in the occupant as effectually as does descent, devise, or grant, so that he may not only defend, but if afterwards another enter upon the land, he may maintain ejectment on the title conferred by the statute, though he may not have the scratch of a pen to show title." Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

Color or Claim of Title.—In an action of ejectment a party who relies upon his adverse possession of the land in controversy under color or claim of title, will on trial be required to show on what color or claim of title he relies. Hall *v.* Hall, 27 W. Va. 468.

If a deed under which the plaintiff claims is defective, it is nevertheless competent evidence to show with other evidence an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed might ripen into a right of possession, and so bar the

right of the opposing party. Flanagan *v.* Grimmet, 10 Gratt. 421.

Payment of Taxes by Plaintiff.—If, in an action of ejectment, the case is such that the rights of neither of the parties are in any way dependent upon any forfeiture under the laws relating to taxes, and there is no evidence in the case of the payment of taxes on any of the property by either of them, and the jury are instructed, at the instance of the defendant, that, if they believe from the evidence the land in controversy is included in the defendant's deed and he has been in actual possession of any part of the land embraced in the boundary described in his deed, said possession extends to his exterior boundaries, and if continued for a period of ten years and having paid all the taxes on the same for that period of time, they must find for the defendant; the giving of such instruction, although obviously objectionable, is not a reversible error, when it appears that the plaintiff could not have been prejudiced thereby. Maxwell *v.* Kent, 49 W. Va. 543, 39 S. E. 174.

Effect of Possession of Interlocks by Defendant.—A plaintiff in an action of ejectment claiming title by adverse possession, though he recovers other parts of the tract claimed, can not recover possession of an interlock which has never been in his actual possession and which has been occupied for a long time by the defendant. The plaintiff must show possession of the interlock or some portion of it for the period of the statutory bar before his claim will ripen into title. Breeden *v.* Haney, 95 Va. 622, 29 S. E. 328; Garrett *v.* Ramsey, 26 W. Va. 345; Congrove *v.* Burdett, 28 W. Va. 220.

Duration of Possession.—Temporary possession of land, by cutting and sawing timber upon it, is not such adverse possession as will give title, and enable a party to sue in ejectment. Pasley *v.* English, 5 Gratt. 141.

The plaintiff in ejectment, who relies on adverse possession, will be required to show that his adverse possession of the premises in controversy has continued unbroken for the full period of ten years before the institution of the suit. Hall *v.* Hall, 27 W. Va. 468.

Necessity for Continuance of Adverse Possession to Commencement of Action.—Where the plaintiff relies upon title by adverse possession it is error to instruct the jury that such adverse possession must continue, without interruption, to the time of the institution of the action, where the evidence tends to show the completion of the required period of adverse possession long before the action was commenced. Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

Adverse Possession as Curing Defects in Deed.—In ejectment, the jury having found twenty years' possession in the plaintiff, an objection to one of his title deeds that it was not indented, and expressed no consideration, was not sufficient to prevent a judgment in his favor. Kinney *v.* Beverly, 2 H. & M. 318.

Presumption of Grant.—Plaintiff claimed under a possession taken by A in 1792 under a claim of title, and a continued, uninterrupted, notorious, possession by parties claiming under A, the party first taking the possession. The defendants entered upon the land only a few years before the action was commenced, not even under color of title, and they sought to set up an outstanding title in another; and for this purpose relied upon a deed executed in 1792 by B, the original patentee of the land, containing 10,000 acres, including the land claimed by the plaintiffs, and is a part of a tract of 340,000 acres conveyed by B to his grantees, excepting in the conveyance 50,000 acres, which he had sold to A. It was held, that after the long possession by A and those claiming under him, although the language of the exception may not amount to a convey-

ance of the land to A as against B if he or persons claiming under him were the parties, a conveyance to A would be presumed; and so it will be as against these defendants. Carter *v.* Robinett, 33 Gratt. 429.

3. Prior Possession.

As to recovery in ejectment on prior possession alone, see ante, "Action against Intruders or Trespassers," III, B, 2, c.

4. Settlement and Possession of Public Lands.

Settlement of and Payment of Taxes on Public Land.—A plaintiff in ejectment who does not claim title by grant from the commonwealth, but by certain proceedings had under § 41, ch. 108, Va. Code of 1873 as amended by acts, 1879-80, p. 205, which provides that the commonwealth's title to land which has been settled continuously for five years, and on which taxes have been paid within five years by the person in possession, shall be relinquished to the person in possession of the land claiming the same under such settlement and payment must bring himself within the terms of this act. And where the evidence showed that the plaintiff's grantor was not in possession when proceedings under such act were begun, it was held proper for the court to sustain a demurrer to evidence, for want of title in the plaintiff. Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3.

Occupancy under Grant of Forfeited or Delinquent Lands. — Parties who would avail themselves of the provisions of the act of 1841, in relation to forfeited and delinquent lands, which vests title in actual occupants of land who claim under title derived from grant, must show not only possession but title derived from or under grant of the commonwealth, and possession within the grant. Kenna *v.* Quarrier, 3 W. Va. 210.

Therefore, parties in an action of ejectment, who claim title from a patent issued on different entries and surveys of different dates, must show within which of the entries and surveys the land lies, claimed by them as actual occupants and of which title is vested in them by the act of 1841. Kenna *v.* Quarrier, 3 W. Va. 210.

In an action of ejectment for land, in which neither the plaintiff nor the defendant claim under a good paper title, and it is not shown that the title has ever been granted by the state or the commonwealth of Virginia to any one, it is error to instruct the jury, that the plaintiff may recover without tracing his title to a grant from the state or commonwealth. The instruction should require the jury to find, that the plaintiff had in such case been in the actual possession of the land for the time prescribed, and had paid all the state taxes required, by § 3, art. 13, of our constitution. Witten *v.* St. Clair, 27 W. Va. 763.

E. TITLE FROM COMMON SOURCE.

Where plaintiff and defendant in ejectment claim title under a common grantor, it is unnecessary for the plaintiff to trace his title back to such grantor. Carter *v.* Wood, 103 Va. 68, 48 S. E. 553; Chesterman *v.* Bolling, 102 Va. 471, 46 S. E. 470; Bolling *v.* Teel, 76 Va. 487.

It is prima facie sufficient for the plaintiff to prove such common derivation of title, without proving that such person had title to the land in controversy. Bolling *v.* Teel, 76 Va. 487; Laidley *v.* Cent. Land Co., 30 W. Va. 505, 4 S. E. 705; Low *v.* Settle, 32 W. Va. 600, 9 S. E. 922; Carrell *v.* Mitchell, 37 W. Va. 130, 16 S. E. 453.

"Where parties claim title from one person as a common source, they are estopped from denying the title of the original claimant from whom they derived title." Herman on Est., § 593; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154.

It is reversible error to give an in-

struction which assumes that a mesne grantor of plaintiffs had the legal title from the common grantor and authorizes the jury to find for plaintiffs if they have acquired the title of such mesne grantor, without tracing the title to its original source, unless defendant has shown title by adverse possession. Atkinson *v.* Smith, 2 Va. Dec. 373.

F. EQUITABLE TITLE.

It is well settled that an equitable title is not sufficient to sustain an action of ejectment. Nelson *v.* Triplett, 81 Va. 236; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393; Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763; Aldridge *v.* Giles, 3 Hen. & M. 136; Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345; Ruffners *v.* Lewis, 7 Leigh 720; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895; Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Chapman *v.* Mill Creek Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262.

Except in a very limited class of cases, a court of law, in an action of ejectment, is governed by the rigid rules of law, and decides according to the legal rights alone of the parties, and leaves them to settle their equitable rights in the equity forum, where alone they can be properly settled. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284, 291; Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393.

"The plaintiff may come into court upon an absolutely perfect equitable title, but will lose his case if the defendant can show an outstanding legal title in himself or a stranger, except in a few cases dependent upon certain technical principles." Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763; Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393.

In Suttle *v.* Richmond, etc., R. Co., 76 Va. 284, the plaintiff came into a court of law, in an action of ejectment, basing his right of recovery upon an equitable estoppel, and lost his case because he was unable to show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. Virginia Iron, etc., Co. *v.* Crane's Nest Coal, etc., Co., 102 Va. 406, 46 S. E. 393.

G. RIGHT OF PLAINTIFF TO POSSESSION.

The plaintiff in ejectment must be entitled to possession at the commencement of his suit. Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895; Nelson *v.* Triplett, 81 Va. 236; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Rudd *v.* Farmville, etc., R. Co., 2 Va. Dec. 346.

The plaintiff must have the legal title and a present right of possession under it at the time of the commencement of the action. Nelson *v.* Triplett, 81 Va. 236; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Rudd *v.* Farmville, etc., R. Co., 2 Va. Dec. 346; Jennings *v.* Gravely, 92 Va. 377, 23 S. E. 763.

Ejectment will not lie against a railroad company for land upon which, after a report in its favor by commissioners duly appointed, and payment into court of the damages assessed, it has entered for construction of its road, notwithstanding the proceedings were still pending, since it has the right of possession under Va. Code, § 1081, authorizing it, under such circumstances, to enter for such purpose. Rudd *v.* Farmville, etc., R. Co., 2 Va. Dec. 346. See the title EMINENT DOMAIN.

H. WHEN TITLE MUST EXIST IN PLAINTIFF.

There can be no recovery in an action of ejectment, except under special circumstances, unless the evidence shows that the plaintiff was the owner of the legal title to the land in controversy at the time his action was in-

stituted. Leftwich *v.* Richmond, 100 Va. 164, 40 S. E. 651; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Nelson *v.* Triplett, 81 Va. 236; Chapman *v.* Mill Creek, Coal, etc., Co., 54 W. Va. 193, 46 S. E. 262.

The plaintiff must have title to the land in controversy at the commencement of the suit in order to support an action of ejectment. Suttle *v.* Richmond, etc., R. Co., 76 Va. 284; Russell *v.* Allmond, 92 Va. 484, 23 S. E. 895.

But it has been held that the conveyance of the land in controversy by the plaintiff pending an action of ejectment does not affect his right of recovery. Beckwith *v.* Thompson, 18 W. Va. 103.

IV. Demand and Notice to Quit.

Necessity of Notice to Tenants at Will.—Where a purchaser of land is put in possession without a conveyance having been made to him, he is a tenant at will, and his possession is lawful, until demand of possession is made by the owner, and refusal is made by the tenant. In such case, the vendor is bound to make demand for the premises, and serve the tenant with notice to quit before bringing an action of ejectment; and this is true even though the vendee may be entitled in equity to a specific execution of the contract. Twyman *v.* Hawley, 24 Gratt. 512; Williamson *v.* Paxton, 18 Gratt. 475; Pettit *v.* Cowherd, 83 Va. 20, 1 S. E. 392; Jones *v.* Temple, 87 Va. 210, 12 S. E. 404. See the titles ACTIONS, vol. 1, p. 122; LANDLORD AND TENANT.

While one in possession under agreement to purchase, can not be ousted before his lawful possession, is determined by demand or otherwise, yet such possession may be determined by the acceptance of a lease. Locke *v.* Frasher, 79 Va. 409.

Necessity of Notice to Tenants at Sufferance.—Tenants at sufferance are not entitled to notice to quit prior to the institution of the suit. McClung *v.* Echols, 5 W. Va. 204; Williamson *v.* Paxton, 18 Gratt. 475.

One in possession under a void contract is merely a tenant by sufferance, and as such not entitled to notice to quit before ejectment can be maintained by his landlord for the premises. McClung *v.* Echols, 5 W. Va. 204.

A party who is in possession under a contract, but who avoids the contract, in a suit to enforce payment of bonds under it, by reason of its being founded on confederate treasury notes, an illegal currency, is in possession thereafter wrongfully, and is a tenant at sufferance; and it is not necessary that he should have notice to quit prior to the institution of an action of ejectment. Nor could this contract, thus annulled, avail the defendant as a valid defense in the ejectment suit, under the provisions of W. Va. Code, 1868. ch. 90, § 20. McClung *v.* Echols, 5 W. Va. 204.

V. Jurisdiction.

County Where Land Lies.—In actions at law affecting lands or other immovable property the forum rei sitæ has exclusive jurisdiction. Witten *v.* St. Clair, 27 W. Va. 762. See the titles JURISDICTION; VENUE.

An action of ejectment must be brought in the county wherein the land sought to be recovered or some part thereof is. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540; Witten *v.* St. Clair, 27 W. Va. 762.

Effect of Interest of Judge as Giving Jurisdiction to Court of Another County.—Quære, whether an action of ejectment or unlawful detainer, may be brought in an adjoining county where the judge of the court of the county where the land lies is interested in the case. McConaughey *v.* Bennett, 50 W. Va. 172, 40 S. E. 540.

Effect of Nonresidence of Defendant.—In an action of ejectment to recover land situate in this state, if the defendant be a nonresident, he may be pro-

ceeded against by order of publication, or the declaration and notice may be served upon him outside of the state in the manner prescribed by § 13, ch. 124, W. Va. Code, and either mode of service will confer jurisdiction upon the forum rei sitæ to determine the ownership of the land in controversy. Witten *v.* St. Clair, 27 W. Va. 762. See the title SERVICE OF PROCESS.

Where the plaintiff files a statement of the profits or damages which he means to demand, and thereafter the defendant appears and pleads not guilty to the action, the court will then have jurisdiction not only to determine the ownership of the land but also to render a personal judgment against the defendant for the profits of, or damage done by him to the land. Witten *v.* St. Clair, 27 W. Va. 762.

VI. Parties.

A. PARTIES PLAINTIFF.

1. As Dependent on Possession of Premises.

a. Persons Out of Possession.

One who has legal title to real estate and is out of actual possession may maintain ejectment against an adversary claimant in possession. Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682; Clayton *v.* Barr, 34 W. Va. 290, 12 S. E. 704; Jones *v.* Fox, 20 W. Va. 370; Otey *v.* Stuart, 91 Va. 714, 22 S. E. 513; Louisville, etc., R. Co. *v.* Taylor, 93 Va. 226, 24 S. E. 1013; Stearns *v.* Harman, 80 Va. 48; Carrington *v.* Otis, 4 Gratt. 235, 252; Stuart *v.* Coalter, 4 Rand. 74; Lange *v.* Jones, 5 Leigh 192.

Equity has no jurisdiction to remove a cloud upon the title to land where the party asking relief is out of possession. The remedy by an action of ejectment is complete and adequate. Nor can a court of equity interfere with a judgment at law unless the complainant has an equitable defense which was not available at law, or a good defense at law of which he was prevented from availing himself by fraud or accident, unmixed with negligence in himself or his agents. Louisville, etc., R. Co. *v.* Taylor, 93 Va. 226, 24 S. E. 1013; Otey *v.* Stuart, 91 Va. 714, 22 S. E. 513; Stearns *v.* Harmon, 80 Va. 48; Carrington *v.* Otis, 4 Gratt. 235; Stuart *v.* Coalter, 4 Rand. 74; Lange *v.* Jones, 5 Leigh 192; Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682; Clayton *v.* Barr, 34 W. Va. 290, 12 S. E. 704; Jones *v.* Fox, 20 W. Va. 370. See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 161; QUIETING TITLE.

b. Persons in Possession.

Neither before nor since the amendment of § 2726 of the Virginia Code (Acts, 1895-96, p. 514) could a plaintiff in possession of land maintain an action of ejectment therefor. The object of the action of ejectment is to try the possessory title to corporeal hereditaments, and to recover the possession thereof. The effect of the amendment was simply to permit a plaintiff, in cases where the premises are occupied, in his discretion, to join as defendant with the occupant any person claiming title thereto, or an interest therein adversely to the plaintiff. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

Quære: Can a person maintain ejectment, though he be in actual possession, against one who either exercises acts of ownership, or claims title to the land in controversy? Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682.

Actual possession of the surface of the land underlain by undeveloped minerals being the only possession of which the subject is capable is a sufficient possession to enable the owner of the surface to invoke the jurisdiction of a court of equity; he can no more bring ejectment for the undeveloped, underlying minerals, than for the surface of which he was actually possessed. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

2. As Dependent on Title or Interest.

a. Heirs and Devisees.

A widow claiming to be the sole heir

of her deceased husband has not a right to file a bill in chancery against parties claiming to be heirs of her husband, who are in possession of the property of her deceased husband as his heirs, and obtain from the court a decision, as to who are the true heirs of the husband, and be put into possession of her husband's land, if she established herself to be his sole heir. In such case her remedy is in a common-law court by ejectment. Jones *v.* Fox, 20 W. Va. 370.

A person, having an equitable title to a tract of land, executed a power of attorney, to obtain a conveyance, but without authorizing a sale of his right. The attorney, being induced to believe the title bond defective and finding it inconvenient to pay the balance due of the purchase money, was persuaded, notwithstanding the land had greatly increased in value, to give up the title bond (but without assigning it) to the husband of a woman in whom the legal title was, in consideration of the husband's giving up to him the unsatisfied bond for the purchase money. After the death of the wife, the husband sold the land, as his own, and the purchaser of him filed a bill in equity to enjoin a judgment in ejectment obtained against him by the heir of the wife, and to get a conveyance of the land. It was decided, that the contract between the attorney and the husband did not stand on such a footing of fairness and equity, that it ought to prevail over the legal title of the heir of the wife. McClenahans *v.* Hannah, 4 Munf. 499.

Heirs of Executor.—Where land has been conveyed to a grantee "as executor" of another, upon the death of the grantee, the legal title passes to his heirs, and they are the proper and only parties to maintain an action of ejectment for its recovery. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

Heirs of Patentee.—The heirs of a patentee of land may recover in ejectment, against a person who had the use and occupation of the land as his own, in the lifetime of the patentee, and so continued until after his death, claiming to hold the same by adverse possession, the duration of such possession having been less than twenty years. See *v.* Greenlee, 6 Munf. 303; Clay *v.* White, 1 Munf. 162; Clay *v.* Ransome, 1 Munf. 454.

Devisees.—Where land is devised subject to the payment of debts the devisee may maintain ejectment against the purchaser who acquires the land at the sale thereof fraudulently made by the executors for other purposes. Smith *v.* Henning, 10 W. Va. 596.

Where a testator devised land to his son with limitation over in case of the son's death without heirs of the body, and the son conveyed a fee simple estate, and died without heirs of the body, it was held, that the person to whom the estate was limited upon the contingency of the son's death without heirs of the body might maintain an action of ejectment against the purchaser from the son for the whole estate. Tomlinson *v.* Nickell, 24 W. Va. 148.

b. Reversioners.

Where there was a devise to a person and the heirs of his body, but if he died without heirs of the body, then a limitation over the heirs of the grantor; this was held to be a fee simple defeasible upon the devisee dying without heirs of the body; and when the devisee died without heirs of the body, the heirs of the grantor were allowed to sue for and recover the land in ejectment. Elys *v.* Wynne, 22 Gratt. 224.

By deed dated July 28th, 1821, D. granted, to take effect after his death, land whereon he had erected a mausoleum, to his grandson, R., for life, and after his death to such person as shall at that time answer the description of his heir-at-law, such person to take as purchaser under the deed, and not

by inheritance as heir of R., on condition that if R. shall ever sell, give, lease, mortgage, or in any way alien the land or any part thereof, or even attempt so to do, to any person whomsoever, then this deed should be void, and the land, together with two other lots conveyed to him in fee, shall revert to and vest in his sister, E., and her heirs forever. This condition R. broke, and the heirs of E. brought ejectment to recover it from those claiming under alienation by R. It was held, that there having been a breach of the condition on which R. held the land, immediately the limitation over to E. took effect, and E.'s heirs have a right to recover it from R.'s alienees. Camp *v.* Cleary, 76 Va. 140.

c. Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS.

Where Will Directs Sale and Devises Land to Executors to Sell.—Where a testator by his will directed the sale of his real estate and devised it to his executors, or to the survivors of them, for that purpose, it was held, that the executors or the survivor of them might maintain ejectment for the recovery of the land. Bell *v.* Humphreys, 8 W. Va. 1.

The delay of the sale of the land did not divest the right of the executors to recover it in ejectment. Bell *v.* Humphreys, 8 W. Va. 1.

Where a testator devised a tract of land to his daughter, and if she should die without heirs to return to his other heirs and be sold, and the money divided between them, and the daughter sold the land and dies without heirs of the body, it was held, that the executor and not the heirs of the testator was the proper party to maintain ejectment. Elys *v.* Wynne, 22 Gratt. 224.

Effect of Death of Executor Pending Action.—Where a will directs a sale of the testator's lands, and devises them to the executor for that purpose, upon the death of the executor, pending an action of ejectment by him to recover the lands, it is competent and proper to revive the suit in the name of the administrator de bonis non of the testator, he being invested by law with the right to prosecute it. Bell *v* Humphreys, 8 W. Va. 1. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 2.

Right of Heirs of Executor to Sue for Land Purchased by Executor for Estate.—On the death of an executor who had acquired the legal title to land at a trustee's sale for the benefit of the testator's estate, his heirs were the proper parties to bring ejectment. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

d. Joint Tenants and Tenants in Common.

See the title JOINT TENANTS AND TENANTS IN COMMON.

(1) Actions Inter Se.

Necessity of Prior Actual Ouster.—In ejectment by one or more tenants in common, joint tenants, or corparceners, the plaintiff shall be bound to prove actual ouster or some other act amounting to a total denial of the plaintiff's right as cotenant. Va. Code, 1887, § 2736; W. Va. Code, ch. 90, § 15; Buchanan *v.* King, 22 Gratt. 414; Taylor *v.* Hill, 10 Leigh 457.

Actual ouster must be shown by the plaintiff before he can maintain the action and the verdict must find an actual ouster. Taylor *v.* Hill, 10 Leigh 457.

In Buchanan *v.* King, 22 Gratt. 444, it is said: "It has been the established doctrine of the courts, that a tenant in common can not maintain ejectment against his companion without proof of an actual ouster. Difficulties often occur in determining whether certain acts constitute an ouster. Parties otherwise entitled to recover are defeated from an inability to prove it. It was, therefore, provided (Va. Code, 1860, ch. 135, § 15; Va.

Code, 1887, § 2736), it should be sufficient for the plaintiff to prove some act amounting to a total denial of the plaintiff's right as cotenant. It was not intended to alter well established principles of law governing the relations of joint tenants or tenants in common to each other, but simply to enlarge existing remedies. Taylor *v.* Hill, 10 Leigh 457."

Effect of Confession of Ouster under Old "Consent Rule."—The necessity of finding ouster was not dispensed with by the entry made, in Virginia, when the tenant in possession was admitted defendant, that he "confesses the lease, entry and ouster in the declaration supposed, and agrees to insist on the title only, at the trial." The confession that Richard Roe ousted John Doe, is not a confession that the real defendant ousted the real plaintiff; and when this latter ouster forms a part of the plaintiff's title to recover (as it does between tenants in common), the fact of such ouster must be proved. Taylor *v.* Hill, 10 Leigh 457.

(2) Actions against Third Persons.

Right of One or More to Recover Interest of All.—One joint tenant can not recover, in an action of ejectment in his own name, as sole plaintiff, the interests of himself and his cotenants. He can only recover that to which he has the title, and if this be an undivided interest he must prove what his proportion is, else there must be judgment for the defendant. Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672; Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345; Allen *v.* Gibson, 4 Rand. 468 (distinguishing, in this respect, the action of ejectment from that of unlawful entry and detainer).

If a partition has been made which is effectual, each joint tenant is still seized of his individual share of the whole, and that will be the extent of his recovery in an action of ejectment. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

And while one may bring suit for the whole of the premises, and his action will not be defeated, if he should fail to prove that he was entitled to the entirety, but showed that he was entitled to some less interest, yet it is incumbent upon him not only to establish the legal title in himself to such less interest, but he must also establish the extent of such interest. If it appears that there are other persons interested with him as cotenants, he must prove what is the share or proportion of the land that belongs to him. His undivided interest must be made certain and definite. It must be clearly designated. Code of Virginia, § 2747. If he fails to do this, so that it can not be specified by the verdict of the jury or the judgment of the court, he can not recover, and judgment must be rendered for the defendant. Marshall *v.* Palmer, 91 Va. 344, 21 S. E. 672; Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345.

e. Trustees.

The fact that a cestui que trust may maintain ejectment, after the trust is satisfied, does not deprive the trustee holding the legal title, of his right to maintain such an action. Hopkins *v.* Stephens, 2 Rand. 422.

The action of a circuit court in appointing trustees of church property is the subject of appeal, and the question of the regularity or validity of their appointment can not be questioned collaterally in an action of ejectment by newly appointed trustees to recover possession from trustees removed. Kreglo *v.* Fulk, 3 W. Va. 74.

f. Cestui Que Trust.

A cestui que trust, after the purposes of the deed has been satisfied, may maintain ejectment, upon a demise in his own name, although the legal estate is still in his trustee. Hopkins *v.* Ward, 6 Munf. 38. See the title TRUSTS AND TRUSTEES.

g Purchaser from Trustee.

Sale in Violation of Trust.—A conveyance of the trust property by a

trustee, though in violation of the terms of the trust deed, passes an absolute legal title to the property, defeasible only in a court of equity, and the purchaser from the trustee may maintain an action of ejectment against the party in possession. Taylor *v.* King, 6 Munf. 358; Harris *v.* Harris, 6 Munf. 367. See the title TRUSTS AND TRUSTEES.

Irregularity in Sale under Deed of Trust.—In action of ejectment by the purchaser at a sale under a deed of trust it would seem that the defendant will not be permitted to prove that the land had not been advertised before the sale as required by the deed of trust, as the deed by the trustee to the purchaser, whether said land was properly advertised or not before the sale, would confer on the purchaser the legal title to the land. Fulton *v.* Johnson, 24 W. Va. 96. See the title MORTGAGES AND DEEDS OF TRUST.

h. Vendors.

Where Contract Is Unexecuted.—A vendor of land who had put the purchaser in possession, while the contract remains executory, has the legal title as to such purchaser, and may demand possession of the purchaser, and recover it from him by an action of ejectment. Locke *v.* Frasher, 79 Va. 411; Dodson *v.* Culpepper, 23 Gratt. 352.

If a vendor of land, retaining the title, assigns one of the bonds given for the purchase money, and then brings ejectment against the vendee, and recovers possession of the land, he recovers and holds in subordination to the rights of the assignee. The assignee having by the assignment acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it; and he can not be deprived of these remedies by any act of the vendor. McClintic *v.* Wise, 25 Gratt. 448.

Breach of Condition Subsequent in Deed.—Where land is granted upon a condition subsequent, and there is a breach of the condition, the grantee's estate is determined by this breach, and an action of ejectment can be maintained by the grantor against the grantee for the recovery of the land. Martin *v.* Ohio River R. Co., 37 W. Va. 349, 16 S. E. 589; Bowyer *v.* Seymour, 13 W. Va. 25.

But where a stipulation in a deed does not amount to a condition subsequent, the grantor can not maintain ejectment upon nonperformance of the stipulation. Brown *v.* Caldwell, 23 W. Va. 187. In Carper *v.* Cook, 39 W. Va. 346, 19 S. E. 379, land was sold to the board of education for school purposes, and afterwards the board of education ceased to use the land for such purposes, and sold it to a third person. It was held that ejectment would not lie by the grantor, for the recovery of the land.

A grant of land for a consideration to a trustee upon trust that the trustee "shall at all times permit all the white religious societies of christians and the members of such societies to use the land as a common burying ground and for no other purpose," is not a grant upon a condition subsequent. The heirs of the grantor can not recover the granted premises in ejectment after they have ceased to be used for the purposes declared in the grant, there being no words of forfeiture or re-entry in the grant. Brown *v.* Caldwell, 23 W. Va. 187.

For Land Reserved in Deed.—Where land is reserved by a grantor in a deed, and dedicated to a public or charitable use, no title passes by subsequent conveyances of the tract out of which the reservation was made, though these conveyances be without reservation; and if a subsequent grantee takes possession of the land so dedicated by reservation, the dedicator may maintain an action of ejectment for it. Benn *v.* Hatcher, 81 Va. 25.

Where there is an intention on the part of the grantor to except from the

operation of a deed certain lands which would otherwise be covered by such deed, the land intended to be excepted must be described with certainty in order to withdraw it from the operation of the deed. Unless the land is described with certainty the grantor can not maintain an action of ejectment for it. Butcher *v.* Creel, 9 Gratt. 201.

But uncertainty in the reservation of a deed may be cured by the election of the grantor made within a reasonable time; and after such election, the grantor may maintain an action of ejectment for the land which he elects to take. Benn *v.* Hatcher, 81 Va. 25.

Action for Life Estate Reserved.—One who has reserved a life interest in himself in a deed conveying an estate in fee, may maintain ejectment for its recovery. Hurst *v.* Hurst, 7 W. Va. 289.

After Execution of Deed While Out of Possession.—A deed of bargain and sale and release of land, from a person not in possession, to another in the same predicament, the land being at the time held by a third person with adverse title, passes nothing, and therefore does not divest the bargainor of his right to recover in ejectment. Hopkins *v.* Ward, 6 Munf. 38. See the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 773.

i. Vendees.

If the heirs being out of possession of the land, have executed a deed of bargain and sale of the same to a third person, such bargainee can not recover in ejectment. See *v.* Greenlee, 6 Munf. 303; Hopkins *v.* Ward, 6 Munf. 38; Ushers *v.* Pride, 15 Gratt. 190. See the title CHAMPERTY AND MAINTENANCE, vol. 2, p. 773.

B., dying in 1834, by his will limited an estate in fee to his daughter, W., for her life, with remainder to her issue in fee, and in default of issue, to his own heirs. At the time of testator's death W. was his sole heir. In 1857 she sold and conveyed the estate. In 1884 she died without ever having had issue. In ejectment by S. and others, who were testator's heirs living at W.'s death, against her grantees, to recover the estate, it was held, that W.'s grantees acquired perfect title by her conveyance. Stokes *v.* Van Wyck, 83 Va. 724, 3 S. E. 387.

j. Assignee of Mortgagee.

The possession of the mortgagor, continuing by the mortgagee's permission, is to be considered the possession of the mortgagee; so that, where the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner. A final decree of foreclosure, in favor of the assignee of a mortgage, ought to put to rest any controversy between the parties thereto, on the ground of any supposed defect in the deed of assignment. Chapman *v.* Armistead, 4 Munf. 382. See the title MORTGAGES AND DEEDS OF TRUST.

k. Patentee of Public Lands.

See ante, "Grant or Patent from State," III, D, 1, b.

l. Debtor Discharged under Insolvency Law.

Where a person taken in execution is discharged as an insolvent debtor, the estate in lands belonging to him at the time of such discharge is, by the statute (1 Rev. Code, 1819, ch. 134, p. 538), so completely vested in the sheriff of the county wherein such lands lie, that ar action of ejectment for such lands can not afterwards be maintained on the demise of the insolvent debtor, while the execution remains unsatisfied. Syrus *v.* Allison, 2 Rob. 200. See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 232.

3. Joinder of Parties Plaintiff.

Though persons who have no joint or common claims to land, but only separate claims, may be named as plaintiffs, jointly in one count as well as severally in others, they need not be named jointly, but may severally com-

plain and count. Ocheltree *v.* McClung, 7 W. Va. 232.

When one plaintiff, in his own name alone, complains, gives the notice and proceeds in the case, but counts separately in his own name and the name of another, alleging right in each, but not stating that the land described in each count is the same, the count in his own name is good, and the other may be treated as surplusage. Ocheltree *v.* McClung, 7 W. Va. 232.

B. PARTIES DEFENDANT.

1. As Dependent upon Possession of Premises.

a. Persons in Possession of Premises.

The person actually occupying the premises may be named defendant in the declaration. Va. Code, 1904, § 2726. Stearns *v.* Harman, 80 Va. 48.

If the premises be occupied, the occupant shall be named defendant in the declaration. W. Va. Code, ch. 90, § 5; Postlewaite *v.* Wise, 17 W. Va. 1; Johnston *v.* Manns, 21 W. Va. 17.

In an action of ejectment brought in 1848, where the facts proven at the trial, did not show that the defendant was in possession of the land described in the declaration, at the time the action was brought, the plaintiff was not entitled to a judgment against him, although the plaintiff's title and right to recover were perfect in all other respects. Nor did the common-law consent rule, then in force, obviate the necessity of its being proved or admitted on the trial, that the defendant was in possession of the land sued for, at the time the suit was brought. Southgate *v.* Walker, 2 W. Va. 427.

If the defendant is in actual possession of land, he can not defeat the action by showing that before the action he had conveyed his title to another. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

b. Persons Out of Possession.

Person Not in Possession Claiming Title to Premises.—Any person claiming title to the premises or any interest therein adversely to the plaintiff may at the discretion of the plaintiff be named defendant in the declaration. Va. Code, 1904, § 2726; Stearns *v.* Harman, 80 Va. 48; Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

If there be no person actually occupying the premises adversely to the plaintiff, then the action must be against some person exercising the ownership thereof or claiming title thereto or some interest therein at the commencement of the suit. Va. Code, 1904, § 2726; Stearns *v.* Harman, 80 Va. 48; Johnston *v.* Manns, 21 W. Va. 15.

Whether the premises be occupied or not, any person exercising acts of ownership thereon or claiming title thereto, or any interest therein at the commencement of the action may also be named as defendant in the declaration. W. Va. Code, ch. 90, § 5; Postlewaite *v.* Wise, 17 W. Va. 1.

Ejectment is the proper remedy under § 2726 of the Virginia Code where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land but has not actual possession. And in such case a bill in equity to remove a cloud from the title will not lie, there being an adequate remedy at law. Stearns *v.* Harman, 80 Va. 48; Postlewaite *v.* Wise, 17 W. Va. 1; Harvey *v.* Tyler, 2 Wall. (U. S.) 328; Carroll *v.* Brown, 28 Gratt. 791.

Under § 2726 of the Virginia Code of 1887, as amended by acts of 1895 and 1896, p. 514, the plaintiff may join as defendants with the occupant of the premises any person or persons claiming title thereto or an interest therein adversely to the plaintiff. Steinman *v.* Vicars, 99 Va. 595, 39 S. E. 227.

2. As Dependent on Estate or Interest.

a. Right of Landlord to Be Made Party to Action against Tenant.

In General.—If a lessee be made defendant at the suit of the party claiming against the title of his landlord,

the landlord may appear and be made a defendant with or in the place of his lessee. Va. Code, 1904, § 2726; W. Va. Code, ch. 90, § 5; Herbert *v.* Alexander, 2 Call 502; Mitchell *v.* Baratta, 17 Gratt. 445; Hanks *v.* Price, 32 Gratt. 111; Johnson *v.* Manns, 21 W. Va. 17. See the title LANDLORD AND TENANT.

While the tenants in possession are the proper, if not the natural defendants to an ejectment, the landlord has a right to be made a defendant, through fear that he may be injured, by a combination between the plaintiff and his tenant; but he may waive this right, or having asserted it, he may relinquish it, by consent of the plaintiff. Herbert *v.* Alexander, 2 Call 502.

"This privilege is given by law as well for the benefit of the landlord as of the tenant. The tenant has a right to be defended by the landlord, and the landlord has a right to defend his title whenever it is assailed by an action of ejectment against his tenant. This right of the landlord can not be surrendered or prevented by any act of the tenant. The tenant can not dispute the landlord's title, but having received possession from him, is bound to restore it at the termination of the lease." Mitchell *v.* Baratta, 17 Gratt. 445.

Necessity for Existence of Relation of Lessor and Lessee.—In an action of ejectment, brought against the person in possession, the landlord of such person may come in and be allowed to defend the action under § 5, ch. 131, Va. Code, 1873, whether the actual relation of lessor and lessee exists between them or not. Hanks *v.* Price, 32 Gratt. 107.

"It is very true the statute uses the word 'lessee' but it also uses the word 'landlord' as its correlative. The word 'lessee' was used, not so much to define a particular estate or interest, as to express a relation—that of landlord and tenant, a person holding under and in subordination to the title of another." Hanks *v.* Price, 32 Gratt. 107.

Effect of Submission to Arbitration by Tenant and Award Made in Favor of Plaintiff.—Even where the plaintiff and defendant in possession have submitted the matters between them to arbitration, and an award has been made in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him, the landlord may be let in to defend. Hanks *v.* Price, 32 Gratt. 107.

As to liability of landlord for costs, see the title COSTS, vol. 3, p. 613.

b. Lessee under Unauthorized Lease.

The judge of a county court has no authority to authorize or assent to a lease of county property acquired for county purposes to any person for private use, or for any purposes other than those provided by law. The judge of the county court is a mere agent of the county in respect to county property, whose duties and powers are prescribed by law, and all contracts made by him in respect to said property not authorized by statute are void. Hence ejectment will lie to recover a part of the real estate of the county leased by the county judge without authority. Franklin County *v.* Gills, 96 Va. 330, 31 S. E. 507; Franklin County *v.* Saunders, 96 Va. 335, 31 S. E. 1007.

c. Tenant in Possession of Land Forfeited for Nonpayment of Taxes.

The heirs of a patentee of land forfeited for nonpayment of taxes and not redeemed, can not maintain ejectment for it against a party who has entered upon it peaceably, though the tenant has no title to the land. Ushers *v.* Pride, 15 Gratt. 190.

3. Right to Maintain Action against Infants.

It can not be maintained that infancy is a good plea in bar to an action of ejectment. Infants are liable to a recovery in ejectment. It is right and

proper that guardian ad litem should be appointed for infant defendants in ejectment at the proper time; and the plaintiff in such action should see that such guardian ad litem is appointed at the proper time, and the infant should appear and defend by guardian ad litem. Campbell *v.* Hughes, 12 W. Va. 183.

If from the record there is any reason to believe a part of the defendants against whom final judgment is rendered, were infants during the pendency of the suit in which the judgment was rendered against the defendants, on a joint plea of not guilty, in ejectment, and no guardian ad litem was appointed for them in the suit, but the fact of such infancy does not so appear as to enable the appellate court to reverse the judgment, set aside the verdict, etc., upon supersedeas for that cause; and it does not appear that a motion to reverse or amend the judgment has been made before the court which rendered it, or the judge thereof, on account of such infancy, and failure to appoint a guardian ad litem, and that such motion has been overruled in whole or in part, the appellate court, in affirming the judgment in such case, may affirm it without prejudice to the rights of the defendants in the court below, or any of them, if so advised, to move said circuit court or the judge thereof to reverse or amend the original judgment in the cause against them upon the ground that some of the defendants were infants during the pendency of the cause in the court, in which said original judgment was rendered, and no guardian ad litem was appointed for them in said suit, and also without prejudice to such defendants, if so advised, to prosecute a writ of error coram nobis, for the reversal of said original judgment, for the cause aforesaid, if such cause exist. Campbell *v.* Hughes, 12 W. Va. 183.

During the trial of an action of ejectment, in which there were several defendants, and the plea was not guilty, the defendants introduced a witness who testified, that a part of the defendants were at the institution of the suit, and then were infants, and that to the best of his recollection he informed one of the counsel of the plaintiffs of the fact before the commencement of such suit; and before the jury retired to consider of their verdict, the plaintiff asked the court to instruct the jury that "If the jury find from the evidence, that the defendants, Munsen C. Van Winkle, Henry Van Winkle, and Harriet Van Winkle, are infants, under the age of twenty-one, and that no guardian ad litem for them had been appointed in this cause, then their verdict must be for said defendants," which instruction the court refused. It was held, that the court did not err in refusing to give said instruction to the jury. Campbell *v.* Hughes, 12 W. Va. 183. See the title INFANTS.

4. Joinder of Parties Defendant.

Several tenants, claiming severally, parts of the land sued for, may be sued in one action of ejectment. Camden *v.* Haskill, 3 Rand. 462.

Ejectment may be brought against several persons, in possession of any part of the tract of land claimed by the lessor of the plaintiff. Stuart *v.* Coalter, 4 Rand. 74.

Necessity of Joining Wife in Action against Husband.—A wife living with her husband on land, and claiming the land as her separate estate, under a right derived from a person other than her husband, prior to commencement of the action, can not be turned out of possession by a writ of possession in an action of ejectment against her husband to which she was not a party. In such case she is, as to her claim, a person distinct from her husband, and must be made a party to the action, like any other person, in order to bind her by the judgment. In such a case equity has jurisdiction by injunction to restrain the execution of the writ of possession as to her. The parties will

be left without prejudice from the decree to test their titles at law. Bushong *v.* Rector, 32 W. Va. 311, 9 S. E. 225. See the title HUSBAND AND WIFE.

VII. Pleadings.

A. DECLARATION.

1. Form and Requisites.

a. In General.

A declaration in ejectment in all other respects good should not be held insufficient on a demurrer, only because in the beginning it uses the language, that the plaintiff complains of the defendant "of a plea of trespass and ejectment for this, to wit." Kemble *v.* Herndon, 28 W. Va. 524.

On a demurrer to a declaration, in considering whether the declaration is sufficient in law the court can not look at the notice served on the defendant to see whether it is such as the statute law required. Kemble *v.* Herndon, 28 W. Va. 524.

b. Averments as to Jurisdiction and Venue.

In Kemble *v.* Herndon, 28 W. Va. 524, the caption of the declaration was: "West Virginia, Preston County, to wit." The declaration described the land as situated in Preston county, in Kingwood district, and gave a description of it which was minute and accurate. The declaration was held valid, and the fact that it was not stated in the body of the declaration that Preston county was in West Virginia, did not invalidate it.

c. Description of Premises.

In General.—The premises claimed should be described in the declaration with convenient certainty, so that, from such description, possession thereof may be delivered. Va. Code, 1904, § 2729; W. Va. Code, ch. 135, § 8; Rhule *v.* Seaboard, etc., R. Co., 102 Va. 343, 46 S. E. 331; Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491; Hitchcox *v.* Rawson, 14 Gratt. 526; Hawley *v.* Twyman, 24 Gratt. 516; Urquhart *v.* Clarke, 2 Rand. 549; Moore *v.* Douglass, 14 W. Va. 725; Postlewaite *v.* Wise, 17 W. Va. 10; Carter *v.* Chesapeake, etc., R. Co., 26 W. Va. 644; Kemble *v.* Herndon, 28 W. Va. 524; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 17 S. E. 203; Simpkins *v.* White, 43 W. Va. 125, 27 S. E. 361; Clerc *v.* Greer, 49 W. Va. 102, 38 S. E. 485; Board of Education *v.* Crawford, 14 W. Va. 790.

Before the plaintiff in ejectment can recover, he must claim the land in his declaration by its exterior boundaries, and identify it to that extent. If the defendant is entitled to exceptions or reservations, he may show the fact as a matter of defense. Fleming Oil, etc., Co. *v.* South Penn Oil Co., 37 W. Va. 645, 17 S. E. 203.

Purpose and Object of Description.—The object of the description of lands in a declaration in ejectment is to so identify them as that the sheriff, with the aid of information derived from the plaintiff, may give possession. It is no longer necessary that the sheriff should be able to tell from an inspection of the record of what lands he is to give possession. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

The rule now is, that the sheriff, in executing the writ of possession, must take information from the plaintiff. This information the plaintiff gives at his peril, for he is a trespasser if he shows the wrong land, and moreover the court will interfere in a summary way and restore possession of what was not recovered. Howdashell *v.* Krenning, 103 Va. 30 48 S. E. 491; Newell on Ejectment, pp. 236, 237. See Hawley *v.* Twyman, 24 Gratt. 516, 519; Rhule *v.* Seaboard, etc., R. Co., 102 Va. 343, 9 Va. L. Reg. 963, 46 S. E. 331.

Reasonable Certainty Only Required.—A description that points out the locality of the land claimed to be withheld, is sufficient to meet the re-

quirements of the statute, provided such description locates the land claimed to be withheld, not with absolute certainty, but with reasonable certainty. Moore *v.* Douglass, 14 W. Va. 725.

Although the description of the premises claimed in a declaration in ejectment are not as accurate as could be desired, this court will not disturb a verdict for the plaintiff where it can not say that the premises are not described with such convenient certainty as that, from such description, possession thereof may not be delivered. Rhule *v.* Seaboard, etc., R. Co., 102 Va. 343, 46 S. E. 331.

What is required in a deed is sufficient in an action of ejectment, and though not certain within itself, if it points out the means through which it can be conveniently made certain, and thereby complies with the rule that "that is certain which can be made certain," it is sufficient. Clerc *v.* Greer, 49 W. Va. 102, 38 S. E. 485; Simpkins *v.* White, 43 W. Va 125, 27 S. E. 361; Postlewaite *v.* Wise, 17 W. Va. 1. See also, Urquhart *v.* Clarke, 2 Rand. 549.

"The statute obviously does not mean to require any great nicety or exactness, and the authorities are to the same effect." Rhule *v.* Seaboard, etc., R. Co., 102 Va. 343, 46 S. E. 331.

Necessity of Giving Metes and Bounds.—The land may be described with reasonable certainty without giving its metes and bounds. Moore *v.* Douglass, 14 W. Va. 708.

Necessity of Stating Quantity.—It is not necessary to state the quantity of acres of land either in the complaint or summons, if the land is otherwise described with reasonable certainty. Moore *v.* Douglass, 14 W. Va. 708.

If the summons or complaint contained no other description of the land claimed in the action than the quantity of acres, the township, and county, in which it is situate, the description probably would not be sufficient, as in such case it could not be said that the land was described with reasonable certainty. Moore *v.* Douglass, 14 W. Va. 708.

Instances of Descriptions in Declarations.—A declaration in ejectment, which describes the land as part of a larger tract owned by plaintiff, near certain creeks which have no public notoriety, is defective and may be demurred to. Hitchcox *v.* Rawson, 14 Gratt. 526; Moore *v.* Douglass, 14 W. Va. 708.

A description of land in an action of ejectment, showing the county, the quantity, the home farm (of which it was a part), the person to whom it was assigned, the suit in which partition was made, the surveyor who made the division, and all the lands by which it is bounded, is conveniently certain, within the meaning of the statute. Clerc *v.* Greer, 49 W. Va. 102, 38 S. E. 485.

A description which gives the names of adjacent owners, and the metes and bounds of a large tract, and continues "which said metes and bounds, however, include land owned by Marion Waddle, embracing 150 acres, and also what is known as the Brunty tract concontaining 41 acres, which tracts are not claimed by the plaintiff," is a sufficient description in an action to recover ten acres, described by metes and bounds, of the larger tract. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

Where the declaration described the land demanded as being bounded by certain roads, describing them, and by the lands of certain named persons, and as containing nineteen acres and eight poles, it was held, to be sufficiently certain. "The statute merely requires that the premises shall be described with convenient certainty, so that from such description possession may be delivered. The description here is plainly sufficient for that purpose. It points out the locality of the tract by reference to the lands of coterminus owners

and the public highways passing it; a form of description equally satisfactory and certain as a statement of the metes and bounds ordinarily contained in deeds of conveyance." Hawley *v.* Twyman, 24 Gratt. 516. See also, Moore *v.* Douglass, 14 W. Va. 708.

Where the declaration described the premises as "a certain lot of land lying in the town of Ronceverte, in the county aforesaid, being the piece of land near the railroad depot in said town, upon which the defendant has erected a pumphouse and appliances for the purpose of supplying its engines with water," it was held, that the description was sufficient, and a demurrer to the declaration was overruled. Carter *v.* Chesapeake, etc., R. Co., 26 W. Va. 644.

In an action of ejectment, brought under the Code of Virginia of 1860, the land is described with sufficient accuracy in the declaration, when the county in which it lies is stated, and it is said to lie adjoining what is known as the old William Postlewaite farm, and that it contained one hundred and fourteen acres, and its boundaries are set out in detail by courses and distances; or where it is stated in what county it lies, the number of acres it contains its boundaries by courses and distances in detail, and is described as the same that was conveyed to the plaintiffs by the heirs of William Postlewaite, deceased, by deed bearing date June 10, 1856, duly recorded in the recorder's office of said county. Postlewaite *v.* Wise, 17 W. Va. 1.

d. Description of Estate or Interest Claimed.

The plaintiff must state in his declaration whether he claims in fee, for his life, for the life of another, or for years, specifying such lives or the duration of such term, and when he claims an undivided share or interest he shall state the same. Va. Code, 1904, § 2730; W. Va. Code, ch. 90, § 9; Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228; McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281; Parr *v.* Currence, 53 W. Va. 524, 44 S. E. 184.

An allegation in a declaration in ejectment that the plaintiff "was possessed in fee" of the land is a sufficient allegation that the plaintiff claims in fee. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

Where the declaration alleged "that the plaintiff was possessed in a life interest of a certain tract of land to have and to hold the said tract of land for the term of said plaintiff's natural life, which life interest is not yet terminated, said plaintiff being yet living," it was held, that while the plaintiff might have stated the character of the estate claimed in fewer words the declaration was sufficient to show that he claimed an estate for life in the premises and a demurrer thereto was overruled. McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281.

A declaration stating that the plaintiffs were possessed each in fee simple absolute, of an undivided share or interest in a tract of land, where the suit was for the whole land so claimed, and not for any part or parcel was held sufficient under § 2730 of the Virginia Code of 1887. Roach *v.* Blakey, 89 Va. 767, 17 S. E. 228.

Under § 9, ch. 90, W. Va. Code, in an action of ejectment against a cotenant having an equitable interest in the land in controversy, the legal title to the whole of the land being vested in the plaintiff, it is not necessary or proper that the declaration mention the equity in the defendant, that being a matter of defense. Parr *v.* Currence, 53 W. Va. 524, 44 S. E. 184.

e. Laying of Demise.

In ejectment, where the demise was laid precedent to the plaintiff's title, it was held to be cured by the statute of jeofails. Duvall *v.* Bibb, 3 Call 362; Whittington *v.* Christian, 2 Rand. 353.

A demise being laid in ejectment, before the title of the lessor of the plaintiff accrued, can not be taken advantage

of after issue joined. Whittington *v.* Christian, 2 Rand. 353.

After issue joined in ejectment on the title only, and a verdict for the plaintiff, for the land in one of the counts in the declaration mentioned, it was held to be no ground for a motion in arrest of judgment, that the two counts laid demises of the land from different persons. Throckmorton *v.* Cooper, 3 Munf. 93; Paul *v.* Smiley, 4 Munf. 468.

The plaintiff may recover under one or the other of two demises of the same land, from different persons. Hopkins *v.* Ward, 6 Munf. 38; See *v.* Greenlee, 6 Munf. 302.

Effect of Expiration of Term before Decision of Cause.—In ejectment, if the term laid in the declaration expire before the decision of the cause, the practice is to grant leave to amend the declaration by enlarging the term. Hunter *v.* Fairfax, 1 Munf. 218.

Upon a judgment in ejectment, if execution of the writ of habere facias possessionem be prevented for several years by injunction, the plaintiff is entitled to the writ on motion upon a rule to show cause, without a scire facias, provided not more than a year has elapsed since the affirmance, by the court of appeals, of the decree dissolving the injunction, and dismissing the bill in chancery. In such case, if the term laid in the declaration has expired pending the proceedings on the injunction the court to which the motion is made for the writ, may cause the term to be enlarged and award the writ, upon a rule to show cause, served upon the defendant. Noland *v.* Seekright, 6 Munf. 185.

The fact that the term stated in a declaration in ejectment has expired, previous to the decision on an appeal, is a circumstance of no importance. Baker *v.* Seekright, 1 Hen. & M. 177.

f. Ouster.

In ejectment, where the ouster is laid precedent to the plaintiff's title, it is cured by the statute of jeofails. Duvall *v.* Bibb, 3 Call 362.

g. Unlawful Withholding of Possession.

It is sufficient in such a declaration to allege, that the plaintiffs on a certain day were possessed of and claimed title to this tract of land in fee simple, describing it as above, and that the defendant afterwards, to wit, on a certain day named, entered into the said premises and ejected them from their said land, and still holds them out of the possession thereof; it not being necessary to say in such a declaration that this withholding the possession from them was unlawful. Postlewaite *v.* Wise, 17 W. Va. 1.

2. Filing.

An amended declaration, in an action of ejectment, whereby a new party plaintiff is introduced, is copied into the record by the clerk, but no order of the court had been entered permitting it to be filed, nor any order in any manner recognizing it as filed. Such amended declaration is no part of the record, though it was placed among the papers of the case in the court below, and indorsed by the clerk as filed on a particular day. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

3. Amendment of Declaration by Substitution of New Parties.

A declaration in ejectment may be amended by the insertion of a count in the name of new plaintiffs. The action, as to such plaintiffs, will be deemed to have commenced at the time of the service of the new count, with notice on the defendants; or if it be not served, then at the time of their pleading to or other recognition of the count. Strader *v.* Goff, 6 W. Va. 257.

When one or more plaintiffs have been named in the declaration in ejectment, and it is afterwards discovered or supposed that other persons may have the right, the same reason that authorizes the joinder of several different persons, not claiming jointly

or in common, in an original declaration, admits the introduction of new plaintiffs by an amendment. When this is done, all may proceed in the one suit; the same surveys and depositions, thereafter made and taken, and the same evidence, may be used, as far as competent and relevant; and the rights of all the parties may, at one time, be determined. Strader *v.* Goff, 6 W. Va. 257.

4. Necessity of Filing Written and Record Evidence with Declaration.

By the act of March 9, 1880, it was provided that in all cases of ejectment pending or thereafter brought in the counties of Buchanan, Dickinson and Wise the plaintiff should file with his declaration, thirty days before trial, the written and record evidence on which he relies. Section 4202 of the Virginia Code of 1887 provided that upon its adoption all acts of a general nature should be repealed. It was held, that the act of March 9, 1880, was a general law within the meaning of § 4202 and was thereby repealed. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

B. PLEA.

Necessity of Plea.—In ejectment, judgment will be reversed if it appears that the defendant has not filed a plea and there is no issue made up between the parties. Brown *v.* Cunningham, 23 W. Va. 109, citing Ruffner *v.* Hill, 21 W. Va. 159.

Where there were three defendants in ejectment, who appeared at different times; the first pleaded and, as to him, issue was joined; the second was admitted a defendant, but did not plead; the third pleaded, but no issue was joined; and in this state, the cause was tried, and verdict and judgment were given for the plaintiff; it was not error, notwithstanding there was no plea for the second defendant; nor issue as to the third; for their rights remained untouched, and may be tried when issues are made up as to them. Hambleton *v.* Wells, 4 Call 213.

General Issue.—In ejectment the defendant can plead in bar only the general issue, that he is not guilty of unlawfully holding the premises claimed by the plaintiff in the declaration. Va. Code, 1904, § 2734; W. Va. Code, ch. 9, § 13; Johnson *v.* Griswold, 8 W. Va. 240; James River, etc., R. Co. *v.* Robinson, 16 Gratt. 434; Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710.

Under the plea of not guilty, the defendant may avail himself of the defense provided by Va. Code, 1873, ch. 131, § 20, but only when "there is a writing stating the purchase and the terms thereof, signed by the vendor or his agent." Locke *v.* Frasher, 79 Va. 409; Dodson *v.* Culpepper, 23 Gratt. 355.

Special Pleas in Bar.—In an action of ejectment, the only plea in bar of the action, in whole or in part, admissible under the statute (Code 1873, ch. 131, § 13) is the plea of "not guilty;" and where the defendant was allowed to file a paper which he called a disclaimer, but which was in effect a special plea, the appellate court held the allowance of the filing of such paper error. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710.

In an action of ejectment there is no error in a judgment sustaining a demurrer to a special plea to the effect that since the last continuance of the cause the plaintiff had conveyed by deed all his title to another party, his name being stated, as evidence in support of the plea can be given under the general issue, and, moreover, the West Virginia Code provides, ch. 90, § 13, that a defendant in ejectment shall plead the general issue only, which shall be that he is not guilty of unlawfully withholding, etc. Johnston *v.* Griswold, 8 W. Va. 240.

Pleas in Abatement.—A plea in abatement is admissible in an action of ejectment. James River, etc., Co. *v.* Robinson, 16 Gratt. 434.

Waiver of Plea in Abatement.—The

defendant in ejectment may, after pleading in abatement, waive such plea, and plead in bar. James River, etc., Co. *v.* Robinson, 16 Gratt. 434.

A defendant in ejectment admitted that he was mistaken as to matters pleaded in abatement, and upon this admission submitted the issue upon the plea to the court, and at the same time asked leave to file the plea of "not guilty." It was held, that this was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of "not guilty." James River, etc., Co. *v.* Robinson, 16 Gratt. 434.

VIII. Defenses.

A. IN GENERAL.

An agreement between a tenant in possession and the plaintiff in an action of ejectment, that if the plaintiff recovers against the tenant's lessor, a lease shall be executed by the plaintiff in the same terms as that subsisting before, does not operate to bar the action by the plaintiff, which joins the tenant as a defendant. Carrington *v.* Otis, 4 Gratt. 235.

Where the complainants are in possession of real estate they can not enjcin defendant, who is out of possession, from prosecuting an action of ejectment against them for the recovery of the premises upon the ground that the deed under which the plaintiff claims is absolutely void, either from want of delivery and acceptance or because obtained by duress or fraud, since in either event, the defense in the action of ejectment would be complete. Hawkinberry *v.* Snodgrass, 39 W. Va. 332, 19 S. E. 418.

Contract of Purchase from Plaintiff to Defendant. — Where defendants to an action of ejectment do not attempt to show title in any other person than the plaintiff, but claim under him, and seek to defend their possession by virtue of a contract of purchase, they are estopped from disputing his title. McClung *v.* Echols, 5 W. Va. 204; Emerick *v.* Tavener, 9 Gratt. 220.

B. ADVERSE POSSESSION.

See the title ADVERSE POSSESSION, vol. 1, p. 199.

In General.—Adverse possession by the defendant of the premises for the period of the statutory bar is a good defense to an action of ejectment. Virginia Midland, etc., R. Co. *v.* Barbour, 97 Va. 118, 33 S. E. 554; Taylor *v.* Burnsides, 1 Gratt. 166; Creekmur *v.* Creekmur, 75 Va. 430; Thomas *v.* Jones, 28 Gratt. 383; Virginia Mining, etc., Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689; Bream *v.* Cooper, 5 Munf. 7; Andrews *v.* Roseland Iron, etc., Co., 89 Va. 393, 16 S. E. 252; Stull *v.* Rich Patch Iron Co., 92 Va. 253, 23 S. E. 293; Core *v.* Faupel, 24 W. Va. 238; Adams *v.* Alkire, 20 W. Va. 480; Lagorio *v.* Dozier, 91 Va. 492, 22 S. E. 239.

When Statute Commences to Run.—The statute of limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the state. But the statute does commence to run in favor of such occupant against the grantee of the state, from the date of the grant of the land so occupied. Hall *v.* Webb, 21 W. Va. 318; Adams *v.* Alkire, 20 W. Va. 480; Shanks *v.* Lancaster, 5 Gratt. 110; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347.

Continuity of Possession.—The defendants must show not only entry, but continuous possession during a period necessary to give title under the statute of limitations. A break in the possession restores the seisin of the true owner. Stonestreet *v.* Doyle, 75 Va. 356; Turpin *v.* Saunders, 32 Gratt. 27; Parkersburg, etc., Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22.

Color or Claim of Title.—In an action of ejectment a party who relies upon his adverse possession of the land in controversy under color or claim of title, will on trial be required to show

on what color or claim of title he relies. Hall *v.* Hall, 27 W. Va. 468.

Mere naked possession of land without claim of right is no adverse possession, and, no matter how long continued, will not furnish a defense to an action or confer title. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255.

Possession under Equitable Title.—The holder and claimant of property, under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely but in subordination to the grantor's title; and no length of possession under such title will ripen into such a title as to bar an action of ejectment brought by a second grantee, who has the legal title. Nowlin *v.* Reynolds, 25 Gratt. 137; Garrett *v.* Ramsey, 26 W. Va. 345.

Possession under Parol Gift from Plaintiff.—An open, exclusive, notorious and uninterrupted possession of land for more than twenty years, taken, held, and claimed under a parol gift from a plaintiff in ejectment, for a life not yet terminated, is no bar to his recovery in the action. Clarke *v.* McClure, 10 Gratt. 305; Flanagan *v.* Grimmet, 10 Gratt. 421.

Adverse Possession by Defendant When Plaintiff Acquired Paper Title.—If it appear from the record in ejectment, that the defendant, or his testator, had adverse possession of the land, at the time when a deed of trust, under which the plaintiff claims, was executed, judgment ought to be rendered for the defendant, although the nature of his title does not appear. Bream *v.* Cooper, 5 Munf. 8.

Where the evidence showed that the defendant and those under whom he claimed title had had adverse possession of the land in controversy under color of title for more than twenty-five years; that those under whom the plaintiff claimed knew that this land was cut off from the tract subsequently acquired by them, acknowledged the right of defendant's ancestor, and asserted nc claim to the land themselves, and that at the judicial sale at which they purchased it was announced that a part of the tract had been cut off, it was held, that the plaintiff could not recover. Chesterman *v.* Bolling, 102 Va. 471, 46 S. E. 470.

If it be stated in a bill of exceptions, upon a trial in ejectment, that the testator of the defendant departed this life in possession of the land, which possession he had held "adverse to the lessor of the plaintiff" for a specified time; it must be understood that such possession was adverse to those under whom the lessor of the plaintiff claimed; especially, if it appear from another bill of exceptions in the same trial, that the title of the lessor of the plaintiff did not commence until after the death of the said testator. Bream *v.* Cooper, 5 Munf. 8.

Where Plaintiff Claims under Deed from Defendant.—In ejectment a man can not object his own possession for twenty years against his own deed given within that period. Duvall *v.* Bibb, 3 Call 362.

By One of Several Cotenants.—In ejectment between cotenants, where the defendants rely upon adversary possession, and acquiescence by the plaintiffs, letters by a party under whom defendants claim, and also a correspondence between one of the plaintiffs and the agent of the defendant, may be competent evidence to show for what purpose the tenants in possession had claimed the property, and the plaintiffs acquiesced in their claim. Stonestreet *v.* Doyle, 75 Va. 356. See the title JOINT TENANTS AND TENANTS IN COMMON.

In an action of ejectment in which the question of cotenancy is involved and evidence strongly tending to establish the same, it is error to instruct the jury "that if they believe from the evidence that the defendants were in

possession of the land in controversy under a claim and color of title adverse to the title claimed by the plaintiff and exercising open, notorious, visible and exclusive possession of the said land claiming title to the extent of the boundary mentioned in the deed under which they claimed title exercising such acts of ownership and control over said land as residing upon it, clearing the land, and cultivating the land for more than ten years next before the commencement of this suit that then they should find for the dedefendants;" ignoring the question of cotenancy and the bringing of knowledge of such adverse holding home to the plaintiff. Parr *v.* Currence, 53 W. Va. 524, 44 S. E. 184.

Stay Laws.—A defendant in ejectment is protected by twenty years' possession before the bringing of the action, but the stay law period provided for by the legislature is not to be counted in his favor. Clay *v.* Ransome, 1 Munf. 454; Virginia Mining, etc., Co. *v.* Hoover, 82 Va. 449, 4 S. E. 689; Hall *v.* Webb, 21 W. Va. 318. But a statute providing for the war and stay law period, so far as it relates to actions for recovery of land, is unconstitutional and void, as to actions which had become barred before the passage of that act. Hall *v.* Webb, 21 W. Va. 318.

C. STATUTE OF LIMITATIONS.

See the title LIMITATION OF ACTIONS.

In General.—The bar of the statute of limitations not only defeats the remedy, but devests the title, and confers it upon the adverse holder. Adkins *v.* Spurlock, 46 W. Va. 139, 33 S. E. 121; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Summerfield *v.* White, 54 W. Va. 311, 46 S. E. 154; Middleton *v.* Johns, 4 Gratt. 129; Norfolk *v.* Cook, 27 Gratt. 430; Thomas *v.* Jones, 28 Gratt. 383.

Within What Time Action May Be Brought.—In Virginia the period of limitation upon an action of ejectment is fifteen years, if the land sought to be recovered is east of the Alleghany mountains, and ten years if the land is west of the Alleghany mountains. Va. Code, 1904, § 2915; Birch *v.* Linton, 78 Va. 584.

In West Virginia an action of ejectment is barred in ten years from the date of its accrual. Warren *v.* Syme, 7 W. Va. 474; Criss *v.* Criss, 28 W. Va. 388.

When the plaintiff is under disability the period of limitation is twenty years. Warren *v.* Syme, 7 W. Va. 474.

It has been held, that the fact, that the time, in which a right of entry on land is barred, or the right to bring an action of ejectment, has been reduced to less than twenty years by statute, does not operate to reduce the time, in which a presumption of the payment of such a debt arises, and therefore does not affect the time, in which real estate may be sold to pay such debt, when it is secured by a deed of trust on such real estate. Criss *v.* Criss, 28 W. Va. 388.

Effect of Infancy of Plaintiff.—Instructions suggesting that Va. Code, 1873, ch. 146, §§ 4, 5, curtails infant's time of making entry on, or of suing for land, from fifteen to ten years, is erroneous. Those sections enlarge such time, by giving fifteen years in any event or ten years from disability removed. Birch *v.* Linton, 78 Va. 584.

M, an infant, conveys her land, and then marries, September, 1857, and with husband leaves the state. She comes of age April, 1858. She and husband bring ejectment for her land September, 1876. She had been inert and silent, but absent, while grantee occupied and improved the land. Defendant relied on the statute of limitations. It was held, that she was entitled to disaffirm the deed after attaining majority, and her action was sufficient notice of disaffirmance Without affirmance the deed was not valid.

Mere silence or inertness did not affirm it. Considering her claim accrued September, 1857, it was not barred when asserted by her action in September, 1876, as she was entitled to fifteen years plus the period from April 17, 1861, to March 2, 1866, within which to enter or sue. Birch *v.* Linton, 78 Va. 584.

The saving in favor of infants, married women or insane persons in § 36, ch. 135, of the Virginia Code, in relation to actions of ejectment was held not to apply to actions of ejectment brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord, under his right of re-entry for rent in arrears, as provided for by § 16, ch. 138, Code. In such case the lessee is always barred in twelve months. Leonard *v.* Henderson, 23 Gratt. 331.

As ejectment lies in Virginia for an undivided interest in realty, the infancy of one joint tenant will not prevent the running of the act of limitations as to the other joint tenants not under disability. Redford *v.* Clarke, 100 Va. 115, 40 S. E. 630.

D. OUTSTANDING TITLE IN THIRD PERSON.

In General.—As the plaintiff must recover on the strength of his own title, proof of an outstanding title in a third person is a good defense to the action of ejectment. Wilcher *v.* Robertson, 78 Va. 602; Holloran *v.* Meisel, 87 Va. 398, 13 S. E. 33; Atkins *v.* Lewis, 14 Gratt. 30; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E 499. See ante, "Plaintiff Must Recover on Strength of His Own Title," III, B.

Nature of Title Required to Defeat Action.—To defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative legal title, on which the owner could recover if asserting it in an action. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Wilcher *v.* Robertson, 78 Va. 602; Atkins *v.* Lewis, 14 Gratt. 30.

An outstanding title which will defeat an action of ejectment must be one that is subsisting and superior at the commencement of the action. Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. E. 177.

The outstanding title in the third person, in order to defeat the plaintiff's recovery in ejectment, must not be one barred by the statute of limitations, abandoned or otherwise lost. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

One who is in actual possession of land, can not defeat an action of ejectment, by showing that he had conveyed his title to another, before the commencement of the action. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

In an action of ejectment it was held, that a grant of land by the commonwealth, which was properly issued and authenticated, gave the grantee prima facie title, which could not be resisted in ejectment, by a defendant who had taken possession without color of title, and relied on the fact that the land had been conveyed by an old colonial governor, to a third person, prior to the grant by the commonwealth to the plaintiff. Holloran *v.* Meisel, 87 Va. 398, 13 S. E. 33.

E. FORMER ADJUDICATION.

R. conveyed to K. certain real estate in consideration of twelve thousand dollars, of which three thousand dol-

lars was paid in cash and the residue secured by deed of trust. K. then conveyed the land to the St. L. B. & M. Co. and, latter, R. caused the trustee to advertise the land for sale, under the deed of trust. Thereupon, K. and the St. L. B. & M. Co. enjoined the sale, alleging in their bill that H. & M. claimed to own 1,632 acres of the land in fee under an older grant than the one under which plaintiffs claimed and had included the same in a survey made by them, that this claim constituted a serious cloud on the title, and that plaintiffs did not know whether said surveys were accurate or said title of H. & M. valid, and praying that the sale be stayed until the title should be settled and quieted and that H. & M. and R. be required to deduce their respective titles. Although made parties and served with process, H. & M. made no appearance nor defense to the bill. The circuit court caused the St. L. B. & M. Co. to bring an action of ejectment and enjoined the sale pending the trial of the ejectment suit. R. appealed from this action and the appellate court dissolved the injunction and unqualifiedly dismissed the bill and decreed costs against the complainants. It was held, that the decree is an absolute and final adjudication that H. & M. had no valid title to the land and estops them to set up, in the action of ejectment, the said older grant under which they claim, and that the court properly allowed the St. L. B. & M. Co. to introduce, on the trial of said action, the record, and decision of the appellate court, in said chancery cause, as evidence, and instructed the jury that the legal title to the land was in said trustee. St. Lawrence Co. *v.* Holt, 51 W. Va. 352, 41 S. E. 351. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

F. CONVEYANCE OF LAND PENDING ACTION.

It was formerly the law that if the plaintiff, pending the action, conveyed away the premises to a third party, he could not recover. Johnston *v.* Jarret, 14 W. Va. 230; Johnston *v.* Griswold, 8 W. Va. 240; Fisher *v.* Camp, 26 W. Va. 579.

Since ch. 110 of the act of 1877 went into effect, the right of the plaintiff in an action of ejectment to recover is not affected or impaired by a conveyance of the legal title to the land in controversy pending the suit to any person, not even when the conveyance is to the defendant. Beckwith *v.* Thompson, 18 W. Va. 103; Fisher *v* Camp, 26 W. Va. 579; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Bolling *v.* Teel, 76 Va. 487.

G. FORFEITURE OF LAND FOR TAXES.

If the defendant in an ejectment suit shows that the land in controversy has been omitted from the land books of the proper county for five successive years before the trial, he makes a prima facie case of forfeiture and defeats the plaintiff's right to recover, unless plaintiff can show that the land was assessed improperly in another county and the illegal taxes thereon paid or that the land has been redeemed, regranted, or resold so as to reinvest the title in him. Davis *v.* Living, 50 W. Va. 431, 40 S. E. 365.

H. EQUITABLE DEFENSES.

Generally, as to equitable defenses in ejectment, see the title ACTIONS, vol. 1, p. 151.

By § 17 of the act of March 18, 1850, incorporating the Wheeling Gas Company, it was provided that upon the expiration of twenty years from the granting of the franchise, the city of Wheeling should have the right to acquire the gas works for a price fixed by arbitrators. It was held, that after the making and delivery of the award, fixing the price and terms of the purchase, and the tender of the purchase money, the city became and occupied the relation of vendee and purchaser, and having acquired peaceable posses-

sion under claim of being such vendee, after such tender, in ejectment against it by the company to recover possession of the property, the city was entitled to the defense provided by § 20, ch. 90, W. Va. Code, which provides that "a vendor, or any person claiming under him, shall not at law recover against a vendee, or those claiming under him, land sold by such vendor to such vendee, when there is a writing stating the purchase and the terms thereof signed by the vendor or his agent." Wheeling Gas Co. *v.* Wheeling, 8 W. Va. 320.

IX. Survey, Plats and Diagrams.

An order of survey and plat or diagram are not indispensable to the trial of an ejectment, and it is not error to try it without them. He who wishes such order must ask it, and without delay. King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022.

Though it is common, and generally advisable, in an action of ejectment to have an executed order of survey of the lands in controversy before trial, still such executed order of survey is not in all cases necessary or indispensable. And when an order of survey has been made in the cause, but not properly executed by the surveyor, and the parties proceed to trial without objection, and the plaintiffs during the trial offer the report and survey or plat, made by the surveyor under the order of survey, as evidence, and to the reading of said report and survey as evidence, the defendants by their counsel objected, and the court sustained said objection, and did not permit said report and survey to go to the jury as evidence, it was not error in the court to refuse to instruct the jury, "that in the absence of a proper and official execution of the order of survey, heretofore made in the cause, the plaintiffs can not recover in this action," although it appears that the report of the surveyor under said order was read to the jury as evidence by the surveyor. The absence of a proper and official execution of the order of survey, made in the cause prior to the trial, should not necessarily prevent the plaintiffs from recovering in the action, if they are otherwise entitled to such recovery. Campbell *v.* Hughes, 12 W. Va. 183.

A plat or diagram of land or premises, shown to be approximately correct, may be used, on a trial of any kind before a court or jury, to illustrate and apply the evidence, or, in argument, to show the claim of a party, but is not of itself evidence. It is only so in connection with the evidence of witnesses. King *v.* Jordan, 46 W. Va. 106, 32 S. E. 1022.

X. Evidence.

A. PRESUMPTIONS AND BURDEN OF PROOF.

Presumption as to Possession.—It was proved on a trial in ejectment, that the father of the lessor of the plaintiff, who devised the land to him, was in possession thereof many years before and until his death; and that the lessor of the plaintiff afterwards conveyed it to a person, who was in possession at the time of his death; it was held that the jury might presume that the lessor of the plaintiff was in possession from the death of his father to the date of such conveyance, if it was not proved that some other person, in the meantime, had that possession. Moore *v.* Gilliam, 5 Munf. 346.

Burden of Proof as to Boundaries.—Before the plaintiff can recover, he must identify the land claimed, so far as the exterior boundaries are concerned. Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. 128; Witten *v.* St. Clair, 27 W. Va. 763.

The burden is on the plaintiff to

prove the lines he claims correct. Grief *v* Norfolk, etc., R. Co., 2 Va. Dec. 600.

"The doctrine that where a plaintiff in ejectment claims under an inclusive grant, embracing excepted lands, the onus rests upon him to establish his outside boundaries, and locate the excepted lands, and to show that the land claimed by the defendants is within the exterior bounds of the plaintiff's grant, and is not included in the excepted lands, although at one time vigorously assailed, is not too firmly established in this state to admit of debate." Virginia Coal, etc., Co. *v.* Keystone Coal, etc., Co., 101 Va. 729, 45 S. E. 291; Bryan *v.* Willard, 21 W. Va. 65; Stockton *v.* Morris, 39 W. Va. 432, 19 S. E. 531; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

Burden of Proof as to Defense of Outstanding Title.—The plaintiff having in the first instance established his right to the possession of the land in controversy, by showing a prima facie title, it is incumbent on the defendant, if he relies upon an outstanding title for the purpose of defeating the action, to positively and clearly establish such title, as an actual and subsisting and better title than the plaintiff's title. Newell on Ejectment, § 53; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Wilcher *v.* Robertson, 78 Va. 602; Jarrett *v.* Stevens, 36 W. Va. 445, 15 S. S. 177; Atkins *v.* Lewis, 14 Gratt. 30.

It is not for the plaintiff to disprove the validity of the title set up by the defendant by way of defense. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Parkersburg Industrial Co. *v.* Shultz, 43 W. Va. 470, 27 S. E. 255; Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

Burden of Proof as Defense of Adverse Possession.—Where defendants in ejectment rely upon adverse possession as a defense, the burden of proving adverse possession is on them. Stonestreet *v.* Doyle, 75 Va. 356; Turpin *v.* Saunders, 32 Gratt. 27; Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. 255; White *v.* Ward, 35 W. Va. 418, 14 S. E. 22; Hall *v.* Hall, 27 W. Va. 468.

B. ADMISSIBILITY.

1. Evidence to Show Title in Plaintiff.

Evidence Not Tending to Show Title in Lessor of Plaintiff.—Where in ejectment the lessor was a fictitious person, instead of the lessee, evidence on the part of the plaintiff not going to show title in the lessor, was excluded. Butts *v.* Blunt, 1 Rand. 255.

Land Patent.—Where a land patent issued to plaintiff's ancestor lacking state seal was not admitted until evidence was offered to show seal was on it when issued, it was held, error, as patent should have been admitted with instruction that its validity depended on its legal execution. Carter *v.* Edwards, 88 Va. 205, 13 S. E. 352.

Declarations and Admissions of Defendant's Grantee.—In an action of ejectment, the heirs of a wife demanded land in possession of grantees of the husband, on the ground that it had descended upon her from her father, though the wife's brothers had conveyed it to her and her husband by a deed reciting a consideration, but which the heirs claimed was only a deed of partition. It was held, that the declarations of the husband that the land had come to the wife from her father and that he had only a life estate in it, were admissible in evidence. Dooley *v.* Baynes, 86 Va. 644, 10 S. E. 974.

Record in Other Actions.—A record in another suit was held admissible in evidence in an action of ejectment, for the purpose of using as evidence certain exhibits contained in the record,

where the exhibits tended to prove title, and the record was accompanied by proof of possession under claim or color of title. Virginia, etc., Iron Co. *v.* Fields, 94 Va. 102, 26 S. E. 426.

On the trial of an action of ejectment, plaintiff claimed under a conveyance from a commissioner of delinquent lands, and offered the record of the proceedings for the sale of the lands in evidence. The defendant objected to it for irregularities on its face. But as these irregularities did not render the proceedings void, it was held they could not be attacked in a collateral proceeding between the purchaser and a third party. Hitchcox *v.* Rawson, 14 Gratt. 526.

In ejectment plaintiff claims under a deed from the commissioners of delinquent lands; the record of the proceedings, including the exhibits, in which the sale and conveyance of the lands were directed, is competent evidence, though there be irregularities in the proceedings apparent on its face. Smith *v.* Chapman, 10 Gratt. 445.

Where an action of ejectment is brought by an adverse claimant against a tenant to recover possession of the premises, and judgment is rendered for such plaintiff against the tenant by default, and a writ of possession is executed by which the plaintiff is placed in actual possession, the possession is thereby changed, and the landlord is thereby actually turned out —in a second action of ejectment by plaintiffs, who derive title from the plaintiff in the first suit, against such landlord, sued as defendant, the record of the recovery in the former suit is competent evidence on behalf of plaintiff in the latter suit as showing or tending to show that the defendant's possession at that time was ended and changed by the execution of such writ of possession. Clark *v.* Perdue, 40 W. Va. 300, 21 S. E. 735.

In an action of ejectment, the record of another action of ejectment between other parties, not in privity with the parties to the present suit, is not competent evidence upon a question of boundaries, or the location of the land in controversy. Reusens *v.* Lawson, 100 Va. 143, 40 S. E. 616; Stinchcomb *v.* Marsh, 15 Gratt. 202.

Will of Patentee of Land Not Referring to Land.—The will of a patentee of land under whom the plaintiff in ejectment claims is inadmissible in evidence, where it made no reference to the land in controversy. Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Parol Evidence to Show Land Conveyed Not Described in Deed.—In an action of ejectment where the plaintiff's deed conveyed by well-defined boundaries, it was held that a parol agreement made before the execution of the deed, that other adjoining land beyond these boundaries, should be included in it, or an agreement after its execution that it should extend to include other adjoining lands, could not have the effect to embrace these lands within the deed. Pasley *v.* English, 5 Gratt. 141; Pasley *v.* English, 10 Gratt. 236.

Reputation of Ownership in Plaintiff's Ancestor.—In ejectment, it being proved that an ancestor of the plaintiff lived upon the land, evidence that he was generally considered the owner, or that the witness so considered him, is incompetent and inadmissible. Taliaferro *v.* Pryor, 12 Gratt. 277.

Recitals in a Deed.—In an action of ejectment, it was held admissible for the plaintiff to introduce in evidence a deed, for the purpose of supplying a link in his chain of title, by means of recitals contained therein, and from which a grant might be presumed as against the defendant. Virginia, etc., Iron Co. *v.* Fields, 94 Va. 102, 26 S. E. 426. See also, Hall *v.* Hall, 12 W. Va. 1; Hassler *v.* King, 9 Gratt. 115.

Where plaintiffs in ejectment deraign title through a son of the original owner, deeds to such son from his brothers, conveying to him any interest which they would have inherited

had their father died intestate, and reciting that, under the will of their father, he was entitled to the land, are admissible in evidence in the absence of the will. Atkinson *v.* Smith, 2 Va. Dec. 373.

When, in an action of ejectment predicating a claim of title solely upon a deed referring to a plat, there is sufficient evidence of the identity of the plat to show prima facie that it is the one so referred to, and there is no evidence to the contrary, the court should construe the deed as if the plat were incorporated in it, and rule accordingly upon the admissibility of oral evidence offered. Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. 277.

Accounting for Nonproduction of Will under Which Plaintiff Claims.—Where plaintiffs in ejectment claim title through one of several heirs of the original owner, to whom such owner devised it to the exclusion of the other heirs, and the will has been lost, evidence of a witness who has examined the records of the courts where the will would probably be recorded that such records do not contain any record of the will is admissible to account for the nonproduction of the will or a copy. Atkinson *v.* Smith, 2 Va. Dec. 373.

Evidence to Show Color of Title.—In an action of ejectment to recover a larger tract of land, of which defendants claimed title to two parcels or interlocks, it was held proper for the court to admit evidence of the possession of the plaintiff of the larger tract outside of the interlocks in controversy, where the plaintiff's claim was based upon adverse possession under color of title. Breeden *v.* Haney, 95 Va. 622, 29 S. E. 328.

The deed or instrument relied on to give color of title, must seem to define specifically the boundaries of the claim, therefore, an instrument offered by the plaintiff in evidence in an action of ejectment, which did not point to the boundaries of the claim, was rejected. Blakey *v.* Morris, 89 Va. 717, 17 S. E. 126.

Evidence to Show Forfeiture of Land Claimed by Plaintiff under Sale of Forfeited Lands.—In November, 1842, the commissioner of delinquent and forfeited lands for Randolph county sold, among a number of other tracts, a tract of 1,000 acres, under the erroneous impression that it had been forfeited under a patent issued to one Ely. The plaintiff in his said action of ejectment claimed title through the purchaser at said sale, and introduced evidence tending to show that the land in controversy, when sold and conveyed by said commissioner, was actually forfeited under another title and in a different name. This evidence was pertinent, and should not have been excluded, because, under the act of March 30, 1837, and amendatory acts, under which said commissioner proceeded, his deed conveyed all the interest vested in the commonwealth by forfeiture, no matter in whose name or under what title the land was forfeited. Bowman *v.* Dewing, 37 W. Va. 117, 16 S. E. 440.

In an action of ejectment the plaintiff introduced in evidence the books of the assessors of the county wherein the land lay, to prove that from 1829 to 1842, inclusive, the land in question was omitted from the land books of said county. The tendency of this evidence was to show that the land was forfeited to the state, and it should not have been excluded from the jury. Bowman *v.* Dewing, 37 W. Va. 117, 16 S. E. 440.

Evidence to Identify Land of Plaintiff.—In ejectment for land in Wood county, lessor of plaintiff claimed under grant of land described in the patent as lying in Monongalia; defendant showed by the statute of 1784, dividing Monongalia and establishing Harrison county, and other evidence that the land described in the patent, at the

date of the patent, lay not in the then county of Monongalia, but in that of Harrison, and that no part of the present county of Wood was then part of Monongalia. It was held, competent to the plaintiff to prove, that the land in Wood was the same land granted by the patent, notwithstanding the error of the patent as to the county in which it lay. Chapman *v.* Bennett, 2 Leigh 329.

Upon the trial of an action of ejectment it was held admissible for the plaintiffs to introduce evidence showing that a tract of land containing the same number of acres, and lying the same distance from the courthouse, and in the same direction as the land in controversy, was charged on the land books for the purposes of taxation, and to introduce tax tickets showing the payment of taxes on the land so listed. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232.

An entry may be introduced, as presumptive evidence, before the jury, in an action of ejectment, to identify the calls of the patent; but not to furnish particulars of description, not contained in the grant, nor to invalidate or aid the legal title of which the patent is the foundation. Camden *v.* Haskill, 3 Rand. 462.

2. Evidence to Show Want of Title in Plaintiff.

Where the plaintiff was permitted to show by parol evidence, possession in conformity with his deed, it was held error to exclude the evidence which the defendant offered in rebuttal. Shanks *v.* Lancaster, 5 Gratt. 110.

Death of Patentee at Time of Issuance of Patent.—Evidence to show that the grantee named in a patent for land was dead at the time the grant issued, and that the patent was therefore void may be shown on a trial of ejectment in which the plaintiff claims under the patent. Blankenpickler *v.* Anderson, 16 gratt. 59.

Fraud in Obtaining Patent under Which Plaintiff Claims.—In ejectment, it was held competent to the defendant, to give in evidence that the patent, under which the plaintiff claimed, was obtained by fraud, although upon the face it appeared to have been regularly issued. Hambleton *v.* Wells, 4 Call 213. But evidence is inadmissible, in an action of ejectment, to show irregularities which do not amount to fraud. Witherinton *v.* McDonald, 1 Hen. & M. 306.

Parol Disclaimer of Title by Plaintiff's Ancestor.—In ejectment by the heirs of the devise of an estate in fee, the defendant introduced evidence tending to show a parol disclaimer by the devisee, of the land devised to him, and moved the court to instruct the jury, that if they believed from the facts proved, that there was such parol disclaimer of the land devised, they must find for the defendant. The court refused to give this instruction to the jury, and instructed them that the disclaimer must be by writing. Bryan *v.* Hyre, 1 Rob. 94; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284.

3. Evidence to Show Title in Defendant.

Evidence to Sustain Deed under Which Defendant Claims.—Where, in an action of ejectment, evidence by the female plaintiff, that she did not sign or acknowledge the deed under which the defendant claimed, was admitted, it was held that the defendant might rebut this by showing that she received a part of the consideration for the deed. Blair *v.* Sayre, 29 W. Va. 604, 2 S. E. 97.

Evidence to Show Title in Tenant in Action by Landlord.—Where, in an action of ejectment brought by the landlord against a tenant in possession, it appeared that before the institution of the action the tenant had disclaimed to hold under the landlord, it was held, admissible for the tenant to introduce in evidence matters which tended to

show title in a third person, and an assignment of that title by such third party, to the tenant himself. Smoot *v.* Marshall, 2 Leigh 134.

Indorsement of Reservation on Back of Deed.—Upon a deed of conveyance of land from B. to L. there is a writing indorsed by L., the bargainee, importing, that "it is understood that two acres of land in the deed conveyed, having been heretofore applied for the erection of a church, are excepted in the deed, and are to be located in the most convenient spot near the cross roads;" B., the bargainor, conveys two acres of land near the cross roads, by metes and bounds, to S.; and H. claiming under L. brings ejectment for the two acres of land against S. claiming under B. It was held, that the writing indorsed on the deed from B. to L. is part of the deed, and not a distinct executory contract and, therefore, the defendant in ejectment giving B.'s deed to L. in evidence, has a right to give in evidence the writing indorsed thereon also. Stone *v.* Doe, 5 Leigh 122.

Evidence to Show Adverse Possession.—In ejectment between cotenants, where the defendants relied on adverse possession, and acquiescence by the plaintiff, letters by a party under whom defendants claimed, and also a correspondence between one of the plaintiffs and the agent of the defendant, were held competent evidence to show for what purpose the tenants in possession had claimed the property, and the plaintiffs acquiesced in their claim. Stonestreet *v.* Doyle, 75 Va. 356.

Defendant in ejectment claiming under a junior patent, founded on an inclusive survey, may introduce in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey itself, in order to show possession under color of title prior to his patent. Shanks *v.* Lancaster, 5 Gratt. 110.

Record in Other Actions.—In ejectment where the defendants claimed as a purchaser under a decree, it was held that the record in a chancery cause was legal evidence for him, as a link in his chain of title, though the plaintiff was not a party to the cause. Baylor *v.* Dejarnette, 13 Gratt. 152.

But in an action of ejectment, the record of another action of ejectment between other parties was held not competent evidence upon a question of boundaries, or the location of the land in controversy. Stinchcomb *v.* Marsh, 13 Gratt. 202; Reusens *v.* Lawson, 100 Va. 143, 40 S. E. 616.

4. Evidence to Show Want of Title in Defendant.

A decree of partition obtained by several parties against the vendor of certain lands was held inadmissible in evidence in an action of ejectment brought by them against the vendee, who was not a party to the suit for partition and was therefore not bound by the decree. Carter *v.* Washington, 2 Hen. & M. 345.

Defendant in ejectment having introduced the patent under which he claimed, and also evidence to prove that it should be located as he claimed so as to cover the land in controversy, to do which it was necessary that all the courses in the patent should be reversed, to rebut this testimony, the entry on which the patent was founded, and the survey thereon in which the courses were the same as in the patent, and five other large surveys bearing the same date and made by the same surveyor as that under which the defendant claimed, are competent evidence for the purpose of showing that the survey under which the defendant claimed had never been made upon the land; and thus to repel his claim to reverse the courses of his patent. Smith *v.* Chapman, 10 Gratt. 445.

C. COMPETENCY OF WITNESSES.

The trustee in a deed of trust, con-

veying property to be sold for payment of a debt, is equally the agent of the debtor and creditor, and is a competent witness, in an action of ejectment against the debtor in behalf of a purchaser from himself, to prove that the sale of the property was advertised, according to the terms of the deed of trust. Ross *v.* Norvell, 3 Munf. 170. See the title WITNESSES.

D. WEIGHT AND SUFFICIENCY.

Proof that a corporation, suing in ejectment, has an estate in fee in land, whether on the dissolution of the corporation the estate would revert to the grantor or not, is sufficient to support a finding by the jury that the corporation has an estate in fee. Mercer Academy *v.* Rusk, 8 W. Va. 373.

In an action of ejectment all of the defendants pleaded a joint plea of not guilty, without disclaiming title to any of the land in the declaration. The plaintiff proved his right to the whole land, but failed to prove that certain of the defendants were in possession of any part of the land, or that they claimed title to it, or any part thereof. It was held that a general verdict for the whole land claimed in the declaration was not erroneous, because of this failure of proof by the plaintiff. Beckwith *v.* Thompson, 18 W. Va. 103.

In an action of ejectment in which the controversy turns wholly upon the location of a boundary line between the lands of the litigating parties, and competent, material and weighty evidence is adduced by both parties in support of their respective claims as to the true location of the line, and there is a verdict for the defendant, such verdict should not be set aside as being against the weight of the evidence. Maxwell *v.* Kent, 49 W. Va. 542, 39 S. E. 174.

Evidence of Outstanding Title.—Defendants in ejectment relied upon an outstanding title in a third person and offered in evidence an abstract of the patent certified by the register, which was received without objection. It was held that this was to be regarded in the appellate court as prima facie evidence that such a grant was issued, though the case came up on a demurrer to evidence. Atkins *v.* Lewis, 14 Gratt. 30.

Record of Action as Evidence of Date of Demise.—The record of an action of ejectment is not conclusive evidence of the date of the demise, in an action for mesne profits, although it is conclusive as to the title. Whittington *v.* Christian, 2 Rand. 353.

Effect Where Evidence Is Conflicting.—Where, in an action of ejectment, the evidence is conflicting as to boundary lines, the verdict of the jury fixing such lines will not be disturbed unless some other valid objection thereto be shown. Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482. See the title NEW TRIALS.

XI. Questions of Law and Fact.

It is for the jury to determine the weight of all the evidence in ejectment. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. 232; Whitacre *v.* McIlhaney, 4 Munf. 310.

In an action of ejectment on a motion to exclude all of the plaintiff's evidence, the motion should be overruled if any of that evidence tends in an appreciable degree to show in the plaintiff a right to recover the land claimed. Bowman *v.* Dewing, 37 W. Va. 117, 16 S. E. 440.

Whether Deed in Plaintiff's Title Is Fraudulent.—In an action of ejectment, where a deed which forms part of the chain of title of the plaintiff, is alleged to be voluntary and fraudulent, it is proper for the jury under suitable instructions from the court, to determine whether the deed was voluntary and fraudulent, or not. Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Whether Plaintiff Is Sole Heir.—Whether the plaintiff in ejectment is

sole heir of a person through whom he traces title is a question for the jury. Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Adverse Possession.—Whether the vendee has had possession of the premises for the period of statutory bar is for the jury. Taylor *v.* Mallory, 96 Va. 18, 30 S. E. 472.

Questions as to Boundaries.—In an action of ejectment, the plaintiff offered evidence to prove where one of the corners of a survey was located, and the defendant offered evidence to prove where another corner was located. As both of them could not be correct it was held a question for the jury, to determine the boundary upon all the evidence which was produced before them. Bowers *v.* Dickinson, 30 W. Va. 709, 6 S. E. 335. See the title BOUNDARIES, vol. 2, p. 579.

The question whether marked trees found on or near the line were in fact line trees was for the jury, or the court where a jury was waived. Grief *v.* Norfolk, etc., R. Co., 2 Va. Dec. 600.

XII. Separate Trials.

Where there are a number of defendants to an action of ejectment and a trial and verdict is had as to part of them and the case is revived against the heirs of others and a further trial is had as to them, no objection being made in the court below, it is too late to raise the question of there being error in the separate trials when the case is in the supreme court. Kenna *v.* Quarrier, 3 W. Va. 210.

XIII. Verdict and Judgment.

A. VERDICT.

See generally, the title VERDICT.

1. General Verdict.

a. Finding in Favor of One or More of Several Plaintiffs.

The jury may find for the plaintiffs, or such of them, as appear to have right to the possession of the premises or any part thereof. W. Va. Code, ch. 90, § 23; Va. Code, 1904, § 2744; Callis *v* Kemp, 11 Gratt. 78; Lewis *v.* Childers, 13 W. Va. 1; Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

b. Finding against One or More of Several Defendants.

The jury may find against such of the defendants as are in the possession of the premises or claim title thereto at the commencement of the action, and in favor of the rest. Va. Code, 1904, § 2744; W. Va. Code, ch. 90, § 23; Callis *v.* Kemp, 11 Gratt. 78; Lewis *v.* Childers, 13 W. Va. 1; Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

c. Effect of General Finding Where Defendants Claim Only Part of Premises.

General Finding against Defendants.—Where, in an action of ejectment against a single defendant, who pleads not guilty without disclaiming title to any part of the land named in the declaration, the defendant proves at the trial that he is in possession of and claims title to only a definite part of the land, a verdict and judgment for the plaintiff for all the land claimed in the declaration is not erroneous; or if erroneous, it is not an error, by which the defendant is injured, or of which he can complain in the appellate court. Beckwith *v.* Thompson, 18 W. Va. 104. See Carrington *v.* Goddin, 13 Gratt. 588; Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

When all the defendants in an action of ejectment plead jointly not guilty, none of them disclaiming title, and the plaintiff on the trial proves his title and right to the possession of the whole land claimed in his declaration but fails to prove, that certain of the defendants were in possession of or claimed title to any interest in any part of the land, a general verdict for the whole land claimed in the declaration against all the defendants is not for this failure of proof by the plaintiff erroneous. Beckwith *v.* Thompson, 18 W. Va. 103.

General Finding for Defendants.—A general verdict for the defendant in an action of ejectment, is proper, if warranted by the evidence; and no disclaimer is necessary to its validity, although much more land was described in the declaration than the defendant had in possession at the commencement of the suit. Jones *v.* Chesapeake, etc., R. Co., 14 W. Va. 514.

But a general verdict for the defendant is erroneous where the declaration claims an entire tract and the defendant claims only a right to quarry limestone from it. The verdict in such case should be for the plaintiff except as to the right of the defendant to quarry and remove limestone. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710.

d. Effect of General Finding Where There Are Several Defendants.

In an action of ejectment against several defendants none of them disclaim title to the whole or any part of the land, but all plead jointly not guilty; at the trial they severally prove a claim of title to several distinct parcels of land within the boundaries of the land named in the declaration, and to which it is proved the plaintiff has a good title. The jury may find a verdict for the plaintiff, specifying each several parcel of land so claimed or held by each defendant severally, and should do so in all cases, when the ends of justice demand that there should be such separate finding. But when all the defendants claim under the same title, though by separate deeds for distinct parcels of land, and nothing appears in the case to show, that the defendants can in any manner suffer from a failure of the jury to find separately against them, a verdict against all the defendants jointly for the whole land claimed in the declaration is not erroneous. Beckwith *v.* Thompson, 18 W. Va. 103.

e. Right to Render Verdict for Part of Premises Claimed.

The jury have the right to find for the plaintiffs a part of the said land, and against them as to the residue. Va. Code, 1904, § 2739; W. Va. Code, ch. 90, § 18; Callis *v.* Kemp, 11 Gratt. 78; Lewis *v.* Childers, 13 W. Va. 1.

f. Form and Requisites.

(1) In General.

When the meaning of the jury can be clearly collected from the verdict, it ought not to be set aside for irregularity or want of form in its wording. Lewis *v.* Childers, 13 W. Va. 1.

(2) Certainty.

The verdict must be certain and its findings must not be contradictory. Doe *v.* Northern, 1 Wash. 282; Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482; Lewis *v.* Childers, 13 W. Va. 1. See post, "Description of Premises," XIII, A, 1, f, (4); "Description of Estate or Interest," XIII, A, 1, f, (5).

When the meaning substantially of the jury can not be satisfactorily collected from their verdict, upon material matters involved in the issue, the verdict is irregular and too vague, and is insufficient, and should be set aside and a new trial awarded. Lewis *v.* Childers, 13 W. Va. 1; Doe *v.* Northern, 1 Wash. 282.

Examples.—Where the premises in an action of ejectment were described in the declaration with "convenient certainty," and the verdict was that the plaintiff was entitled in fee to the whole of the premises in the declaration described, such verdict was held not defective for uncertainty. Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

To a charge in a declaration of ejectment that the defendant unlawfully withholds the possession of the land, the plea was "not guilty," and the verdict of the jury was: "We the jury, find that the defendant does not withhold possession of the land in the declaration mentioned, as alleged, and therefore find for the defendant on the issue joined." This was held responsive to the issue, and the verdict in form was unexceptionable. Andrews

v. Roseland Iron & Coal Co., 89 Va. 393, 16 S. E. 252.

Where in ejectment the jury found a verdict in these words: "We, the jury, find for the defendants, and fix the line, as shown on the Sinnett map, from C. to D." This verdict was held to be so irregular and vague as to matters in issue that it was set aside, and a new trial awarded. Lewis *v.* Childers, 13 W. Va. 1.

(3) Responsiveness to Issues.

Where some of the defendants in ejectment demur to the evidence and others go to trial on the issue made upon their plea of not guilty, and a conditional verdict is found as to all of the defendants, it should be set aside as to the defendants who have not demurred, as it is not responsive to the issue made by their plea. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491. See post, "Description of Premises," XIII, A, 1, f, (4); "Description of Estate or Interest," XIII, A, 1, f, (5).

Where the plaintiff in ejectment, in describing the land claimed by him in his declaration, sets forth the metes and bounds, and one of the calls is "thence N., 2 W., 490 poles, to a stake in a line of B.'s 750 acres," and said line, when ascertained, constitutes the division line between plaintiff's and defendant's land, the true location of which is the real controversy in the suit, the jury, by its verdict, must find that true location, and a verdict and judgment thereon, which merely finds for the plaintiff the land as described in the declaration, does not determine the question raised by the pleadings. Miller *v.* Holt, 47 W. Va. 7, 34 S. E. 956.

Necessity of Finding upon Each Count in Declaration.—Where the declaration in ejectment contained three counts, the first in the name of two persons and the second and third in the name of each separately, it was held, that the failure of the jury to find upon the first and second count was not sufficient cause to set aside a verdict on the third count. Myers *v.* Ford, 9 W. Va. 184.

(4) Description of Premises.

(a) In General.

When the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally as specified in the declaration. Va. Code, 1904, § 2746; W. Va. Code, ch. 90, § 25.

The object of describing the premises is that possession may be delivered, and where a verdict points out the locality of the tract by reference to the lands of coterminous owners and the public highways passing it, it forms a description equally satisfactory and certain as the statement of metes and bounds ordinarily contained in deeds of conveyance. Hawley *v.* Twyman, 24 Gratt. 513; Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

Effect of Variance between Description in Verdict and Declaration.—Where the quantity and boundaries of the land described in the count and in the verdict vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the court, it was to be presumed that the description given in a count is a mistaken description and that the land recovered is the land demanded. Koiner *v.* Rankin, 11 Gratt. 420; Benn *v.* Hatcher, 81 Va. 25.

A declaration in ejectment claimed five acres of land, and the plot of the surveyor made in the cause showed that the boundaries and lines as described in the verdict finding for the plaintiffs contained nine acres. It was held that as the only question in dispute was a common line, claimed by the plaintiff and the defendant, and the jury having found for the former, it was immaterial whether the quantity be five or nine acres, as the bounds and line claimed in the declaration corresponded with the bounds and lines

found by the jury. Elliott *v.* Sutor, 3 W. Va. 37.

(b) Verdict for Part of Premises.

In General.—When the right of the plaintiff is proved to only a part or share of the premises, the verdict shall specify such part specifically as the same is proved, and with the same certainty of description as is required in the declaration. Va. Code, 1904, § 2747; W. Va. Code, ch. 90, § 25; Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710; Callis *v.* Kemp, 11 Gratt. 78; Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Shiflet *v.* Dowell, 90 Va. 745, 19 S. E. 848; Hawley *v.* Twyman, 24 Gratt. 518; Clay *v.* White, 1 Munf. 162; Gregory *v.* Jackson, 6 Munf. 25; Cropper *v.* Carlton, 6 Munf. 277; Murra *v.* Northern, 1 Wash. 282; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Lowe *v.* Settle, 22 W. Va. 387; Myers *v.* Ford, 9 W. Va. 188; Board of Education *v.* Crawford, 14 W. Va. 790; Moore *v.* Douglass, 14 W. Va. 708; Oney *v.* Clendenin, 28 W. Va. 34; Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

In ejectment, when a part of the land claimed in the declaration is found for the plaintiff, and a part for the defendant, the verdict must specify and describe the parts found for each by some method of description reasonably definite, such as is required of a declaration in that action. Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367; Callis *v.* Kemp, 11 Gratt. 78; Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3.

Where a verdict in ejectment is for a part only of the land sued for, the boundaries of the part recovered should be designated. The verdict must be certain in itself, or must refer to some certain standard by which to ascertain the land so found, otherwise it will be too uncertain to warrant a judgment upon it. Callis *v.* Kemp, 11 Gratt. 78, 84; Gregory *v.* Jackson, 6 Munf. 25; Slocum *v.* Compton, 93 Va. 374, 25 S. E. 3; Clay *v.* White, 1 Munf. 162.

A verdict in ejectment, finding for the plaintiff, in general terms, a certain number of acres, part of the premises in the declaration mentioned, without designating the boundaries of such part, or referring to some certain standard to supply such defect, was held too uncertain to warrant a judgment upon it, and a venire facias de novo was awarded. Gregory *v.* Jackson, 6 Munf. 25; Cropper *v.* Carlton, 6 Munf. 277; Murra *v.* Northern, 1 Wash. 282; Clay *v.* White, 1 Munf. 162.

A verdict is fatally defective which finds that the defendant is entitled to hold a specified part of the land described in the declaration, and that he has no title to any other land described in the declaration, but which does not find that the plaintiff was entitled to recover the residue, and therefore fails to find whether the defendant is entitled to hold that residue or not. Low *v.* Settle, 22 W. Va. 387; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

Where the declaration claimed an entire tract, and the defendant claimed only a right to quarry limestone from it, it was held, that a general finding for the defendant was erroneous; that it should have been for the plaintiff, except as to the right of the defendant to quarry and remove limestone. Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710; Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. 367.

A verdict describing the land found for the plaintiff by reference to the plat of the surveyor filed in the cause, and giving metes and bounds by reference to the plat sufficiently describes the premises. Myers *v.* Ford, 9 W. Va. 184.

(5) Description of Estate or Interest.

(a) In General.

The verdict shall specify the estate found in the plaintiff whether it be in fee or for life, stating for whose life, or whether it be a term of years, and specifying the duration of such term. Va. Code, 1904, § 2746; W. Va. Code, ch. 90, § 27; Oney *v.* Clendenin, 28 W.

Va. 34; Low *v.* Settle, 22 W. Va. 387, overruling Elliott *v.* Sutor, 3 W. Va. 37; Myers *v.* Ford, 9 W. Va. 184; Hawley *v.* Twyman, 24 Gratt. 518; Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

The verdict of a jury in an ejectment case is fatally defective, which finds for the plaintiff the land in the declaration described, but which fails to specify the estate found in the plaintiff, even though the declaration states, that the plaintiff had been possessed of the land in fee. Oney *v.* Clendenin, 28 W. Va. 34; Low *v.* Settle, 22 W. Va. 387, overruling Elliott *v.* Sutor, 3 W. Va. 37.

Upon such a verdict no judgment can be entered, and even without a motion in arrest of judgment or for a new trial the court should set aside such a verdict and award a new trial and if it does on such a verdict enter up a judgment for the plaintiff, on a writ of error the appellate court will reverse and set aside such judgment and award a new trial, whether the defendant moved the court for a new trial or not, or whether, if the defendant moved the court for a new trial, he based his motion solely on other specified grounds or included such defect in the verdict as one of the grounds on which he based his motion. Oney *v.* Clendenin, 28 W. Va. 34.

Sufficiency of Finding as to Estate or Interest.—In an action of ejectment, the declaration stated that the plaintiff had title in fee simple to the land, and described it by quantity, and as bounded by certain roads and coterminous owners. The issue was upon the plea of "not guilty," and the verdict of the jury was: "We, the jury, find that the defendant is guilty in manner and form as stated in the declaration." It was objected that this verdict did not specify the estate to which the plaintiff was entitled; but it was held to be a finding by the jury that the plaintiff was entitled to the land in fee, and was a sufficient description of the estate. Hawley *v.* Twyman, 24 Gratt. 516.

The declaration in ejectment alleged that the plaintiff was possessed of an estate in fee, and the defendant entered upon this estate and unlawfully withheld possession thereof from plaintiff. The defendant pleaded not guilty, the verdict of the jury was: "We, the jury, find for the plaintiff that he is entitled in fee to the whole of the premises in his declaration described, and that all the defendants were in possession of a part thereof, or claimed title to some part at the commencement of this suit." It was held, that the verdict responded to the issue. Messick *v.* Thomas, 84 Va. 891, 6 S. E. 482.

A finding by the jury "the following land in fee simple" describing the land so found by reference to the plat of the surveyor filed in the cause, is a finding that the plaintiff has an estate in fee simple and is sufficiently specific. Myers *v.* Ford, 9 W. Va. 184.

(b) Verdict for Undivided Share or Interest.

If the verdict is for an undivided share or interest in the premises, it shall specify the same and if for an undivided share or interest of a part of the premises, it shall specify such share or interest and describe such part as before required. Va. Code, 1904, § 2747; W. Va. Code, ch. 90, § 26.

Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it Callis *v.* Kemp, 11 Gratt. 78.

Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries; but the interest being certain, that is sufficient. Callis *v.* Kemp, 11 Gratt. 78.

(c) In Action between Cotenants.

In an action of ejectment against a

tenant in common by a cotenant, if the jury return a special verdict, actual ouster must be found therein, to entitle the plaintiff to judgment; the pro forma confession of ouster which the defendant is compelled to make before he is allowed to enter his plea, was held not sufficient in an action of ejectment, between cotenants. Taylor *v.* Hill, 10 Leigh 457; Purcell *v.* Wilson, 4 Gratt. 16.

g. Construction.

In ejectment, verdicts of juries are to be favorably construed. Lewis *v.* Childers, 13 W. Va. 1.

If the point in issue is subtantially decided by the verdict, it is the duty of the court to mould it into form. Lewis *v.* Childers, 13 W. Va. 1.

In an action of ejectment there was only one plaintiff, and on a plea of not guilty the jury found this verdict: "We, the jury, find the issue for the plaintiffs, and we find the plaintiffs have title in fee to the lands in the declaration mentioned, and we find one cent damages for the plaintiff." It was held, that this verdict was valid, as the word "plaintiffs" could only refer to the one plaintiff in the case. Williams *v.* Ewart, 29 W. Va. 659, 2 S. E. 881.

h. Amendment.

In an action of ejectment the jury found for the plaintiff one cent damages. The verdict was extended by the court so as to include the land in the declaration mentioned, and one cent damages. This was no error. McMurray *v.* Oneal, 1 Call 246.

2. Special Verdict.

Where in ejectment the jury set out the wills of a grandfather and father and found that if the son, who was dead, took under his father's will, they find for the plaintiff, and that if he took under the grandfather's will, they found for the defendants; it was held, that the verdict was sufficiently certain, and submitted the single question upon the construction of the wills to the court. Callis *v.* Kemp, 11 Gratt. 78.

When the jury returned a special verdict, which found facts in relation to two tracts of land, and concluded by saying that if the law arising upon those facts were for the plaintiff they found for the plaintiff, the lands in the declaration mentioned, but if the law was for the defendant they found for the defendant, the court being of the opinion that the law was for the plaintiff as to one of the tracts of land, and for the defendant as to the other, held it unnecessary to award a venire facias de novo, but gave judgment on the special verdict for the plaintiff for one tract, and for the defendant for the other. Hutchison *v.* Kelly, 1 Rob. 123.

In Cropper *v.* Carlton, 6 Munf. 277, a special verdict in ejectment was set aside, for not finding the time of the death of a person, under whom the lessors of the plaintiff might or might not have been entitled to the land in controversy, their title depending upon the time when he died, which, from the circumstances disclosed in the verdict, probably could have been found by the jury; also, for not finding whether the defendant or those under whom he claimed, had or had not such possession of the land as would be sufficient for his defense, in that action, whatever might be the state of the title.

It was held, that in tracing title in a special verdict in an action of ejectment, it was not necessary to find a seizin in the crown, because that was the ultimate point beyond which the party was not bound to go. Birch *v.* Alexander, 1 Wash. 34.

B. JUDGMENT.

See the title JUDGMENTS AND DECREES.

Judgment by Confession.—See the title CONFESSION OF JUDGMENTS, vol. 3, p. 64.

Office Judgment.—An office judgment in an action of ejectment does not become final without the intervention of a court or jury. Smithson *v.* Briggs,

33 Gratt. 180; James River, etc., Co. *v.* Lee, 16 Gratt. 424.

The defendant in the ejectment may, upon notice to the plaintiff, appear at the next term of the court and move the court to set aside the judgment and allow him to plead therein. Smithson *v.* Briggs, 33 Gratt. 180; James River, etc., Co. *v.* Lee, 16 Gratt. 424. See the title INQUEST AND INQUIRIES.

Joint Judgment.—In an action of ejectment, parties defended it jointly and neither of them entered a disclaimer, but on the contrary gave notice with their plea of not guilty, that they jointly claimed the premises in controversy, and would rely on a contract between the plaintiff and one of the defendants, as a defence at the trial. It was held that this was an admission that they were in possession, and in possession jointly; and that they would make a joint defence, so a joint judgment was held valid. McClung *v.* Echols, 5 W. Va. 204.

Judgment against Defendant on Count to Which He Is Not a Party.—There can be no judgment against a defendant in ejectment for the land claimed in one count of the declaration to which he was not a party. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

Effect of Judgment.—The whole effect of a judgment for the plaintiff in ejectment is to put the lessor of the plaintiff into possession of the land; and the only point decided is, that he has a better title to the possession than the defendant. Chapman *v.* Armistead, 4 Munf. 382.

No verdict and judgment in ejectment, can be relied on as a bar to a subsequent action of ejectment, even though for the same land, and between the same defendants and lessors of the plaintiffs, if the fictitious plaintiffs are not the same. Pollard *v.* Baylors, 6 Munf. 433; Urquhart *v.* Clarke, 2 Rand. 549.

Where the court of a county having caused a courthouse and jail to be erected, in or about the year 1754; and courts having been continually held in such courthouse, until the year 1801, it ought, in a court of equity, to be presumed that the title to two acres of the land built upon, and adjacent, were duly vested in the court and their successors, although no deed from the original proprietor can be produced, and it seems, that in such case, a decision in ejectment, against a person claiming by assignment from the county court, is no bar to his recovering the land in a court of equity. Boykin *v.* Smith, 3 Munf. 102.

Amendment.—In following an old form, a judgment in ejectment was entered for "the term yet to come." It was held no error for a court to allow an amendment of this judgment, so as to conform with the modern action of ejectment, which is adapted to try title to land, as well as to get possession of it. Alvey *v.* Cahoon, 86 Va. 173, 9 S. E. 994.

Injunction against Judgment.—See the title INJUNCTIONS.

Judgment against Defendant for Land Disclaimed by Plaintiff in Declaration.—Where a plaintiff in ejectment disclaims, in his declaration, any part of certain lands embraced within his outside boundaries but excepted from his grant, if any part of the lands claimed by the defendant is within the excepted lands, no judgment can be rendered against the defendants therefor, or if such judgment is rendered, the claim of the defendants to such part is not affected thereby. Howdashell *v.* Krenning, 103 Va. 30, 48 S. E. 491.

XIV. New Trials.

See the title NEW TRIALS.

Rule as to Granting New Trials to Plaintiff.—A court ought to hold a stricter course towards plaintiff, moving for new trials, in ejectment, than towards defendants. Deems *v.* Quarrier, 3 Rand. 476.

But where a verdict in favor of a de-

fendant, in ejectment, is founded in mistake and produces injustice, it is both the right and duty of the court to grant a new trial. Deems *v.* Quarrier, 3 Rand. 476.

Motion on Ground of Newly-Discovered Evidence.—In an action of ejectment, judgment being given for the plaintiffs, the defendants moved for a new trial upon the ground of after-discovered evidence. This evidence, which they claimed was after-discovered, was a conveyance which had been on record for two years. It was held, that as the defendants did not allege that they had used due diligence, the motion was properly overruled; and the judgment was affirmed on appeal. Lewis *v.* McMullin, 5 W. Va. 582.

Motion by Stranger to Action.—A person who is not a party in an action of ejectment, but granted land in controversy, with a covenant of general warranty, to one who is a defendant, can not, in his own name, maintain a motion to set aside a verdict in favor of a plaintiff. Strader *v.* Goff, 6 W. Va. 257.

Imposition of Terms by Court.—New trials being addressed to the discretion and authority of the court, it may impose such terms upon the successful party as will meet the ends of substantial justice. The new trial may be limited to a single point, to a single issue, or a particular question, or even to a part of the demand sued for without reopening the whole case. These principles apply to actions of ejectment as well as to other civil actions. Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482.

If the verdict is for more land than the plaintiff is entitled to recover, the trial court should put him upon terms to release the excess by proper description, or else grant a new trial. If the trial court has failed to do this upon a writ of error, the supreme court will reverse the judgment of the trial court, and remand the cause with direction that, unless the plaintiff make such release of record the verdict be set aside and a new trial awarded, but, if he accepts the terms and makes the release then to overrule the motion for a new trial, and render judgment for the plaintiff with costs. Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482, overruling Shiflet *v.* Dowell, 90 Va. 745, 19 S. E. 848.

"We do not approve the rule announced in Shiflet *v.* Dowell, 90 Va. 745, 19 S. E. 848, that the principle stated does not apply in the case of an action of ejectment, because of the statute which requires that the verdict shall 'specify the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration.' The practice of putting a party upon terms where the verdict is plainly erroneous in part, is a wise and salutary one, saving delay, costs, and above all, ending strife, and we perceive no good reason why the ends of justice are not as much subserved by the application of the principle in an action of ejectment as in any other case." Fry *v.* Stowers, 98 Va. 417, 36 S. E. 482.

Proceedings upon Second Trial.—Upon an appeal from a judgment of a circuit court refusing to grant a new trial in an action of ejectment, the appellate court looking alone to the documentary evidence and the parol evidence of the appellee, the plaintiff below was of opinion that the appellee had failed to prove adversary possession of the land in controversy, which was not embraced in his deed but was embraced in the deed of the appellant; and reversed the judgment and remanded the cause for a new trial. On the second trial the plaintiff introduces the same parol evidence as to his adversary possession, not making his case other or stronger than it was before the appellate court. Held, that the defendant is entitled to an instruction to the jury to disregard all the parol evidence introduced by the plaintiff to prove his right to the land in

controversy not embraced within the boundaries of the deed under which he claimed. Pasley *v.* English, 10 Gratt. 236.

XV. Damages, Mesne Profits, and Improvements.

Statutory Provision as to Profits and Damages.—If the plaintiff files with his declaration a statement of the profits and other damages which he means to demand, and the jury find in his favor, they shall at the same time, unless the court otherwise order, assess the damages for mesne profits of the land for any period not exceeding five years previously to the commencement of the suit until the verdict, and also the damages for any destruction or waste of the buildings or other property during the same time for which the defendant is chargeable. Va. Code, 1904, § 2751; W. Va. Code, ch. 90, § 30; McCann *v.* Righter, 34 W. Va. 186, 12 S. E. 497; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856; Cain *v.* Cox, 29 W. Va. 258, 1 S. E. 298; Hollingsworth *v.* Funkhouser, 85 Va. 448, 8 S. E. 592; Corr *v.* Porter, 33 Gratt. 278; Goodwyn *v.* Myers, 16 Gratt. 336.

When the defendant has been proceeded against as a nonresident and has appeared and pleaded to the action before such statement has been filed with the declaration, the trial court should not thereafter permit the plaintiff to file such statement without the consent of the defendant. Witten *v.* St. Clair, 27 W. Va. 762.

Time of Filing Claim.—A statement claiming profits or damages may be filed after the declaration has been filed and before trial; but, if not filed at the commencement of the action, the trial court ought not to permit the same to be thereafter filed when doing so might operate as a surprise or fraud upon the defendant. Witten *v.* St. Clair, 27 W. Va. 762.

Where a plaintiff in ejectment filed a claim for mesne profits under § 30, ch. 90, Code of West Virginia, after the defendant had entered his plea, he was not allowed to recover in the same action, because it might have operated as a surprise or fraud upon the defendant. Witten *v.* St. Clair, 27 W. Va. 762; McCann *v.* Righter, 34 W. Va. 186, 12 S. E. 497.

Mode of Estimating Rents and Profits.—In estimating the rents and profits of the land, the annual value of the land in the hands of a prudent and discreet tenant upon a judicious system of husbandry is the proper rule in the case, to be influenced in some measure by the mode of treatment of the land by the occupant. Bolling *v.* Lersner, 26 Gratt. 37.

Clay removed from the land for the purpose of making brick should not be accounted for as mineral, but as damage done to the land by digging and removing it therefrom. Effinger *v.* Kenney, 92 Va. 245, 23 S. E. 712.

Interest.—It seems that it is now proper to charge interest upon rents and profits. Bolling *v.* Lersner, 26 Gratt. 37.

But prior to the Virginia Code of 1849, ch. 177, § 14, p. 673, interest could not be allowed, and where the jury allowed such interest it was held mere surplusage, and judgment was given for the principal sum with interest from the date of the verdict. Hepburn *v.* Dundas, 13 Gratt. 219.

Mode of Assessing Rents and Profits.—In actions of ejectment, if there is a claim by the plaintiff for mesne profits and damages for waste, and by defendant for improvements under §§ 30 and 32 of ch. 135 of the Code, both claims must be passed upon by the same jury. Where the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the enquiries required at the same time that they try the issue, or the enquiries may, if the court should so order, be made by the same jury after the ver-

dict on the title is recorded; or by a new jury to be empanelled. Goodwyn *v.* Myers, 16 Gratt. 336.

In an action of ejectment, after the plea of not guilty was filed, the plaintiff filed an account of rent and profits, and after the suit had been pending a number of years, an agreement was entered into between the parties to the suit, whereby the defendant agreed to let judgment go by default in the suit, and the plaintiff agreed to waive all claims to damages sustained by destruction of a dwelling house, timber, etc., and the defendant agreed to pay the plaintiff all legal costs and rents in said suit. The action of ejectment remained pending for several years and was dismissed under the four-year rule, without the said rents having been ascertained in the action. In an action of covenant brought on the agreement, by the plaintiff in said action of ejectment, to recover the rents and costs, it was held that as the rents had never been assessed in either of the modes provided by statute, covenant could not be maintained for them. McCann *v.* Righter, 34 W. Va. 186, 12 S. E. 497.

Where, in an action of ejectment, the same jury which tried the case on its merits was allowed without objection from either side, to fix the value of the land, the rent and profits thereof, and the value of the improvement claimed by the defendant, it was held too late after verdict, to object to this action of the court. Corr *v* Porter, 33 Gratt. 278.

Recovery by Defendant for Improvements.—See the title IMPROVEMENTS.

Ejusdem Generis.

See the titles STATUTES; WILLS.

ELECTED.—See APPOINT, vol. 1, p. 683.

It is not clear beyond a "reasonable doubt," that the words "members **elected,**" in the constitution of this state, in the section providing that "no bill shall be passed by either branch (of the legislature) without an affirmative vote of a majority of the members **elected** thereto," can only refer to persons **elected** at the last preceding elections, although they may have ceased to be members at the time the vote is taken on the passage of the bill; and a reasonable doubt as to this, is sufficient to sustain the validity of the act under consideration. Osborn *v.* Staley, 5 W. Va. 85.

Election.

See the titles ELECTION OF REMEDIES; EQUITABLE ELECTION; SPECIFIC PERFORMANCE.

As to election by widow as to dower, see the title DOWER, ante, p. 782. As to election by husband as to curtesy, see the title CURTESY, ante, p. 148. As to election between testamentary dispositions, see the title WILLS. As to statutory and common-law remedies, see the title ACTIONS, vol. 1, p. 125. As to another suit pending, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 15. As to election by infants, see the title INFANTS.

ELECTION OF REMEDIES.

I. Definition, 921.

II. What Actions Subject to Election, 921.

III. What Acts Constitute an Election, 922.

IV. Election between Legal and Equitable Remedies, 922.

V. Effect of Election, 924.

I. Definition.

The author of Bouvier's Law Dictionary defines election of remedies as, "A choice between two or more means of redress for an injury or the punishment of a crime allowed by law. The selection of one of several forms of action allowed by law."

II. What Actions Subject to Election.

Trespass, Trover, Detinue or Assumpsit.—"When A wrongfully takes the property of B and sells it, B may bring trespass, trover, detinue or assumpsit for money had and received, against A at his election." Sangster *v.* Com., 17 Gratt. 124. See the titles ASSUMPSIT, vol. 2, p. 1; DETINUE AND REPLEVIN, ante, p. 634; TRESPASS; TROVER AND CONVERSION.

Trespass, Trover or Assumpsit.—It is a well-settled doctrine that after tortious taking of goods the owner may bring trespass for the taking, or waiving the trespass he may bring trover for the conversion, or if they have been sold and the money received o· otherwise appropriated or consumed, he may waive the tort altogether and bring an action of assumpsit for their value upon an implied promise to pay. Maloney *v.* Barr, 27 W. Va. 381; McDonald *v.* Peacemaker, 5 W. Va. 439.

Trespass or Trover.—If defendant stop the plaintiff's wagon and team, and take by force from the team a horse claimed by the defendant, the plaintiff may in trespass recover damages for the injury in st ›pping his team, delaying him, etc., as well as the value of the horse taken; but, if he elects to bring trover for the horse taken, he can not maintain trespass for stopping the team. Hite *v.* Long, 6 Rand. 457.

In Olinger *v.* M'Chesney, 7 Leigh 660, the court said: "I lay it down that nothing is more common, in relation to trespasses upon property, than the right to waive the trespass and treat the defendant as a wrongdoer without force. Thus in trover, though the goods have come to the hands of the defendant by the commission of a trespass, the plaintiff may waive the trespass, may sue in trover, and may declare that the defendant acquired the possession by finding; and this the defendant can not deny, for the finding is not traversable. Now this is doctrine as old as the times of Queen Elizabeth; for in Bishop *v.* Viscountess Mantague, Cro. Eliz. 824, where the plaintiff's oxen were seised as for heriots due the defendant, when no heriots were due, it was objected that the taking was a trespass, and so the action should have been trespass. But it was held, that 'though trespass lies, the plaintiff may have his action if he will; for he hath his election to bring either; and as he may have detinue or replevin for goods taken by a trespass, at his election, so he may have this action; for one may qualify a tort, but not increase a tort, and he hath election to make it a tortious prisal or not.' Here too we see, that even at that

early day it was held, that the party injured might waive the trespass and sue in detinue, which is in form an action of contract."

Trespass or Case.—Where a distress is made for rent pretended to be due, when in truth there is none due, and the goods distrained are not sold, the remedy is by action at common law, and trespass may be maintained; but the party suing is not obliged to bring trespass; he may waive the trespass and bring case. Olinger *v.* M'Chesney, 7 Leigh 660.

III. What Acts Constitute an Election.

"As to what act constitutes an election is the subject of conflict among the adjudicated cases. By some it is held, that the bringing of the suit is an election; by others that the suit must be prosecuted to judgment, and by yet a third class that the judgment must be satisfied." Richmond, etc., R. Co. *v.* New York, etc., R. Co., 95 Va. 386, 28 S. E. 573.

IV. Election between Legal and Equitable Remedies.

See post, "Finality of Election," V.

Necessity for Election.—A person having a suit at law depending on an appeal, and bringing a bill for relief as to the same subject matter, will be compelled to make an election in which court he will proceed. Gibbs *v.* Perkinson, 4 Hen. & M. 415. See the titles ADEQUATE REMEDY AT LAW, vol. 1, p. 171; EQUITY.

In Warwick *v.* Norvell, 1 Rob. 308, it was held, that a defendant at law, having a legal defense to the action, and a distinct ground for equitable relief against the plaintiff's claim, may bring his suit in equity without waiting for the determination of the action at law, and may, without being compelled to waive his legal defense by confessing a judgment, have a hearing in the court of chancery on the merits of the case, and a decree for the proper relief, the court saying: "No authority has been produced which establishes that a party having a defense at law to an action brought against him, and a distinct ground for equitable relief should his defense prove unavailing, must abandon his legal defense by confessing judgment, or await the decision of the action at law before he can be entertained in equity. Where there is a concurrent jurisdiction of the same matter, and the plaintiff may sue in either forum, there is good reason to compel him to elect between them. Redress can be obtained in either, and the plaintiff should not be permitted to harass his adversary by pursuing him in both tribunals. The defendant has no such election; he is brought into court against his consent; and I perceive no good reason why he should be prohibited from setting up his distinct ground for equitable relief, during the pendency of the action at law."

Transactions under Power of Attorney and Deed of Trust.—Z. being about to leave the country, executes a power of attorney, by which he gives to M. and C. the amplest power to manage and dispose of all property here for his benefit, and collect debts due him. On the same day Z. and his wife convey to M. and C. a house and lot, in trust to lease or sell the same, and pay over the proceeds as received to Z. The deed of trust and power of attorney being designed to effect one common object, Z. can not file a bill against M. and C. for an account of the trust subject under the deed, and bring an action at law for the moneys received from the personal property and debts, under the power of attorney. The court in its opinion saying: "The court is further of opinion, that instead of overruling the motion of the defendant Myers to put the plaintiff to election whether he would prosecute this suit or the said action at law, the said circuit court should have made an order requiring the said plaintiff to

make his election within a time specified, whether he would amend his bill in this case so as to embrace therein the transactions under the power of attorney, as well as those under the deed of trust, and dismiss his said action at law, or whether he would prosecute his action at law; and that in the event of his electing to prosecute his said actions at law, or failing to make any election, the said circuit court should have dismissed the bill in this case with costs." Zetelle *v.* Myers, 19 Gratt. 62. See the title TRUSTS AND TRUSTEES.

Wrongfully Withholding of Trust Funds.—Where A delivered a claim to B to be by him collected and paid to C, and B agreed with C to collect said claim and pay it to him, and B refusing after he has collected the claim to pay it over, C may either sue him at law for money had and received to his use, or he may enforce the trust in a court of equity. Miller *v.* Lake, 24 W. Va. 545. See the title TRUSTS AND TRUSTEES.

Mortgagee or c. q. t. with Remedy in Personam and in Rem.—As a general rule, one can not sue at law and in equity, at the same time, for the same debt. But a mortgagee, or c. q. t., may sue at the same time at law upon his bond and in equity, to enforce his mortgage or trust deed, the one remedy being in personam, and the other in rem. Priddy *v.* Hartsook, 81 Va. 67. See the titles MORTGAGES AND DEEDS OF TRUST; TRUSTS AND TRUSTEES.

Also Applicable to Deed of Trust or Assignment to Trustee.—"And as a deed of trust to secure the payment of a debt, or a deed of assignment of property to a trustee to sell the property to secure the payment of debts already due, is, in substance and effect a mortgage, it would seem by analogy to be subject to the rules applicable to mortgages; and a creditor secured by such a deed would have the same right as the ordinary mortgagee to proceed, both at law and in equity, to enforce the collection of his debt. 2 Perry on Trusts, 2d Ed., § 602, d, et seq.; 4 Kent's Com. 142, 143." Priddy *v.* Hartsook, 81 Va. 67.

In Attachment Proceedings.—Where a creditor has attached the effects of the debtor, at law as well as in equity, he may dismiss his attachment at law and proceed on his attachment in equity. Magill *v.* Manson, 20 Gratt. 527. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 70.

Rights of Judgment Creditor against Specific Legacy.—After the assent of an executor to a specific legacy, the property is changed and a creditor obtaining a judgment against the executor, can not levy an execution upon the property in the hands of the legatee. He may pursue the executor at law, or follow the property in equity, making all the legatees parties. Burnley *v.* Lambert, 1 Wash. 308.

Nulla Bona on Fieri Facias De Bonis Testatoris.—A creditor, having obtained a judgment against an executor as such, and sued out a fi. fa. de bonis testatoris, which proved ineffectual, may either resort to his action at law to establish a devastavit, or file a bill in equity against the executor and legatees, for an account of assets, and proportional contribution to pay the debt. Sampson *v.* Payne, 5 Munf. 176; Burnley *v.* Lambert, 1 Wash. 308. See the title WILLS.

Where Verdict Set Aside and Pleas Withdrawn.—If a defendant files his equitable plea at law, and issue is taken thereon, and a trial had, and verdict given against him, which is set aside by the court, if he then withdraws his pleas, he may still resort to equity for relief. Knott *v.* Seamands, 25 W. Va. 99.

Jurisdiction.—It seems to be well settled that the defense, that the plaintiff is suing both at law and in equity for the same cause of action, can not properly be made in a court of law, but must be made by a rule in the

chancery suit obtained after the answer of the defendant has been filed, to put the plaintiffs to his election between the suits. And the reason for this is, that the complainant has at all times a right to a discovery in a court of chancery, though not for relief, if he chooses to seek it elsewhere. Williamson *v.* Paxton, 18 Gratt. 504; Priddy *v.* Hartsook, 81 Va. 67.

V. Effect of Election.

Finality of Election.—See ante, "Election between Legal and Equitable Remedies," IV.

"Where a plaintiff has concurrent remedies for the same demand and elects one of them, and prosecutes it to a judgment, he can not then resort to another, but is bound by his election, although it may be a bad one." Sangster *v.* Com., 17 Gratt. 124; Magill *v.* Manson, 20 Gratt. 527; Hite *v.* Long, 6 Rand. 457.

Where a plaintiff has two causes of action open to him and elects one, and adapts his pleading and proofs thereto, he will be bound by his election and can not thereafter adopt the other. Noel *v.* Noel, 93 Va. 433, 25 S. E. 242.

The statute giving the right to a defendant to defend at law or obtain relief in equity, if he avails himself of his right to make his defense at law, and a judgment is rendered against him, he can not afterwards obtain relief in equity. Knott *v.* Seamands, 25 W. Va. 99; Tarpley *v.* Dobyns, 1 Wash. 185; Penn *v.* Reynolds, 23 Gratt. 518; Sanders *v.* Branson, 22 Gratt. 364.

Reason for the Rule.—The plain reason of this rule of law is, that a defendant will not be suffered to be harassed by two suits when one would answer all the purposes of justice. Sangster *v.* Com., 17 Gratt. 124.

"When A wrongfully takes the property of B and sells it, B may bring trespass, trover, detinue or assumpsit, for money had and received, against A at his election; but having elected one of these forms of action, and prosecuted it to judgment, he can not then abandon it and bring another. Trespass comprehends the whole injury, as well the wrongful taking as the wrongful detention or conversion, and the value of the property, unless it be restored. By bringing detinue or trover, the plaintiff waives all claim for the wrongful taking of the property; and by bringing assumpsit he also waives all claim for the wrongful detention and conversion, affirms the sale, and makes the proceeds of it money had and received to his use. It would be inconsistent to permit him, after electing and prosecuting to judgment either of the three last-named actions, and especially the last, to resort to the first." Sangster *v.* Com., 17 Gratt. 124.

Waiver of Trespass by Bringing Trover or Detinue.—If a plaintiff bring trover or detinue, to recover a horse, and trespass for taking the same horse, a judgment for the defendant in the action of trover or detinue, is a good bar to the action of trespass; for, by bringing trover or detinue, he waives the trespass. Hite *v.* Long, 6 Rand. 457.

Review of Rule Requiring Election.—A rule in action at law requiring plaintiff to elect by the next term whether he will proceed at law or in chancery, is not, in the meaning of § 2, ch. 178, Va. Code, 1873, a final judgment, and the supreme court has not jurisdiction to review it. Priddy *v.* Hartsook, 81 Va. 67.

Act of Limitations Applicable.—Where an election of remedies has been made, the act of limitations applicable will be the one appropriate to the cause of action selected. Noel *v.* Noel, 93 Va. 433, 25 S. E. 242. See the title LIMITATION OF ACTIONS.

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